

**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 -

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**PATEL ENGINEERING LIMITED (INDIA)**

**(Claimant)**

- and -

**THE REPUBLIC OF MOZAMBIQUE**

**(Respondent)**

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The Arbitral Tribunal

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

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**ORAL HEARING  
PORTO, PORTUGAL**

**Thursday, 1 December 2022**

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Registry  
The Permanent Court of Arbitration

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A P P E A R A N C E S

The Tribunal:

Presiding Arbitrator:

PROFESSOR JUAN FERNÁNDEZ-ARRESTO

Co-Arbitrators:

PROFESSOR GUIDO SANTIAGO TAWIL  
MR HUGO PEREZCANO DIAZ

Administrative Secretary:

MS SOFIA DE SAMPAIO JALLES

Registry, Permanent Court of Arbitration:

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Legal Counsel

Court Reporters:

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Interpreters:

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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 CHAUQUE  
MR PAULO FRANCISCO ZUCULA (via video conference)

Expert Witnesses:

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

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1 (9.28 am, Thursday, 1 December 2022)

2 **PRESIDENT:** This is the fourth day in the  
3 hearing on the merits between Patel Engineering Ltd  
4 and the Republic of Mozambique.

5 Is there any point of order before we  
6 start?

7 **MS MARTINS:** Not from Claimant's side,  
8 thank you.

9 **MS BEVILACQUA:** None from Respondent,  
10 thank you.

11 **PRESIDENT:** Very good. So we call -- is  
12 it Mr or Dr Luis Amândio Chaúque?

13 **MS BEVILACQUA:** Mr.

14 LUIS AMÂNDIO CHAÚQUE

15 **PRESIDENT:** Good morning.

16 **MR CHAÚQUE:** Good morning.

17 **PRESIDENT:** Good morning, Mr Chaúque. You  
18 are here as a witness and, as a witness, the first  
19 thing we have to do is to take your oath as witness.

20 Can I kindly ask you that you stand up and  
21 raise your right-hand?

22 Do you solemnly declare upon your honour  
23 and conscience that you will speak the truth, the  
24 whole truth and nothing but the truth?

25 **MR CHAÚQUE:** Yes.

1           **PRESIDENT:** Can you confirm?

2           **MR CHAÚQUE:** I confirm. I confirm.

3           **PRESIDENT:** Very good. Thank you very  
4 much.

5           Mr Chaúque, you are a jurist?

6           **MR CHAÚQUE:** Yes, I am.

7           **PRESIDENT:** So you know how this procedure  
8 works?

9           **MR CHAÚQUE:** Yes.

10          **PRESIDENT:** You have on your right side  
11 counsel to the Claimant, and then your left side is  
12 counsel to the Republic of Mozambique.

13          **MR CHAÚQUE:** Yes.

14          **PRESIDENT:** And there will be questions to  
15 you, and the questions will be phrased in such a way  
16 that you can answer with a yes, a no, or I don't  
17 know. I would kindly ask you that you say first  
18 yes, no, or I don't know, and then you are welcome  
19 to add any clarification which you think may be  
20 helpful to the Tribunal.

21          **MR CHAÚQUE:** I understand.

22          **PRESIDENT:** Very good. Ms Bevilacqua,  
23 your turn.

24          **MS BEVILACQUA:** Thank you, Mr President.

25 Examination by Respondent

1 MS BEVILACQUA: Good morning, Mr Chaúque.

2 MR CHAÚQUE: Good morning.

3 MS BEVILACQUA: You have in front of you  
4 on the table a copy of your witness statements, and  
5 do you see the first one, witness statement of  
6 Mr Chaúque? If you could turn to the last page.  
7 You see it is dated the 18th day of March, 2021?

8 MR CHAÚQUE: Yes.

9 MS BEVILACQUA: Is that your signature?

10 MR CHAÚQUE: Yes, this is my signature.

11 MS BEVILACQUA: Do you have any additions  
12 or corrections you wish to make to your first  
13 witness statement?

14 MR CHAÚQUE: No.

15 MS BEVILACQUA: Thank you. Then if you  
16 would take a look at the document to your left  
17 marked RWS-3 and turn to the first page, it states  
18 that it is your second witness statement, correct?

19 MR CHAÚQUE: Yes.

20 MS BEVILACQUA: If you would look at the  
21 last page, please, it is dated the 25th  
22 of November 2021, and is that your signature?

23 MR CHAÚQUE: Yes, that is my signature.

24 MS BEVILACQUA: Do you have any additions  
25 or corrections you wish to make to your second



1 witness statement?

2 **MR CHAÚQUE:** No.

3 **MS BEVILACQUA:** Thank you, Mr Chaúque.

4 **PRESIDENT:** Very good. So we give the  
5 floor to Claimant, Ms Martins.

6 **MS MARTINS:** Thank you, Mr President.

7 Cross-examination by Claimant

8 **MS MARTINS:** Good morning, Mr Chaúque.  
9 Thank you, first of all, for your presence here  
10 today. My name is Sofia Martins and I will be  
11 asking you some questions on behalf of claimants.  
12 Given that our time is quite limited, as the  
13 president has already asked you I would appreciate  
14 it if you could reply as simply and concisely as  
15 possible. I know we are both native Portuguese  
16 speakers but, as you are aware, the language of the  
17 proceedings is English so I will be asking the  
18 questions in English. You have the translation. In  
19 any event, could I just ask you just to clarify if  
20 you understand some English?

21 **MR CHAÚQUE:** Very little.

22 **MS MARTINS:** Not a lot. OK, thank you  
23 very much.

24 Another issue, Mr President, Mr Ricardo  
25 Saraiva will be sitting next to Mr Chaúque, if

1 that's permitted, just to help him with the exhibits  
2 that we'll be showing during the examination.

3 So, Mr Chaúque, thank you for confirming  
4 your witness statements. As you point out in these  
5 witness statements, during the relevant period that  
6 we're discussing here you were the legal aid to the  
7 Minister of Transport and Communication, correct?

8 **MR CHAÚQUE:** Yes.

9 **MS MARTINS:** And, as asked by the  
10 president of the Arbitral Tribunal, you're a jurist  
11 so I assume that you hold a degree in law, correct?

12 **MR CHAÚQUE:** Yes.

13 **MS MARTINS:** And as I understand from your  
14 witness statements, and I would ask you to please  
15 confirm this, you still work for the MTC today, is  
16 that right?

17 **MR CHAÚQUE:** Yes.

18 **MS MARTINS:** So you're essentially a civil  
19 servant for the Republic of Mozambique, and for the  
20 past ten years you have been working at the MTC, at  
21 least for the past ten years. Is that so?

22 **MR CHAÚQUE:** Yes, I've been working for 19  
23 years.

24 **MS MARTINS:** Always at the MTC,  
25 Mr Chaúque?

1           **MR CHAÚQUE:** Yes.

2           **MS MARTINS:** So let's go, then, to your  
3 witness statements. You have just confirmed that  
4 you signed those witness statements and that you  
5 have no corrections to make to them.

6           Can I ask you, did you have access to the  
7 pleadings that were presented in these proceedings  
8 by the Republic of Mozambique before preparing your  
9 witness statements?

10           **MR CHAÚQUE:** I'm not sure I understood  
11 your question.

12           **MS MARTINS:** Did you have access to the  
13 written pleadings, the written submissions, that  
14 were presented by the Republic of Mozambique in  
15 these proceedings?

16           **MR CHAÚQUE:** No.

17           **MS MARTINS:** You did not?

18           **MR CHAÚQUE:** I had access to them later,  
19 and I did read some documents in the proceedings.

20           **MS MARTINS:** Can I then ask you the  
21 following question? Did you draft these witness  
22 statements?

23           **MR BASOMBRIO:** Mr President, I believe  
24 that invades the attorney-client privilege. This is  
25 a fact witness of the Republic of Mozambique, and

1 how the witness statements were prepared is between  
2 counsel and our fact witness.

3 **PRESIDENT:** It is quite a standard  
4 question to ask him if there has been any support  
5 from counsel. I don't think that the client --  
6 I wonder if there is a client privilege relationship  
7 with a witness, but in any case this is a standard  
8 question. I mean, I don't see any difficulty.

9 Please.

10 **MS MARTINS:** Thank you very much. So  
11 Mr Chaúque, if you could please reply, did you draft  
12 these witness statements that you signed?

13 **MR CHAÚQUE:** Yes.

14 **MS MARTINS:** And in what language did you  
15 draft them, Mr Chaúque?

16 **MR CHAÚQUE:** In Portuguese.

17 **MS MARTINS:** So then can we have a look at  
18 paragraph 7 of your first witness statement? Have  
19 you read it?

20 **MR CHAÚQUE:** Yes.

21 **MS MARTINS:** OK. You used twice in that  
22 paragraph the expression "pré-visibilidade". Can  
23 you explain what you are referring to?

24 **MR CHAÚQUE:** Yes, I can. Pre -- or  
25 "pré-visibilidade", the prefeasibility study, is the

1 preliminary stage in a process such as this. May I?  
2 May I proceed?

3 Exactly. So the initial stage in this  
4 process is called the "pré-visibilidade" study,  
5 because it is not the definitive study which allows  
6 the carrying out or evaluation of the project. It  
7 does not give us enough elements to ascertain the  
8 feasibility of a project. Those elements are  
9 assessed in a definitive study. This is a  
10 Preliminary Study.

11 **MS MARTINS:** Mr Chaúque, you just used the  
12 correct words now in your reply which is  
13 "viabilidade" not "visibilidade". these are two  
14 different words in Portuguese, are they not?

15 **MR CHAÚQUE:** Yes, they are.

16 **MS MARTINS:** Thank you. So they sound  
17 similar in English, feasibility, visibility, but in  
18 Portuguese they are quite different, are they not?

19 **MR CHAÚQUE:** Yes.

20 **MS MARTINS:** In the same paragraph you say  
21 that the MOI, in your opinion, was never intended to  
22 carry out or promise -- and I will use the  
23 expression you used in Portuguese, "compensação  
24 directa".

25 Now, I assume that you meant to refer to a

1 direct award, which is one of the disputed issues in  
2 these proceedings. Is "compensação directa" not a  
3 literal translation of the expression in English  
4 "direct award"? You said that you understood some  
5 English?

6 **MR CHAÚQUE:** I'm not sure I understand the  
7 translation that you want to make. Allow me to  
8 explain what I wanted to say and what I stated in  
9 this paragraph.

10 What I am saying here in the second part  
11 of the paragraph is that the memorandum that was  
12 signed never intended to promise compensation to  
13 whomever made the study. The memorandum is clear.  
14 The study was to be paid for by Patel. It was never  
15 the intention in the MOI for there to be  
16 compensation for the study.

17 **MS MARTINS:** That's not my question.  
18 We'll get to the interpretation of the memorandum in  
19 a few moments. I'm going to language now.

20 You used the expression "compensação  
21 directa". Is the expression in Portuguese correct  
22 legal expression not "ajuste directo"?

23 **MR CHAÚQUE:** These are two different  
24 things.

25 **MS MARTINS:** "compensação directa" is not

1 mentioned anywhere in the law?

2 **MR CHAÚQUE:** I'm not sure I follow.

3 Sorry.

4 **MS MARTINS:** Is the expression  
5 "compensação directa" used anywhere in the law?

6 **MS BEVILACQUA:** I need to object,  
7 Mr President. She's asking him the whole of  
8 Mozambican law and whether it uses that --

9 **MS MARTINS:** In the PPP Law.

10 **MR CHAÚQUE:** The PPP law, if it is as  
11 intended in the question, it is talking about a  
12 direct award, but this is not what I have here in my  
13 statement.

14 **MS MARTINS:** What is the expression used  
15 in the PPP Law, "compensação directa" or "ajuste  
16 directo"?

17 **MR CHAÚQUE:** "Ajuste directo".

18 **MS MARTINS:** Now, it's your position in  
19 your witness statements -- and please bear with me  
20 that I'm going to language now, I am not asking what  
21 your opinion of the MOI is or not, or I'm not asking  
22 your opinion on the law.

23 You do say in your witness statements that  
24 the Portuguese version of the MOI prevails, and you  
25 also said that you understand a little bit of

1 English but not a lot, so I assume that the version  
2 of the MOI that you used to prepare your witness  
3 statements was the Portuguese version, is that  
4 correct?

5 **MR CHAÚQUE:** Correct.

6 **MS MARTINS:** Can I then please ask you to  
7 turn to paragraph 19 of your first witness  
8 statement? Have you read it?

9 **MR CHAÚQUE:** I have.

10 **MS MARTINS:** So here you refer to clause 8  
11 of the MOI, correct? And you quote it.

12 **MR CHAÚQUE:** Yes.

13 **MS MARTINS:** Now, could I please ask you  
14 to have a look at the Portuguese version of the MOI?  
15 That's in volume 1, tab 6. It's a version submitted  
16 by Mozambique as Exhibit R-1. So, Mr Chaúque, this  
17 clause 8 says the implementation of the project --  
18 I'm translating literally now -- will be made within  
19 the principles to be approved by the Government of  
20 Mozambique.

21 Is this not so?

22 **MR CHAÚQUE:** Correct.

23 **MS MARTINS:** Yet, in your written witness  
24 statement, that is not what you quote. You say, and  
25 you write: The implementation of a project shall be



1 made within the laws approved by the Government of  
2 Mozambique. Is that not so?

3 **MR CHAÚQUE:** Yes, that is what I have  
4 written.

5 **MS MARTINS:** So you are making a quote to  
6 the Portuguese version, but it is a misquote,  
7 correct?

8 **MR CHAÚQUE:** It's not a literal copy.

9 **MS MARTINS:** Can we then have a look at  
10 the English version of the MOI that was submitted by  
11 Mozambique? It's at volume 1, tab 5, Exhibit R-2.  
12 Now, this English version does say the  
13 implementation of a project shall be done within the  
14 laws approved by the Government of Mozambique, does  
15 it not?

16 **MR CHAÚQUE:** Well, as I indicated, my  
17 level of understanding of the English language does  
18 not allow me to say precisely whether that is it.  
19 I work more with the Portuguese version.

20 **MS MARTINS:** So you refer to the English  
21 version of the MOI, not to the Portuguese version,  
22 contrary to what you responded before, is that not  
23 correct?

24 **MR CHAÚQUE:** The basis for our work is the  
25 version in Portuguese. However, this memorandum was

1 signed in both languages.

2 **MS MARTINS:** I'm not referring to the MOI,  
3 I'm referring to your witness statement, Mr Chaúque.  
4 You replied to my question about five minutes ago  
5 that you relied on the Portuguese version of the MOI  
6 to prepare your witness statements because you don't  
7 understand English very well, and I'm putting it to  
8 you now that this witness statement was prepared  
9 based on the English version of the MOI, not the  
10 Portuguese version.

11 **MR BASOMBRIO:** Mr President, we object to  
12 this question on the grounds that's argumentative.  
13 I also object to her interruption of Mr Chaúque's  
14 answer. He's entitled to answer and explain his  
15 answer.

16 **PRESIDENT:** Mr Chaúque, I think what  
17 counsel is asking you is whether the witness  
18 statement I -- I'm reading it in Portuguese, but  
19 whether there was an English version of it and that,  
20 through the use of an English and the Portuguese  
21 version, this difference in the quotation of clause  
22 8 may have arisen. I think that is the question of  
23 counsel.

24 **MR CHAÚQUE:** Thank you, your Honour. The  
25 original text of my witness statement was in

1 Portuguese. In the meantime, knowing the fact that  
2 the text was being referred to for an English  
3 language session, we carried out this exercise of  
4 translating the text into English.

5 We have made this effort to familiarise  
6 ourselves with the English language -- actually the  
7 memorandum was signed in both languages. It is from  
8 this exercise that this issue arises, the issue  
9 raised by the lawyer. However, what we intended in  
10 point 19 of my statement was to show that this  
11 matter should be governed by Mozambican law. That  
12 is what one concludes from clause 8 and also from  
13 clause 9.

14 This is our aim, to cite the clauses in  
15 the memorandum that emphasise the need to use  
16 Mozambican law.

17 **MS MARTINS:** Thank you, Mr Chaúque, but  
18 that was not my question.

19 Let's move on to title Section VI of your  
20 first witness statement. That's at page 5 -- can  
21 you see this title? Roman VI. Just before  
22 paragraph 30. The title. I want you to look at the  
23 title, VI Roman. You just said that this was  
24 written in Portuguese. What is "Estudo de  
25 Pré-preensão", Mr Chaúque?

1           **MR CHAÚQUE:** Here we made the effort to  
2 translate the statement into the English language,  
3 and in that exercise these precisions arose --

4           **MR BASOMBRIO:** Mr President, I have to ask  
5 the chair to please instruct opposing counsel not to  
6 interrupt the witness.

7           **MS MARTINS:** I apologise. I'm making an  
8 effort to wait for the translation. I know -- I do  
9 apologise for this. I'll make a better effort.

10           Mr Chaúque, could you please repeat your  
11 answer for the translation and for the transcript?

12           **MR CHAÚQUE:** Thank you. First, the first  
13 text was written in Portuguese. Then we carried out  
14 the exercise of translating it into the English  
15 language. It was during that exercise that these  
16 situations arose. I don't speak the English  
17 language very well, and in an attempt to bring a  
18 consensual text, these situations arose. As the  
19 lawyer has said, these are linguistic issues,  
20 language issues, which derive from our weak  
21 understanding of the English language.

22           **MS MARTINS:** Mr Chaúque, this witness  
23 statement was, according to your own words and  
24 you've said this twice, written in Portuguese. It  
25 was submitted in these proceedings only in

1 Portuguese. My question is very simple. What does  
2 "Pré-preensão" mean in Portuguese? Or does it mean  
3 anything at all?

4 **MR CHAÚQUE:** We wanted to write  
5 Preliminary Study, "Estudo Preliminar" as you can  
6 see between the parentheses in the point 3.

7 Sometimes there's confusion between  
8 preliminary, "Preliminar", and prefeasibility  
9 "viabilidade prévia" hence the situation. We are  
10 referring to the same thing.

11 **MS MARTINS:** Let's move on to title of  
12 section VIII, please. That's at page 9. Have you  
13 read it, Mr Chaúque?

14 **MR CHAÚQUE:** Yes.

15 **MS MARTINS:** Here you use another  
16 expression in Portuguese, "prémio directo".

17 I assume you are once again referring to a "ajuste  
18 directo" and not "prémio directo".

19 **MR CHAÚQUE:** Yes.

20 **MS MARTINS:** "prémio" would be "prize" in  
21 English. Is your English sufficiently good to say  
22 that, or is it not?

23 **MR CHAÚQUE:** No, I don't understand. I'm  
24 sorry.

25 **MS MARTINS:** We'll move on.

1           Let's switch to your second witness  
2 statement. Throughout this whole witness  
3 statement -- and I will give you some examples. At  
4 paragraphs 23 -- I will give you time to read  
5 them -- 23 on the sixth line you can see the word  
6 "identification".

7           **MR CHAÚQUE:** Yes.

8           **MS MARTINS:** Yes. And you can find it  
9 again in the next paragraph, paragraph 24, line 3.

10          **MR CHAÚQUE:** Yes, I read it.

11          **MS MARTINS:** Can you please turn to  
12 paragraphs 38, 39 and 40?

13          **MR CHAÚQUE:** Yes, I've read it.

14          **MS MARTINS:** So we could go through  
15 several paragraphs, but my question is why is this  
16 word "Identificação" found so many times in the  
17 middle or at the end of several paragraphs of your  
18 witness statement? There are further examples. 40,  
19 52, 61, 82, 88 -- it's found throughout your second  
20 witness statement.

21          **MR CHAÚQUE:** Thank you very much. We can  
22 understand from paragraph 23 at the last part of my  
23 statement, where it reads "PEL's reply dated 18 June  
24 '12 was in English", that -- I'd like to state that  
25 we hereby are expressly asserting our

1 *direito de preferência* to implement the project. We  
2 were looking for what Patel had said in English, and  
3 we identified the choice of words in the English  
4 language. We wanted to bring this quote into this  
5 statement because we read Patel's replies in  
6 English, and then we had to refer to it in  
7 Portuguese.

8           The same applied to my drafting of my  
9 statement. Reading existing English language  
10 documents and writing in the Portuguese language, I  
11 had to identify -- I needed to identify those  
12 passages originally in the English language. This  
13 is the result of such an exercise.

14           **PROFESSOR TAWIL:** Sorry, I have a  
15 follow-up question. Was it that you don't speak  
16 English?

17           **MR CHAÚQUE:** Yes, I did, your Honour.  
18 I struggle with English, but I forced myself to  
19 learn a bit because I had to draft my statement, and  
20 I exerted myself to that end. Probably because of  
21 this shortcoming of mine, I made these faults. I do  
22 not speak perfectly English. I can recognise some  
23 words but not enough to reason in English.

24           **MS MARTINS:** Mr Chaúque, who is "we"? You  
25 said "we". "Nós" ...

1           **MR CHAÚQUE:** I'm very sorry, I did not  
2 understand your question.

3           **MS MARTINS:** "We" were preparing this  
4 witness statement. Who is we?

5           **MR CHAÚQUE:** No. We prepared my  
6 statement. We --

7           **MS MARTINS:** "Nós". You used the word  
8 "nós".

9           **MR CHAÚQUE:** I'm saying to signify that,  
10 when we got Patel's documents at the ministry, those  
11 documents are sent to us, Legal Department, which  
12 I head, but the statement is personal. It's not on  
13 behalf of the legal department. But these documents  
14 are sent to the legal department, and at that level  
15 we did our best to interpret these English language  
16 texts. That's what I mean by "we". Not when it  
17 came to drafting the actual statement but referring  
18 to our work in these files where we get documents in  
19 the English language. Sometimes I asked my  
20 colleagues to help me in interpreting Patel's  
21 English language documents at the legal department  
22 where I work.

23           **MS MARTINS:** Mr Chaúque, once again I  
24 recall I'm just referring to this witness statement  
25 which you have stated you wrote yourself in



1 Portuguese.

2 **MR CHAÚQUE:** Yes.

3 **MS MARTINS:** Did you review it carefully?

4 **MR CHAÚQUE:** No, not the last version  
5 because of an urgent delivery and the deadline,  
6 I did not. I had to send it off.

7 **MS MARTINS:** So you acknowledge that your  
8 written witness statements contain a number of  
9 mistakes and incorrect expressions in legal  
10 Portuguese?

11 **MR CHAÚQUE:** Quotes such as this.

12 **MS MARTINS:** Let's move on, Mr Chaúque.

13 You have been indicated as a fact witness  
14 in this case, correct?

15 **MR CHAÚQUE:** Correct.

16 **MS MARTINS:** And you have confirmed that  
17 you have legal training. Would you agree, then,  
18 that a fact witness is in principle someone who  
19 testifies about facts of which he or she had  
20 firsthand knowledge?

21 **MR CHAÚQUE:** Yes.

22 **MS MARTINS:** And that a fact witness is  
23 supposed to provide his or her source of knowledge  
24 of the facts, is that not so?

25 **MR CHAÚQUE:** Yes.

1           **MS MARTINS:** Now, you've said that your  
2 English is not perfect but I would like to show you  
3 a document that compares the paragraphs of your  
4 written witness statements with the pleadings that  
5 have been submitted in these proceedings. Can you  
6 please look at paragraph 26 of your first witness  
7 statement?

8           Mr Chaúque, on the left-hand side you have  
9 paragraph 26 of your witness statement, and on the  
10 right-hand side I put to you is paragraph 73 of the  
11 Statement of Defence that was submitted in these  
12 proceedings by the Republic of Mozambique. H-3.  
13 Exhibit H-3.

14           Have you been able to read this,  
15 Mr Chaúque?

16           **MR CHAÚQUE:** In Portuguese, yes.

17           **MS MARTINS:** You are not able to  
18 understand the English?

19           **MR CHAÚQUE:** I have to exert a modicum of  
20 effort, but I'm afraid to misread the English  
21 version, so I've been following the Portuguese  
22 version.

23           **PRESIDENT:** Ms Martins, I don't know what  
24 you are trying to prove. They seem very similar,  
25 but it can be that the Statement of Defence takes

1 over the witness statement. There is a cross  
2 reference. What do you want to -- I think the  
3 witness has said he has not read the Statement of  
4 Defence.

5 **MS MARTINS:** That's exactly what I --  
6 where I'm going, Mr. Chairman.

7 Mr Chaúque, would the expression "good  
8 standing" in English in Portuguese not be "idónea".

9 **MR CHAÚQUE:** I do not know.

10 **PRESIDENT:** He does not read English. He  
11 has stated that he does not read English, so it's a  
12 difficult linguistic question.

13 **MS MARTINS:** I will move on, Mr Chairman.

14 **PRESIDENT:** I'm not quite sure how much he  
15 can help us if there are -- what you seem to show is  
16 that the witness statement and the Statement of  
17 Defence are similar, but it may be that the  
18 Statement of Defence --

19 **MS MARTINS:** It's not only that. That's  
20 not the point. It's the point that the Portuguese  
21 is not Portuguese, it's English literally translated  
22 into Portuguese, and the witness has testified that  
23 he wrote this directly in Portuguese himself. I put  
24 it to the Tribunal that he did not, and I will move  
25 on now to other topics.

1           **PRESIDENT:** Let's.

2           **MR BASOMBRIO:** Mr President, I wish an  
3 opportunity to respond to what she just put on the  
4 record, which was her opinion. They are clearly  
5 showing here the witness statement in Portuguese,  
6 the original on the left, and on the right they're  
7 showing the Statement of Defence.

8           It refers to the Portuguese language and  
9 is translated in the Statement of Defence to  
10 English, and it properly cites specifically at the  
11 bottom that it's referring to paragraph 26 of the  
12 witness statement, and this is very common too.

13           **MS MARTINS:** This is very common indeed,  
14 Mr Basombrio. Thankfully the Tribunal manages to  
15 understand the Portuguese and will realise, but this  
16 is for closing arguments, not for now. Let's move  
17 on --

18           **PRESIDENT:** Let's move on.

19           **MS MARTINS:** -- to the topics that we're  
20 here to discuss.

21           So, Mr Chaúque, can I please direct you  
22 once again to your first witness statement, in  
23 particular to paragraphs 2 to 5. I'll give you a  
24 few minutes to reacquaint yourself with what you  
25 said here.

1           **MR CHAÚQUE:** Yes, I've read it.

10:14

2           **MS MARTINS:** Thank you, Mr Chaúque.

3           So basically what you say, in short, is

4 that PEL did not come up with the idea for the

5 project foreseen in the MOI, and you refer to

6 Resolution 37/2009 of 30 June. That is

7 Exhibit R-2 -- sorry, it's the resolution of the

8 Council of Ministers, which is RLA-15. Tab 1, 132.

9           We'll get to that in a minute, but I would

10 also like you to have besides that resolution open,

11 could I please ask you to have open Exhibit R-2,

12 which is clause 1 of the MOI. Actually, let's have

13 it in the Portuguese version, which would be

14 Exhibit R-1.

15           Mr Chaúque, can you please just have a

16 look at clause 1 of the MOI in Portuguese?

17           **MR CHAÚQUE:** Yes, I've read it.

18           **MS MARTINS:** Thank you. You agree with me

19 that this project is comprised of two things, a port

20 and a railway together, correct?

21           **MR CHAÚQUE:** Yes, correct.

22           **MS MARTINS:** And the recommended

23 locations --

24           **MR CHAÚQUE:** Indeed a railway, yes.

25           **MS MARTINS:** So the recommended location

1 for this port was Macuse. That was the first  
2 option, right?

3 **MR CHAÚQUE:** No. May I?

4 **MS MARTINS:** You may.

5 **MR CHAÚQUE:** May I refer to the witness  
6 statement, to the strategy and to the memorandum?  
7 My statement states that the concept of building a  
8 railway between Moatize and the coast of Zambezia,  
9 Macuse, is not authored by Patel. This is what we  
10 are meant -- this is what I say in this section of  
11 ours.

12 The idea of the project predates the  
13 memorandum. This was an idea that had been in  
14 existence at the ministry. We had worked thereon  
15 from 2008 onwards when we drafted the strategy,  
16 which is the strategy for the transport and  
17 communications sector, not limited to railways and  
18 ports. It is an overall strategy for the  
19 development of transport in general. It includes  
20 railways, roadways, even airways.

21 In 2009 the government approved this  
22 strategy. The strategy covers several options for  
23 the evacuation of goods from in this case the coal  
24 area of Moatize all the way to the port, which would  
25 be found along the coast obviously.

1           In that strategy there's no exact  
2 reference to the location for the itinerary for the  
3 route of any line to be built, nor where exactly  
4 would any port be built. The strategy leaves that  
5 open, which is why this opportunity arose for  
6 feasibility studies to be undertaken for each  
7 project.

8           It is to that end that we come across,  
9 when it comes to the Moatize-Macuse railway, several  
10 interested parties. Allow me to state that in  
11 2009/2010, the government was working simultaneously  
12 with a view to enhancing the transport capability of  
13 the Sena line, lasting for 596 kilometres from  
14 Moatize to Beira and which begged for greater  
15 capacity. It should go from 6 to 20 million tons  
16 per year.

17           We were also working on enhancing the  
18 capacity of the northern line which connects Nacala  
19 to Malawi, but these were not meant to be the only  
20 options at a point in time where we had to increase  
21 the number of options to evacuate goods. This is  
22 the backdrop against which the government approves a  
23 strategy that indicates where lines and ports could  
24 be built. And there were a great many interested  
25 parties. Patel was not the only one, not even when

1 it came to embarking on the study, which was why  
2 Patel, in its Memorandum of Understanding, inserted  
3 the exclusivity clause.

4 **MS MARTINS:** Mr Chairman, I'm sorry.  
5 I asked one question, and this is completely outside  
6 the question I asked, so I will interrupt the  
7 witness with your permission because he's not  
8 replying to my questions.

9 **PRESIDENT:** Let's go. Yes.

10 Mr Chaúque, if you listen to the question  
11 and answer specifically the question, that's  
12 appreciated.

13 **MS MARTINS:** Mr Chaúque, you say that  
14 Patel did not come up with this idea, did not  
15 conceive this project. Do you stand by that  
16 statement?

17 **MR CHAÚQUE:** Yes.

18 **MS MARTINS:** Then how could it be granted  
19 a 15 per cent scoring advantage under the PPP Law if  
20 it did not conceive this project?

21 **MR CHAÚQUE:** Because it had undertaken the  
22 study.

23 **MS MARTINS:** The first stage of the PPP  
24 procurement process is the conception stage, is it  
25 not?



1           **MR CHAÚQUE:** Yes.

2           **MS MARTINS:** Thank you.

3           **MR CHAÚQUE:** Which includes those studies  
4 undertaken at the expense of Patel.

5           **MS MARTINS:** We're all clear. Let's move  
6 on to another topic.

7           So in your first witness statement,  
8 section II -- sorry, section III, you essentially  
9 describe several clauses of the MOI, which we all  
10 know. Then you made a few comments on your personal  
11 interpretation of those clauses, but interpretation  
12 we will leave to the Tribunal so I won't bother you  
13 with that.

14           I do believe, however, that you  
15 participated in the negotiations and were present  
16 when the document was signed, correct?

17           **MR CHAÚQUE:** Yes, I was there when it was  
18 signed.

19           **MS MARTINS:** And you -- my question had  
20 two components. You participated in the  
21 negotiations and were there when the document was  
22 signed. Is your answer yes to both questions?

23           **MR CHAÚQUE:** During the negotiation  
24 process we were sent some drafts before signing, two  
25 days earlier, on May the 4th.

1           **MS MARTINS:** Did you participate in the  
2 negotiations of the MOI? It's a simple question,  
3 yes or no, please, Mr Chaúque.

4           **MR CHAÚQUE:** Yes, on May the 4th.

5           **MS MARTINS:** On May the 4th. In your  
6 capacity as legal aide to the minister, I presume?

7           **MR CHAÚQUE:** Yes.

8           **MS MARTINS:** So at paragraph 7 of your  
9 first witness statement, you state that the MOI was  
10 never approved by the administrative court. Now,  
11 I ask you, Mr Chaúque, is it not true that only  
12 contracts that entail public expenditure are subject  
13 to the approval of the administrative court, in your  
14 capacity as legal aide to the MTC naturally.

15           **MR CHAÚQUE:** I'm sorry, I don't understand  
16 the question.

17           **MS MARTINS:** In paragraph 7 you say the  
18 MOI was never approved by the administrative court.  
19 That's the first line of paragraph 7.

20           **MR CHAÚQUE:** Yes.

21           **MS MARTINS:** And I'm asking you, is it not  
22 true that only contracts that entail public  
23 expenditure are subject to this approval from the  
24 administrative court?

25           **MR CHAÚQUE:** That is correct.

1           **MS MARTINS:** And is it not true that the  
2 MOI did not entail any public expenditure?

3           **MR CHAÚQUE:** Yes. Let me explain.

4           Even those concessions where a private  
5 investor uses its funds without the participation of  
6 the State, it has to be approved by the  
7 administrative court because under the law for  
8 railways and ports, these are assets of public  
9 domain.

10           So even if it's a private sector that  
11 builds these infrastructures, the State must approve  
12 and must know what is being built because it is an  
13 asset of public domain. Its in that sense but not  
14 in the sense of having public, or State investment.

15           **MS MARTINS:** Mr Chaúque, we're talking  
16 about the MOI, not a concession contract.

17           Did the MOI need to be subject to the  
18 approval of the administrative court, yes or no, in  
19 light of your previous answers?

20           **MR CHAÚQUE:** No.

21           **MS MARTINS:** Thank you.

22           So you said that you were involved in  
23 negotiations a few days just before the signing on  
24 4th of May, and that you were there, so this is not  
25 disputed. Mr Daga says the same.

1           You also say, in section V of your first  
2 witness statement -- and I'll let you turn to  
3 section V so you can reacquaint yourself with what  
4 you said -- that's paragraphs 28 and 29, just to  
5 direct you?

6           **MR CHAÚQUE:** Yes.

7           **MS MARTINS:** So in paragraph 28 on the  
8 sixth line, so third counting from the bottom, you  
9 state that the English version of the MOI submitted  
10 by PEL is not the real one and that it couldn't be  
11 found in the records of the MTC.

12          **MR CHAÚQUE:** Yes.

13          **MS MARTINS:** Did you find the original of  
14 the English version that you believe is the correct  
15 one?

16          **MR CHAÚQUE:** We have copies of the English  
17 version in electronic form.

18          **MS MARTINS:** My question was did you find  
19 the original?

20          **MR CHAÚQUE:** No.

21          **MS MARTINS:** So you do not have the  
22 original?

23          **MR CHAÚQUE:** Yes, but if you allow me, the  
24 signing of the MOI was undertaken in two copies  
25 Portuguese and two copies in English, so we have

1 electronic evidence of these MOI's with the same  
2 content.

3           What is happening is that Patel has a  
4 third version which has no correspondence to the  
5 Portuguese version. That's what I'm stating here.  
6 There is an English version presented by Patel which  
7 is not consistent with the Portuguese version. We  
8 have two English versions and one Portuguese  
9 version.

10           **MS MARTINS:** Mr Chaúque, I'm sorry to  
11 interrupt you --

12           **PRESIDENT:** You have asked him. Let him  
13 finish. Yes, please, Mr Chaúque, finish your  
14 explanation.

15           **MR CHAÚQUE:** Thank you, your Honour.

16           What I'm saying is that we have one  
17 version in Portuguese language with a corresponding  
18 English version. We agree with that version, and we  
19 have electronic copies of those.

20           In the meantime, we have a third version  
21 in English which does not exist its corresponding  
22 Portuguese version, and it's this English version  
23 which Patel is using to argue their case, and we  
24 don't agree with that.

25           That English version, I have no knowledge

1 of having been signed. We have a Portuguese  
2 version, English version which are the same with the  
3 same content. We agree with those two versions. We  
4 don't agree with the English version which doesn't  
5 have a corresponding Portuguese version.

6 Thank you.

7 **MS MARTINS:** Mr Chaúque, then would you  
8 like to correct your statement that it's not the  
9 true version? Because this seems to imply some  
10 accusation of fabrication of a document. What you  
11 are saying, after all, is that you simply don't  
12 agree with the contents of the English version. You  
13 are not questioning the authenticity of the  
14 document, original document that was submitted by  
15 PEL in these proceedings.

16 **MR CHAÚQUE:** Your Honour, the copies which  
17 I know about are photocopies in electronic format.  
18 Those are the only ones I know. I don't have the  
19 originals. I can't talk about whether a document is  
20 authentic or not; I'm talking about the content  
21 which is used by Patel for these proceedings.

22 Patel is using an English version which we  
23 do not have a corresponding Portuguese version.  
24 There are two English versions, one corresponding to  
25 the Portuguese draft and one which doesn't

1 correspond to the Portuguese draft. There are no  
2 two Portuguese versions, only one Portuguese  
3 version, and the corresponding translation into  
4 English. And then there's a third English version,  
5 and we don't have that corresponding in the  
6 Portuguese version.

7 That's what I'm stating.

8 **MS MARTINS:** So it's not an accusation of  
9 fabrication; just that you don't agree with the  
10 contents. Let's move on. Now, you stated here --

11 **MR BASOMBRIO:** Mr President, before we  
12 move on, I would request that the Chair instruct  
13 counsel not to make legal arguments for the record  
14 after the witness answers, so I don't have to  
15 interrupt with our version.

16 **PRESIDENT:** Let's move on.

17 When you've finished this line of  
18 questioning, we'll have a break.

19 **MS MARTINS:** And these electronic copies  
20 were found where, Mr Chaúque?

21 **MR CHAÚQUE:** When the arbitration  
22 proceedings started we received all of our  
23 information at the ministry from Patel, including  
24 these versions. That's when I had access,  
25 including, to prepare my witness statement, I looked

1 at those versions.

2 **PRESIDENT:** No, no. That was not the  
3 question, Mr Chaúque. The question is where are  
4 these electronic copies which the ministry has,  
5 where are they located? In which computer? In  
6 which office? Where did you find them? That was  
7 the question of counsel.

8 **MR CHAÚQUE:** In the computer.

9 **PRESIDENT:** Let me try to understand.  
10 You have what you called an electronic  
11 version of a Portuguese and an English MOI, and it's  
12 electronic. I think you said you do not have the  
13 originals. Is that correct?

14 **MR CHAÚQUE:** That is correct.

15 **PRESIDENT:** And these electronic copies,  
16 where are they? In a computer? In a file? Where  
17 did you find them?

18 **MR CHAÚQUE:** The electronic version from  
19 Patel I received from Patel and we scanned and filed  
20 them, including the other documents. We scanned all  
21 the documents, and we keep them in the computer.

22 **PRESIDENT:** So it was scanned? Let me ask  
23 you this. You were present at the signing?

24 **MR CHAÚQUE:** Yes.

25 **PRESIDENT:** And you were the legal



1 advisor?

2 **MR CHAÚQUE:** Yes.

3 **PRESIDENT:** So you then did as all good  
4 legal advisors do, you took the originals and you  
5 scanned them. That was your statement, sir?

6 **MR CHAÚQUE:** No.

7 **PRESIDENT:** So why don't you tell us what  
8 happened with the Portuguese and English originals  
9 of the MOI after they were signed with the ministry?

10 **MR CHAÚQUE:** Thank you, your Honour.

11 All signed documents signed by the  
12 minister are filed in the minister's office. We are  
13 in the legal department, which is another office.  
14 We have access to the information when somebody asks  
15 us to provide a certain opinion. We do not file  
16 these documents -- our legal office, that is.

17 Time went by, and when we reached the  
18 minister's office, we couldn't find the originals.  
19 We found copies. So we looked at these paper  
20 copies, we scanned them, and we filed the scanned  
21 document. The scanned document was based on a copy  
22 of the MOI and not on the originals. We couldn't  
23 find the originals.

24 **PRESIDENT:** OK. So in the Gabinete do  
25 Ministro what is now there is a copy of the

1 original, and what you then did recently is to scan  
2 that copy into the computer?

3 **MR CHAÚQUE:** Yes, your Honour.

4 **PRESIDENT:** And you have no explanation  
5 why the originals are not there?

6 **MR CHAÚQUE:** Your Honour, we started work  
7 on these proceedings two years ago, we started to  
8 look for the originals two years ago, in 2019. We  
9 tried to find them in the archives. Part of the  
10 archives had been removed when we had refurbishment  
11 work done on the building, and we can't find them.

12 We refurbished the whole building.  
13 Documents were sent somewhere in 2019, '20, '21. We  
14 could not find the originals. What we did find were  
15 the copies, and that's what we're working on, and  
16 I'm sure it was that reason that we couldn't find  
17 the originals in the minister's office. We don't  
18 have the originals.

19 **PRESIDENT:** Any further questions on the  
20 archiving of the documents?

21 **MS MARTINS:** No, thank you, Mr Chairman.

22 **PRESIDENT:** Is it a good moment to break,  
23 or do you have further questions on the authenticity  
24 of the documents?

25 **MS MARTINS:** Just one question and then we

1 can break.

2           **PRESIDENT:** And maybe my colleagues have  
3 some questions.

4           **MS MARTINS:** One question on the  
5 authenticity.

6           **PRESIDENT:** On the originals versus copies  
7 and archiving of the MOIs.

8           **MS MARTINS:** Just one final question,  
9 Mr Chaúque, about the day that the MOI was signed.  
10 Do you recall that day? We're talking about May the  
11 6th, 2011.

12           **MR CHAÚQUE:** Yes, I do remember. I can't  
13 remember if it was at the ministry or at the CFM  
14 premises. I can't remember the location, but I  
15 remember the day.

16           **MS MARTINS:** And do you remember who was  
17 there when the MOI was signed in the evening?

18           **MR CHAÚQUE:** There were people present.  
19 The minister, I was present, my colleague -- some  
20 colleagues from the media were present. From Patel  
21 I think we had Mr Daga and another. I can't  
22 remember the names of all those present.

23           **MS MARTINS:** Thank you. I think we can  
24 then take the break now.

25           **PRESIDENT:** No. Do you still have here

1 the originals?

2 **MS MARTINS:** We do.

3 **PRESIDENT:** Can you show them?

4 Mr Chaúque, I would like you to have a look at the  
5 documents which are in the possession of Patel, and  
6 especially at the English one, and if you go to the  
7 last page you will see there is a dry seal, I think  
8 is the English expression. How would be the correct  
9 expression?

10 **MR DAGA:** Franking seal or embossing seal,  
11 it is called.

12 **PRESIDENT:** And I would like to have a  
13 look at them and if they look like the documents  
14 that were being signed by the minister on behalf of  
15 the Republic of Mozambique. You see this is the  
16 original with the seal and his signature.

17 Is there anything there which draws your  
18 attention?

19 **MR CHAÚQUE:** Yes, your Honour. A slight  
20 difference between how the minister is treated in  
21 this English version. Slightly difference.

22 If you look at the Portuguese version, we  
23 don't have a literal translation that we use.  
24 Slight difference in the English version.

25 **PRESIDENT:** I was thinking more about the

1 signature and the seal of the minister and of the  
2 Republic of Mozambique, whether these *prima facie* --  
3 so on your first glance -- and I know you are not a  
4 specialist in signatures but whether you see from  
5 your experience as legal advisor to the minister, if  
6 you see anything which shocks you, especially in the  
7 English version, which is the one which is really  
8 under discussion.

9           **MR CHAÚQUE:** Yes, your Honour. Looking at  
10 the two documents, I'm not an expert in signatures  
11 as such so I can't reach any conclusion, but looking  
12 at the two versions, the two drafts, the two texts,  
13 they don't seem to have the same content in the  
14 issues.

15           The Portuguese version, which is the base  
16 document to translate into English, should have a  
17 literal translation, and that doesn't happen in this  
18 version.

19           There's another English version which is  
20 not here. I don't know if anybody else has that  
21 English version, the original, or if we have to use  
22 what we have in the scanned documents. There is a  
23 version which is the literal translation of the  
24 Portuguese text and is also signed, and this version  
25 here is not that translation. I remember that this

1 brings what they talked about on May the 4th, and we  
2 said that's not what we want and we advised them to  
3 improve the text, and we have the text in Portuguese  
4 which was signed on the 4th, and the translation  
5 into English also exists, and this is not it. This  
6 version has some imprecisions.

7           This is the idea which Patel brought on  
8 the 4th of May, it's not what was agreed on the 6th  
9 of May, so I can't make any comments regarding the  
10 authenticity of the signatures or the franking and  
11 embossing stamps, but I can issue my opinion as  
12 regards the contents.

13           Thank you.

14           **PRESIDENT:** Thank you. Mr Chaúque, we  
15 will now break --

16           **MR BASOMBRIO:** Excuse me, Mr President.  
17 I'm very sorry to interrupt.

18           **PRESIDENT:** Yes.

19           **MR BASOMBRIO:** Instead of coming back on  
20 redirect, I wanted to make one request right now  
21 that the documents are in front of him to save time.  
22 When you asked him, looking at the original with the  
23 seal and his signature -- and I'm reading from the  
24 transcript, "Is there anything there which draws  
25 your attention?", Mr Chaúque answered "Yes, your

1 Honour, a slight difference between how the minister  
2 is treated in the English version, a slight  
3 difference". I would suggest to the Tribunal to ask  
4 him what he meant by that. That would be my  
5 redirect.

6 **PRESIDENT:** Since we have the documents  
7 here and they should then be archived, Mr Chaúque,  
8 did you hear the question from counsel to the  
9 Republic? Can you answer that?

10 **MR CHAÚQUE:** Yes, your Honour.

11 What I mean by "slight difference" is how  
12 the minister is treated in this version, which is  
13 different from the Portuguese version. It's  
14 "Minister", the name is the same, but "his  
15 Excellency" is missing in the English version --

16 **THE INTERPRETER:** No, his Excellency is in  
17 the English version, not in the Portuguese. Sorry.

18 **MR CHAÚQUE:** And these small differences  
19 also exist in the text of the MOI. This is the  
20 version that probably existed on the 4th of May but  
21 we told them we had to fine tune the document and  
22 the fine tuning is present here in this version in  
23 the Portuguese language. Maybe for some reason the  
24 signature was done this way, but I've seen a  
25 version, I've scanned that version with a

1 translation exactly like the original. That's the  
2 version we've been using.

3 **PRESIDENT:** I know my colleague has a  
4 question, but did I understand you correctly? You  
5 said that the English looks like a previous draft,  
6 and I understood you that maybe for some mistake or  
7 something, this previous draft was signed by the  
8 minister? Is that the explanation? Is that your  
9 explanation?

10 **MR CHAÚQUE:** Thank you. It looks to me  
11 that the signature is the same, but I'm not an  
12 expert, but it looks like it's the same signature.  
13 But I also said that there is another version which  
14 is not here in the room, and it's this issue of  
15 having two English versions. This version here is  
16 not the translation of this Portuguese version on  
17 the table in front of me. These two versions don't  
18 have the same content.

19 **PRESIDENT:** Yes. So there must be an  
20 explanation. I mean, there must be an explanation,  
21 and I understood that a possible explanation is  
22 forgery. Another explanation is mistake. And  
23 I understood you that you were saying a possibility  
24 was that a previous draft, I think you said from the  
25 4th of May, that that previous draft was then signed



1 by the minister. Did I understand you correctly?

10:53

2 **MR CHAÚQUE:** Your Honour, the content of  
3 this English version is very similar to the content  
4 which we read on the 4th of May, Patel's proposal.  
5 Between the 4th of May and the 6th of May, we gave  
6 our advice to make sure that this last Portuguese  
7 version should be the version to be signed, the one  
8 here in front of me. And we also saw an English  
9 version which is the same as the Portuguese. We've  
10 seen that version. But after 2019, when the  
11 proceedings started, we became aware of this new  
12 version, which does not correspond to the Portuguese  
13 version which we've been working on. The reasons --

14 **PRESIDENT:** Yes, I fully understand that,  
15 but my question is slightly different.

16 It is I'm trying to find an explanation  
17 for that English version signed -- apparently signed  
18 by the minister, apparently with the seal of the  
19 Republic of Mozambique, and I understood you that  
20 since it is similar to the draft of the 4th of May,  
21 that maybe there was -- that the minister signed a  
22 draft for one reason or the other -- a mistake or  
23 whatever -- but that a previous draft was signed by  
24 the minister and that that explains the existence of  
25 that document. Was that your explanation?

1           **MR CHAÚQUE:** Plus the possibility that the  
2 minister might have signed two different English  
3 versions of the MOI. There is that possibility,  
4 because there is an English version which is not  
5 this one.

6           **PRESIDENT:** That by mistake he signed two  
7 versions in English, one which is the one there in  
8 front of you, and the other a copy which is archived  
9 in the Gabinete do Ministro in Maputo?

10           **MR CHAÚQUE:** It can be. I can't explain  
11 how we have two English versions which are signed.  
12 It was supposed to be only one English version.  
13 Probably at the time of the signature, there were  
14 two Portuguese versions and two English versions,  
15 probably. It can be. I can't explain the mistake.

16           What I can tell you is that this English  
17 version does not correspond to the Portuguese  
18 version we are using.

19           **PRESIDENT:** My colleague, Professor Tawil,  
20 has a question for you.

21           **PROFESSOR TAWIL:** Thanks very much,  
22 Mr President.

23           Mr Chaúque, I happen to be -- my field of  
24 law, as probably is your field of law, is  
25 administrative law.

1           When you found that the original was not  
2 there and you assumed that there was a possibility  
3 that the ministry has executed a prior version,  
4 I understand that you did some administrative  
5 proceedings trying to locate the original, trying to  
6 see what happened. Can you tell us about those  
7 administrative proceedings? Is there a dossier?  
8 Has that dossier evolved? What has been the status  
9 of that dossier, trying to locate the original?

10           **MR CHAÚQUE:** Yes. In addition to the  
11 internal search conducted, we also sought support  
12 from the attorney general's office as we sought to  
13 find the original, which we did not find.

14           **PROFESSOR TAWIL:** And what about this  
15 assumption that he could have signed a prior  
16 version? Was there an investigation about that?  
17 Have you contrasted which prior version? I mean,  
18 I assume that there has been some administrative  
19 proceedings on that. Could you explain us a little  
20 bit? Or is it just your personal belief, and you  
21 have not pursued that value?

22           **MR CHAÚQUE:** As I indicated, internally  
23 the first thing we did was search for the original.  
24 This original I have before me today, I had never  
25 seen before as an original. I had seen a copy of it

1 when Patel did this exercise in some annexes in  
2 2019. Then we started looking for the original. We  
3 don't have the original. The investigation to find  
4 the original, we didn't find it, but that search is  
5 ongoing, the search for the original is ongoing. We  
6 haven't completed that effort. We're still looking  
7 for the original.

8 **PROFESSOR TAWIL:** Last question, related  
9 but not exactly the same.

10 Yesterday former Minister Zucula said that  
11 signing of MOI is quite frequent and that several  
12 MOIs are executed. But you just said that at the  
13 execution time there were some people there, there  
14 was media, et cetera. If this was not that  
15 relevant, why was the media there?

16 **MR CHAÚQUE:** The media always participates  
17 in public sessions in the ministry. As I had  
18 indicated, it was in the interests of the government  
19 to promote the development of new ports and rail  
20 facilities, and that is what we wanted to make  
21 known. We were working on building new facilities.  
22 We had found a partner who was willing to assist in  
23 that work, and that's what we wanted to make  
24 publicly known. It's a normal exercise in the  
25 ministry. Whenever we have sessions such as this,

1 we have the media present, with the exception of  
2 some matters.

11:01

3 **PROFESSOR TAWIL:** So the media is present  
4 in general at the execution of MOIs?

5 **MR CHAÚQUE:** In the case of certain  
6 memorandums, yes, we have an internal communication  
7 department in the ministry. It produces press  
8 releases and sends them to the media. But there are  
9 also sessions where we ask the media to come and see  
10 public ceremonies that take place, especially when  
11 we're talking about large projects.

12 **PRESIDENT:** Yes. My colleague,  
13 Mr Perezcano, has a final question to you,  
14 Mr Chaúque.

15 **MR PEREZCANO:** Thank you, Chair.

16 Mr Chaúque, you just -- we've been talking  
17 about media, and I wonder if there is some confusion  
18 between everybody here that I hope that you can  
19 clear up.

20 I heard that you -- we've been referring  
21 to media and this is what has come through in the  
22 interpretation. But I heard you in Portuguese that  
23 you said "comunicação social"?

24 Now, I worked for the government many  
25 years ago, and at the ministry we had an office of,

1 in Spanish, Comunicación Social, which is not the  
2 media, but it was the internal department that  
3 serves as contact with the media, so I'm wondering  
4 if we have confusion between the public media,  
5 meaning the press, radio, TV, which is outside of  
6 the ministry, and an internal office which is the  
7 office of comunicação social.

8           When I was in government they were there  
9 to take pictures, they sometimes produced a news  
10 report of events that transpired and handed over to  
11 the public media, so I'm wondering if there is this  
12 distinction, and it just came to me when you  
13 mentioned comunicação social. Is that the case, or  
14 are we talking about the public media, press, that  
15 was present at the meeting when the MOI was signed  
16 on 6 May, 2011?

17           **MR CHAÚQUE:** Thank you very much.

18           We always have our department of  
19 comunicação e imagem, communication and image,  
20 present. That's an in-house body to the ministry  
21 that works with the external press.

22           For each session they determine whether or  
23 not it is necessary for there to be journalists  
24 present, other types of media, external media  
25 present. Sometimes when that is not the case it is

1 the actual internal comunicação department that  
2 produces a press release and sends it to the  
3 different media outlets.

4 Now, in public sessions, yes, we do invite  
5 the different media outlets. Whenever there is a  
6 large project being dealt with, large impact  
7 projects, not only in terms of that sector but also  
8 important in terms of public interest, then we would  
9 invite members of media, so journalists from  
10 different outlets, radio, television would be called  
11 in.

12 **MR PEREZCANO:** So who was present on  
13 6 May? The external public media or the internal  
14 department?

15 **MR CHAÚQUE:** The internal comunicação  
16 department which has journalists in it and it has a  
17 publication that belongs to the ministry. Those  
18 were present in the public acts of the minister.

19 **PRESIDENT:** Professor Tawil has a last  
20 question.

21 **PROFESSOR TAWIL:** Yes. It's not related  
22 with this. Thanks for that clarification.

23 You said that it could have happened that  
24 the ministry executed a prior version of the English  
25 MOI, but what I don't understand, if he executed a

1 prior version, shouldn't there have been the two  
2 copies of the prior version? How come they could  
3 have executed one version updated and one copy not  
4 updated?

5 **MR CHAÚQUE:** I confess, I have no  
6 explanation for that because I didn't know this  
7 version. I'd always known this one. And, as I  
8 said, we were working with the Portuguese language  
9 version, and we were convinced the translation was a  
10 faithful translation to what I see here but  
11 unfortunately we see that there is a version with a  
12 different translation which is the one I see on my  
13 table here.

14 **PROFESSOR TAWIL:** Can we say Patel could  
15 have access to the seal? Patel could have accessed  
16 the seal? The seal only belongs to the government,  
17 right? You put the seal.

18 **MR CHAÚQUE:** I confess I don't understand  
19 what might have happened.

20 **PROFESSOR TAWIL:** The two versions, from  
21 what I understand -- and please correct me if I'm  
22 wrong -- the two versions would have been originated  
23 in the government. The two versions signed would  
24 have been originated in the government because we  
25 have the seal. Am I correct? If there was a



1 mistake, was that mistake from two documents  
2 produced by the government? Because of the seal.

3 **MR CHAÚQUE:** Thank you. I just don't  
4 understand why the other English language version  
5 isn't here today, the one that corresponds to the  
6 Portuguese version, because that version does exist,  
7 and it's also a signed version.

8 There are two versions in English that are  
9 signed, but the two versions in English are  
10 different. One in English is a translation of this  
11 version in Portuguese. That version does exist.  
12 I've seen a copy of that version in English which is  
13 also signed.

14 I cannot explain how that happened, how  
15 this mistake happened, but we assume that when the  
16 signatures took place two Portuguese language texts  
17 were signed and two English language texts were  
18 signed and we would expect that they'd have the same  
19 content.

20 Unfortunately, we noticed in 2019/2020  
21 that there is an existing version which does not  
22 correspond to the Portuguese version with which we  
23 have been working. I can't explain how this  
24 happened, what might have happened with this  
25 version. Some time has elapsed. But I did see an

1 English language version with the same text as the  
2 text we have here in the Portuguese, and that is the  
3 version we believe prevails. Unfortunately it's not  
4 here on my table, but it exists.

5 **PRESIDENT:** We will make a break. 11.10  
6 to 11.30. Let's be back at 11.30.

7 (Short break from 11.10 am to 11.35 am)

8 **PRESIDENT:** Very good. We resume the  
9 hearing, and I give the floor back to Claimant.

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

11 So, Mr Chaúque, we'll be moving on to a  
12 different topic now, and I would like to direct you  
13 to paragraph 13 of your first witness statement.

14 Mr Chaúque, here you basically state, and  
15 you repeat this in your second witness statement,  
16 that the *direito de preferência* that was  
17 contemplated in the MOI was the  
18 *direito de preferência* specified in Law 15/2011,  
19 which is the PPP Law as we know, specifically in  
20 article 13(3).

21 Now, you confirm, as you state further in  
22 your witness statement, that this statute was not  
23 yet in force when the MOI was signed, is that  
24 correct?

25 **MR CHAÚQUE:** Yes.

1           **MS MARTINS:** And at this moment in time,  
2 when the MOI was signed, so before Law 15/2011 came  
3 into force, is it not true that the Civil Code  
4 itself referred to a *direito de preferência*?

5           **MR CHAÚQUE:** Not only the Civil Code but  
6 also the procurement law that was what the MOI was  
7 based on at the time, the execution of the MOI was  
8 based on at the time.

9           The principle is to prefer with regard to  
10 another, so what we are saying, and the Law looked  
11 at that later, what we're saying is that the  
12 *direito de preferência* is with regard to interested  
13 third parties, or third parties interested in the  
14 same project, and the entity that has carried out  
15 the prefeasibility study, enjoys this prerogative of  
16 15 per cent in comparison with the other bidders.  
17 That is the principle. What we want to say is  
18 *direito de preferência* does not mean a direct award.

19           There could not be a  
20 *direito de preferência* had there not been other  
21 interested parties. That's where the preference  
22 comes in. That's the principle in the law.

23           **MS MARTINS:** Mr Chaúque, you mentioned the  
24 public procurement rules that were in force at the  
25 time, so you are referring to Decree 15/2010,

1 correct?

2 **PRESIDENT:** 2011.

3 **MR CHAÚQUE:** I think so. I can't quite  
4 say.

5 **MS MARTINS:** I'm sorry, Mr Chairman, no,  
6 that was not in force, so we're talking about  
7 15/2010, the public procurement rules which the  
8 witness just referenced.

9 **PRESIDENT:** OK.

10 **MS MARTINS:** Let's have a look, please, at  
11 the public procurement rules. The Portuguese  
12 version is at CLA-41, that's volume 5, tab 114 of  
13 the Core Bundle, and there is an English translation  
14 at CLA-67 if anyone prefers to look at the English  
15 translation.

16 But, Mr Chaúque, can you please have a  
17 look at article 26 of this statute?

18 **MR CHAÚQUE:** Yes.

19 **MS MARTINS:** So basically this  
20 provision -- and we know that the statute applies to  
21 services contracts and contracts for the supply of  
22 goods, but in any event, so article 26 applies only  
23 to national bidders, correct?

24 **MR CHAÚQUE:** Yes.

25 **MS MARTINS:** And basically what this

1 provision says, if I understand it correctly, is  
2 that the public contracting entity may decide to  
3 exclude foreign bidders, and in that sort of  
4 situation it will, if it does not exclude foreign  
5 bidders -- so if we have both foreign bidders and  
6 national bidders bidding for the same contract --  
7 the national bidders will be entitled to a benefit.  
8 That's numbers 2 and 3 of article 26, correct?

9 **MR CHAÚQUE:** I'm not sure I understand  
10 your question. Article 46 is the guarantee. Are  
11 you talking about 26?

12 **MS MARTINS:** I'm talking about article 26,  
13 Mr Chaúque. 26. Paragraph number 2 says that the  
14 contracting entity may restrict the bidding only to  
15 national bidders.

16 **MR CHAÚQUE:** Yes.

17 **MS MARTINS:** And number 3 says if the  
18 contracting entity does not exclude foreign bidders,  
19 so does not apply the prerogative that is set forth  
20 in the previous paragraph, then it should  
21 establish -- and what does it say? Does it say  
22 *direito de preferência* or does it say "margem  
23 de preferência?"

24 **MR CHAÚQUE:** Here it says "margem  
25 de preferência".

1           **MS MARTINS:** And this "margem de  
2 preferência" is 10 per cent of the value of the  
3 contract, if it's a contract for works, or 15 of the  
4 value of the contract if it's a contract related to  
5 goods, is it not?

6           **MR CHAÚQUE:** Yes.

7           **MS MARTINS:** And these percentages are not  
8 a bonus, are they?

9           **MR CHAÚQUE:** I don't think we're  
10 interpreting this correctly. What are we talking  
11 about, a public tender situation? Or are we talking  
12 about the MOI? I'm just needing to understand that.  
13 Apologies.

14           **MS MARTINS:** Mr Chaúque, you referred,  
15 when I asked you about the MOI, which you state  
16 includes the reference of *direito de preferência* in  
17 the PPP Law, first you said you agreed with me that  
18 the PPP Law was not yet in force.

19           **MR CHAÚQUE:** Yes --

20           **MS MARTINS:** Please let me finish.

21           And you added to your answer that you were  
22 referring to the public procurement rules which were  
23 in force at the time, and so I'm taking you through  
24 the public procurement rules, and to the specific  
25 provision in the public procurement rules that refer

1 to this alleged *direito de preferência*.

2 And I'm asking you to confirm that the  
3 wording of this provision does not refer to  
4 *direito de preferência* but, rather, to a *margem de*  
5 *preferência*?

6 **MR CHAÚQUE:** Exactly. Meantime, we need  
7 to look at this in time, at the time of the signing  
8 of the memorandum and at the time of the public  
9 tender when the principle is to be applied. These  
10 are two different moments in time.

11 So we were saying that we were going to  
12 apply in 2013 during the public tender -- are we  
13 going to apply the old rules then, or are we going  
14 to at the time of the public tender apply the rules  
15 that even appear to be beneficial to the bidder.  
16 Those are the rules in the law in force at the time  
17 of the public tender.

18 **MS MARTINS:** We're not talking about the  
19 public tender. I'm talking about when the MOI was  
20 signed.

21 **MR CHAÚQUE:** Yes.

22 **MS MARTINS:** You agree that when the MOI  
23 was signed, the PPP Law was not yet in force, yes?

24 **MR CHAÚQUE:** Exactly.

25 **MS MARTINS:** And you agree that the public

1 procurement rules which were in force when the MOI  
2 was signed did not contain a similar right. It  
3 contained a *margem de preferência* that was not a  
4 bonus, correct?

5 **MR CHAÚQUE:** I don't understand that  
6 placement. I don't understand the question. I'm  
7 sorry.

8 **MS MARTINS:** The question is simple, and  
9 I will repeat it.

10 Were the public procurement rules in force  
11 when the MOI was signed, as you just stated a few  
12 minutes ago?

13 **MR CHAÚQUE:** Yes.

14 **MS MARTINS:** Do the public procurement  
15 rules refer to a *direito de preferência*? Yes or no?

16 **MR CHAÚQUE:** What we're reading is called  
17 *margem de preferência*, but this is the terminology  
18 that the legislator used and which was clarified in  
19 the law that came into force immediately after the  
20 MOI was signed.

21 **MS MARTINS:** Let's move on, Mr Chaúque.  
22 Can I take you, please, to paragraph 19 of your  
23 second witness statement?

24 **MR CHAÚQUE:** Yes, I've read.

25 **MS MARTINS:** Thank you.



1                   So at line 9 you say: As observed  
2    ("Conforme observado") MTC's position later on was  
3    that the right of preference in the MOI could be  
4    materialised as the right of preference of  
5    15 per cent within the tender. Do you confirm this  
6    statement?

7                   **MR CHAÚQUE:** Yes, I confirm.

8                   **MS MARTINS:** So you then confirm that the  
9    MTC's position, this position, was only made later  
10   on and that it could be. So it's a conditional  
11   assumption.

12                  **MR CHAÚQUE:** Naturally, the public tender  
13   had to come after the memorandum. We assumed that  
14   as a fact. The public tender would come after the  
15   memorandum. We were clear on that. We knew it  
16   would be applied later and not at the time the MOI  
17   was executed.

18                  Now, the MOI had a duration of one year,  
19   which was for the prefeasibility study, and then it  
20   expired, but we brought from the MOI the advantages  
21   for Patel, and the ministry always applied these  
22   benefits in favour of Patel. There was an interest  
23   on the part of the ministry and the government to  
24   materialise the project. That was our interest, and  
25   we needed to do everything we could to benefit

1 Patel, giving them the benefits provided for by law  
2 at the time of the public tender, and that's what we  
3 did. Give them the largest possible advantage.  
4 That's what we did.

5 **MS MARTINS:** So you confirm that this was  
6 something that you did later on, so after the MOI  
7 was signed? It was only later on that you came up  
8 with this idea that this right of preference could  
9 be the 15 per cent scoring advantage. This is what  
10 you state in your witness statement at paragraph 19.

11 **MS BEVILACQUA:** Mr President, I must  
12 object that she is mis-stating the witness statement  
13 and his testimony.

14 **MS MARTINS:** I'm referring to the words  
15 used in the witness statement. If it's poorly  
16 drafted, I'm sorry, but he either confirms or  
17 corrects.

18 **PRESIDENT:** Can you repeat the question?

19 **MS MARTINS:** The question is simple. Do  
20 you confirm the sentence in your witness statement:  
21 As observed, the MTC's position later on was that  
22 the right of preference in the MOI could be  
23 materialised as the right of preference of 15  
24 per cent within the law?

25 **MR CHAÚQUE:** I confirm this, but this is

1 not only what my statement says. This principle was  
2 already in the MOI. My statement came later. The  
3 *direito de preferência* had to come later. The  
4 public tender came later. But the MOI already  
5 provided for that.

6           The MOI already provided for the  
7 possibility of an advantage being applied to those  
8 who had carried out the study, and this is what the  
9 ministry did. We didn't want to use the memorandum  
10 to harm those who had carried out the study. We  
11 knew there was a reason for the study and we had to  
12 find a way to give them an advantage and that's what  
13 we did. This is one of them, the  
14 *direito de preferência* of 15 per cent.

15           Let's not forget that in the public tender  
16 they were competing with other entities, and the  
17 ministry had no memorandum with those. There had to  
18 be transparency, and that transparency had to be  
19 based on the law, and that's what the ministry did.

20           We looked in the law for the advantages  
21 that are to be given to the bidder who carried out  
22 the study. We did that, yes. We gave Patel that  
23 benefit, that advantage. We gave them the  
24 *direito de preferência*. I can confirm that.

25           **MS MARTINS:** Thank you. That's very

1 clear.

2 Can we look then, please, at a letter  
3 dated 11 January 2013 that was sent by MTC to Patel  
4 which you refer to also in your witness statements?  
5 That's tab 22. It's duplicated. It's both  
6 Exhibit C-19 and R-17.

7 Do you have the letter? Could I please  
8 ask you to read paragraph 1 of that letter?

9 **MR CHAÚQUE:** Thank you. It says "Dear  
10 sir, I have received your letter with your reference  
11 100" --

12 **MS MARTINS:** Paragraph 1, if you -- number  
13 1, exactly. So the next page. You don't have to  
14 read it out loud. You can read it to yourself.

15 **MR CHAÚQUE:** Thank you. Yes, I've read  
16 it.

17 **MS MARTINS:** Mr Chaúque, does this  
18 paragraph not say that the *direito de preferência*  
19 could have two different meanings? It could, within  
20 a tender, be 15 per cent, or it could be a direct  
21 award?

22 **MR CHAÚQUE:** These are different  
23 situations. One thing is to say a public tender;  
24 another thing is the direct negotiation, sometimes  
25 called *ajuste directo*. These are different

1 situations.

2 In both situations it falls to the Council  
3 of Ministers to take the decision. Should there be  
4 a direct award, if that is the decision of the  
5 Council of Ministers, there is no  
6 *direito de preferência* to apply. There's a direct  
7 award.

8 Should there be no direct award, because  
9 that is an exceptional rule, the rule is always the  
10 public tender. The public tender is the norm. The  
11 bidder who has carried out the study, which is the  
12 case of Patel, it even says in the minister's letter  
13 that if they put in a bid, they have an advantage in  
14 the scoring at the start, an advantage in the  
15 scoring at the start if they bid.

16 **PRESIDENT:** Can you read -- did you  
17 prepare this letter? Was it drafted by you?

18 **MR CHAÚQUE:** No. That's from -- the  
19 letter is from the minister.

20 **PRESIDENT:** I'm sure you prepared a lot of  
21 letters to be signed by the minister. Were you  
22 physically the person who drafted this letter?

23 **MR CHAÚQUE:** I do not recall, there were  
24 so many. I don't recall.

25 **PRESIDENT:** Because if you look at the

1 text, and that is what counsel is asking you, what  
2 the minister seems to be saying is  
3 *direito de preferência* has like two options.  
4 "Poderia ser materializado através de um concurso  
5 público ou através de uma negociação directa", it  
6 may be materialised through a public tender or  
7 through a direct negotiation.

8 I think counsel is asking you if this  
9 *direito de preferência* --

10 **MR CHAÚQUE:** Yes.

11 **PRESIDENT:** If what the minister is saying  
12 is true, is a fair interpretation of what  
13 *direito de preferência* means.

14 **MR CHAÚQUE:** It's not. It's not. The  
15 *direito de preferência* I know is to prefer with  
16 regard to others. In the public tender there is an  
17 advantage if there is a bid put in. If there is no  
18 public tender, then it is a direct award. There is  
19 no need to be an advantage. It's handed over  
20 immediately by a decision of the Council of  
21 Ministers. So no, the advantage of the preference,  
22 as I understand it, is in the public tender. The  
23 direct award is an exception to the rule, which is  
24 also applied.

25 **MS MARTINS:** But you did refer to this

1 letter in your witness statements, correct?

12:01

2 **MR CHAÚQUE:** Yes, I do.

3 **MS MARTINS:** And you did not make any  
4 correction to the contents of this letter in your  
5 witness statements, did you?

6 **MR CHAÚQUE:** Indeed not. We -- if I may,  
7 this is one of the communications sent by Patel.  
8 There is a great amount of information given to  
9 Patel, even during meetings clarifications were  
10 made, so this is one of said instances.

11 We have to go slightly back, if I may.  
12 The letter is dated 11 January 2013 because Patel,  
13 ever since the study had been approved, had insisted  
14 that a direct award should be granted to itself.  
15 PEL insisted thereon.

16 Even after the decision to launch a public  
17 tender, Patel kept insisting via a great many  
18 letters addressed to the Ministry of Transport, to  
19 the Prime Minister, and I hope that each letter  
20 found a reply -- was replied to, drafted by  
21 different people, namely the PM's office, who  
22 replied to Patel.

23 The principle that you can see in this  
24 instance is that, from the point of view of the MTC,  
25 we've always nurtured Patel's aspiration to

1 implement the project. We always defended this  
2 because we signed with Patel the MOI. We always  
3 protected Patel. We took Patel's proposals and  
4 insistence to the Council of Ministers but the  
5 decision of whether to give a direct award was not  
6 the ministry's to make. This is a decision of the  
7 Council of Ministers. But the minister did nurture  
8 Patel, protect Patel, support Patel, but Patel  
9 sometimes did not respond adequately to the demands  
10 made by the Council of Ministers.

11 **PRESIDENT:** Please continue.

12 **MS MARTINS:** Thank you, Mr Chairman. It's  
13 very difficult to keep the flow because the witness  
14 is not replying to my questions, but anyway, let's  
15 move on.

16 This letter -- and you also discuss this  
17 in your witness statements, you discuss setting up a  
18 JV with the CFM, but there was a condition. First  
19 question and, please, this is a yes or no answer,  
20 did the MOI say anything about setting up a JV with  
21 the CFM?

22 **MR CHAÚQUE:** I do not recollect.

23 **MS MARTINS:** Well, but you can read the  
24 MOI. I ask you --

25 **PRESIDENT:** Why don't you read the



1 sentence. It's easier to present it to the witness.

2 **MS MARTINS:** Well, the MOI says nothing  
3 about setting up a JV with the CFM. The first  
4 reference, and I will represent this, to setting up  
5 a JV with the CFM appears in a letter dated  
6 15 June 2012. This is C-11, R-10, which are at tab  
7 14 of the core bundle. That's the translation. If  
8 you could turn to the original, which is on the next  
9 page. Exactly.

10 So this is the letter, if you will recall,  
11 and I assume that you are familiar with it, in which  
12 the MTC approved the prefeasibility study and  
13 invited Patel to exercise its right of preference.  
14 And, additionally, it asked Patel to negotiate  
15 setting up a company with the CFM to implement the  
16 project.

17 My first question regarding this letter is  
18 the following: Does the MTC in this letter ask  
19 Patel to exercise its right, *direito de preferência*,  
20 or to negotiate with the CFM? Is this an option?

21 **MR CHAÚQUE:** The letter was written after  
22 the approval of the prefeasibility study. The  
23 memorandum states that the implementation of the  
24 project will be undertaken according to rules to be  
25 defined by the government. This is one of said

1 rules, namely *direito de preferência* or negotiation  
2 with CFM.

3 This negotiation with CFM aimed at a  
4 direct award. As I said, we pruned that it should  
5 be Patel to carry out the project. We wanted to  
6 nurture Patel to that end, going through a direct  
7 award way. That's the principle that presides over  
8 this letter.

9 **MS MARTINS:** Mr Chaúque, can you direct me  
10 to the word "or" that you just used in this letter?

11 **MR CHAÚQUE:** It's not to be found in the  
12 letter.

13 **MS MARTINS:** It's not.

14 Now, this letter also, before a) and b),  
15 uses the word "deve" does it not?

16 **MR CHAÚQUE:** Yes.

17 **MS MARTINS:** So Patel is being told by the  
18 MTC that it must exercise its  
19 *direito de preferência*, correct?

20 **MR CHAÚQUE:** That is indeed the case.

21 **MS MARTINS:** This is 15 June 2012. Was  
22 there any tender at this time?

23 **MR CHAÚQUE:** Not yet, but we nevertheless  
24 wanted to grant Patel all the advantages in the  
25 forthcoming process.

1           **MS MARTINS:** Is the right of 15 per cent  
2 bonus not a statutory right, a right that arises  
3 directly from the Law?

4           **MR CHAÚQUE:** Yes, it is.

5           **MS MARTINS:** Now, I believe that you are  
6 aware that PEL did indeed try to negotiate with the  
7 CFM. I would like you to have a look in this regard  
8 at tab 16. This is Exhibit C-13, R-12, once again  
9 repeated. This is the letter dated 22 June sent by  
10 Mr Kishan Daga from Patel to Minister Zucula in  
11 reply to the letter of 15 June that we just saw.

12           **MR CHAÚQUE:** Do we not have a translation  
13 of this letter so as to be sure I understand what's  
14 in it?

15           **MS MARTINS:** We do not have a translation.

16           **PRESIDENT:** If you want to ask the witness  
17 anything about this letter in English, you have to  
18 translate it for him, or you have to say it in  
19 English and the interpreters will put it into  
20 Portuguese. Maybe that's the easiest way. Read  
21 whatever you want to read to him, and the  
22 interpreter puts it into Portuguese.

23           **MS MARTINS:** So in this letter,  
24 Mr Chaúque -- and you can listen to the  
25 translation -- Patel is saying essentially the

1 following, that in continuation of their  
2 above-mentioned letter -- and they're referring at  
3 the top to a letter they had sent previously on  
4 18th June, which in turn referred to the 15th June  
5 letter sent by the MTC approving the PFS, so  
6 basically what they are asking is for the MTC to let  
7 Patel know two things. Number one, the name of the  
8 contact person in the CFM with whom Patel could  
9 contact and discuss the formation of an SPV and,  
10 number 2, a communication to authorise Patel to  
11 discuss the formation of the SPV with CFM and also  
12 that CFM had been appointed or nominated by the  
13 Government of Mozambique as the designated partner  
14 for this PPP project.

15 **PRESIDENT:** What is the question?

16 **MS MARTINS:** I'm just giving time for the  
17 interpreters to translate. Could I ask the  
18 interpreters to confirm that they've finished  
19 translating this?

20 **THE INTERPRETER:** Do you want us to  
21 interpret the whole letter? I just interpreted what  
22 you said.

23 **MS MARTINS:** What I said.

24 **THE INTERPRETER:** We did it as you said  
25 it.

1           **MS MARTINS:** Thank you.

2           Now, this letter was only replied to on  
3 the 27th of August, and the reply is Exhibit C-16,  
4 which is at tab 19. If you could keep the two  
5 letters side by side, please, Mr Chaúque, Patel asks  
6 for the name of a contact person with whom it can  
7 discuss, and the reply comes over two months later,  
8 and it says "Negotiation with CFM is not  
9 prohibited".

10           Is this a clear answer to Patel's  
11 question?

12           **MR CHAÚQUE:** I think it informs and the  
13 minister says that negotiation with CFM is not  
14 forbidden, and to the best of my knowledge has  
15 already started. I take it that when this letter  
16 was written, the negotiation with CFM had started,  
17 ie in the time between June and July -- you  
18 said August, but this is July -- the identity of the  
19 contact had already been given to Patel. I can't be  
20 any more precise than this. But CFM is a public  
21 entity with duly constituted governance system, and  
22 there's no other way to deal with CFM for a major  
23 project other than going through its top leadership,  
24 and the minister has been made aware when this  
25 letter is written that the negotiation has already

1 started. And at the MTC the minister quotes the  
2 right entity for the purpose, namely the project and  
3 study bureau.

4 So the main aim of this reply is to  
5 indicate this entity, project and study bureau, to  
6 help out in the process with CFM.

7 **MS MARTINS:** In what process? Sorry.

8 **MR CHAÚQUE:** Negotiation with CFM to set  
9 up the SPV.

10 **MS MARTINS:** The Ministry of Transport and  
11 Communications -- sorry, the Office of Studies and  
12 Projects? Who at the Office of Studies and Projects  
13 ever participated in this project, to the best of  
14 your knowledge? What assistance did they provide in  
15 negotiations with the CFM?

16 **MR CHAÚQUE:** I do not remember who the  
17 head was of this bureau, of this office, but  
18 I believe so. Whenever there's an instruction of  
19 this nature by the minister, all the department  
20 heads take it upon themselves to move forward with  
21 it.

22 **MS MARTINS:** So there was an instruction  
23 of this nature by the minister?

24 **MR CHAÚQUE:** Yes. As you can see in the  
25 letter itself at the end, you see that a copy is

1 made to the project study office, or bureau, so they  
2 were made aware of this decision by the minister,  
3 and they are supposed to take it forward. There's  
4 no way they would have gotten this copy and do  
5 nothing.

12:17

6 **MS MARTINS:** "They" who? This letter is  
7 to Patel. It's not to the Office of Studies, so I'm  
8 not clear on your answer. Who is "they"?

9 **MR CHAÚQUE:** I was referring to the bottom  
10 part of this letter, "c/c Gabinete de Estudos e  
11 Projectos", Project and Study Bureau. This is  
12 common practice. The letter is addressed to Patel  
13 and a copy of this letter is sent to this bureau for  
14 them to be aware, and awareness is not all it's  
15 meant. They should act on it.

16 So the same letter is addressed to Patel  
17 and copied to this unit.

18 **MS MARTINS:** So it is your testimony that  
19 the Office of Studies and Projects, having been  
20 copied in this letter, should have acted on this  
21 letter upon the instructions of the minister?

22 **MR CHAÚQUE:** I believe they did so.  
23 I believe they acted. When we get a ministerial  
24 instruction, we act. We do not get anything from  
25 the minister and not do anything with it. Like I

1 said, I don't remember who headed this office at the  
2 point in time, but I'm sure that whoever it was  
3 acted upon receiving such a document.

4 **MS MARTINS:** Unfortunately we don't know  
5 because there's nothing in the record in that  
6 regard, and there were no contacts, but anyway,  
7 moving on, the CFM is a wholly State-owned company,  
8 right? You referred to it just now. The Portuguese  
9 expression public company. Empresa pública,  
10 correct?

11 **MR CHAÚQUE:** Yes.

12 **MS MARTINS:** Having worked for the MTC the  
13 past ten years -- or 19 years, I believe you said at  
14 the beginning, can you please confirm that under the  
15 Law, the activity of the CFM is subordinated, in  
16 Portuguese "supervisão" by the MTC.

17 **MR CHAÚQUE:** According to the law on SOEs,  
18 they're under the aegis, they're not subordinated.  
19 The company is autonomous, both administrative,  
20 financial and assetwise, but because SOEs pursue  
21 public ends, the minister with the aegis over this  
22 company is the Minister of Transport and  
23 Communications. Because the company is in the area  
24 of transports and communications. It is not the  
25 Minister who directs the company. But this is not



1 tantamount to saying that the minister directs, or  
2 manages, the company. The company has autonomy and  
3 its own rules, a program contract, they have their  
4 own governance.

5           So it's not subordination but being under  
6 the aegis of.

7           **MS MARTINS:** Mr Chaúque, are you familiar  
8 with the by-laws of the CFM and the law that enacted  
9 those by-laws?

10           **MR CHAÚQUE:** I do not remember it  
11 verbatim, but allow me to mention that, other than  
12 the company's by-laws, we cannot lose sight of the  
13 law on public -- on SOEs, on State-owned  
14 enterprises, which trumps individual by-laws and  
15 must be applied irrespective of the by-laws having  
16 been updated or otherwise. We can't lose sight --  
17 we can't lose the law from sight.

18           **MS MARTINS:** Mr Chaúque, Decree 40/94 of  
19 13 September, it's not the by-laws, it's the statute  
20 that enacts the by-laws, says, we all agree that  
21 there's administrative financial and patrimonial  
22 autonomy. That's the norm with public companies.  
23 But the same law that says this also says that the  
24 CFM exercise their activity under the subordination  
25 of the MTC. This is article 4 of Decree 40/94. Are

1 you aware of this provision?

2 **MS BEVILACQUA:** Mr President, may I ask if  
3 she is quoting or translating the Law, and if she  
4 has it, may we show it to the witness?

5 **MS MARTINS:** Yes, we can show it. It's  
6 one of the exhibits that the Tribunal deferred. We  
7 have copies -- with the Tribunal's permission  
8 obviously.

9 **PRESIDENT:** Let's not spend too much time  
10 on the legal position of the railway company. We  
11 discussed that yesterday with the minister, you  
12 remember.

13 **MS MARTINS:** It's just two or three very  
14 small questions.

15 **PRESIDENT:** I don't think it is really  
16 controversial.

17 **MS MARTINS:** Mr Chairman, by the way, the  
18 law on public companies that the witness just  
19 referred to is precisely one of the other statutes  
20 that Claimants had asked to submit to the  
21 proceedings, and the submission of which was  
22 deferred until, if necessary, they were referred to  
23 in the proceedings.

24 **PRESIDENT:** Which law was that?

25 **MS MARTINS:** So it would be -- just one

1 second. So it would be the exhibit we had named  
2 CLA-352, Law 17/91, and the exhibit that we're  
3 referring to now is Decree No 40/94, which would be  
4 CLA-353. We don't have printed copies of 352 now,  
5 but I won't be asking any questions on that specific  
6 statute. Just so the Tribunal is aware that the law  
7 referenced by the witness is this statute.

8 **PRESIDENT:** Let's have a look at CLA-353  
9 and then let's move on. If you can go to article 4  
10 --

11 **MS MARTINS:** Not of the by-laws but of the  
12 Decree itself.

13 So number 4, article number 4 says, and  
14 I quote, and correct me if I'm wrong: The CFM are a  
15 company of national ambits with head office in  
16 Maputo and they carry out their activity in  
17 subordination to the Ministry of Transport and  
18 Communications. Correct?

19 If you could now turn --

20 **PROFESSOR TAWIL:** Sorry, the answer does  
21 not appear in the record.

22 **MS MARTINS:** Could you repeat your answer  
23 for the transcript because the recording didn't --  
24 you confirm what I just read as being article 4?

25 **MR CHAÚQUE:** I confirm that it is written

1 in article 4, but this is out of date. After Law 91  
2 we have from 2012 public companies and also public  
3 companies Law 2018. This decree from '94 is  
4 outdated, no longer in force, so we're looking at a  
5 very outdated document. It's no longer  
6 "subordination", it's "under the aegis of",  
7 according to the law. Everything that is against  
8 the law no longer applies. At the time of the facts  
9 it wasn't "subordination", it was "aegis". It's the  
10 command under the law, under the legislation  
11 governing public companies -- state-owned companies,  
12 I'm sorry.

13 **MS MARTINS:** We will refer to that  
14 legislation, not now but in our closing arguments.  
15 This is not the place.

16 But I would just like you to confirm that  
17 also according to this law and the by-laws of the  
18 CFM, that for the CFM to undertake financial stakes  
19 in other companies, the authorisation of the  
20 Ministry of Transport and Communications, as well as  
21 the Ministry of Finance, would be required?

22 **MR CHAÚQUE:** We are talking about  
23 something which is not in force.

24 **PRESIDENT:** We are talking about something  
25 completely different, and the question, Mr Chaúque,

1 is let's assume that CFM wants to take a 20 per cent  
2 participation in another Mozambican company. Does  
3 CFM require the authorisation from the Minister of  
4 Transport and Communications and of the Ministry  
5 of Finance? That is the question.

6 **MR CHAÚQUE:** Yes, it has to have  
7 authorisation.

8 **MS MARTINS:** Thank you, Mr Chairman.  
9 Basically Mr Chaúque, going back to the facts of  
10 this case, we have the MTC telling PEL that it  
11 should negotiate a JV with the CFM, we have the  
12 ministry not indicating who the contact person  
13 should be at the CFM, and then the CFM told PEL --  
14 and this is on the record -- that it did not have  
15 any funds and was not interested in the project, and  
16 the MTC did what in this situation? Did it direct  
17 PEL to negotiate with the CFM? It doesn't provide  
18 assistance in these negotiations? It had to  
19 authorise necessarily the formation of a JV but from  
20 the evidence in the record, it did nothing.

21 Do you have any different answer to give  
22 us?

23 **MR BASOMBRIO:** Objection. She just gave a  
24 speech.

25 **PRESIDENT:** I think, for this to be

1 efficient, Ms Martins, it's better if you put one  
2 question to the witness because otherwise, I think  
3 through the interpretation, it gets very confusing.

4 **MS MARTINS:** I'll move on to a different  
5 topic.

6 **PRESIDENT:** Yes. Let's move topic.

7 **MS MARTINS:** Let's move topic.

8 Let's go back to your first witness  
9 statement, Mr Chaúque, and in particular to section  
10 6. So this is at page 6 of your first witness  
11 statement.

12 So starting with the title, and we've been  
13 there before but my question now is different, the  
14 title seems to indicate that you believe that the  
15 prefeasibility study was not adequate, but I would  
16 like to ask you if, when you say "inadequate" in  
17 this title, you are referring to the inadequacy of  
18 the PFS to grant a concession or to the actual  
19 adequacy of the study itself as a prefeasibility  
20 study?

21 **MR CHAÚQUE:** We're talking about two  
22 things. There was a preliminary study which was the  
23 basis for the signing of the MOI, and the MOI  
24 recommended a prefeasibility study valid for one  
25 year. It's two different situations. The

1 Preliminary Study and this, which was handed in a  
2 letter, which was handed in before the signing of  
3 the MOI.

4 **MS MARTINS:** I know that, Mr Chaúque, and  
5 everybody knows that here, but my question is very  
6 simple. In the title you say the PFS was  
7 inadequate. What does this "inadequate" mean?  
8 Inadequate because the study was rubbish or  
9 inadequate because, in your opinion, it was not  
10 sufficient to award a concession? This is a simple  
11 question. It's one option or the other. What are  
12 you referring to?

13 **MR CHAÚQUE:** It wasn't sufficient to grant  
14 the concession.

15 **MS MARTINS:** OK. That's clarified. So  
16 you are not addressing the quality of the study  
17 itself. Just its adequacy --

18 **MR CHAÚQUE:** No.

19 **MS MARTINS:** Thank you very much.

20 Now, at paragraph 32, you then felt the  
21 need to say that the PFS did not grant the  
22 concession, but this is non-disputed. We all agree  
23 that a process needs to be followed towards granting  
24 a concession.

25 And I think we both agree also that this

1 process can be either a direct award process or a  
2 tender process. You agree with me, right?

3 **MR CHAÚQUE:** Yes.

4 **MS MARTINS:** You do say, however, also  
5 that the direct awards process are strongly  
6 disadvantaged, and I think you say this at paragraph  
7 17 -- let me just check if this is your first or  
8 second -- yes, it's at paragraph 17 of your second  
9 witness statement. You say that direct awards are  
10 strongly disadvantaged.

11 **MR CHAÚQUE:** I'm not so sure.

12 **MS MARTINS:** You say in the third line:  
13 However, direct prizes are strongly unfavoured.

14 **MR CHAÚQUE:** This arises from the Law  
15 itself. The rule is public tender. Direct award,  
16 direct negotiation, single sourcing is the exception  
17 to the rule always. That's what's written in the  
18 Law.

19 **MS MARTINS:** We all agree on that. That's  
20 non-disputed.

21 I would like to have you look at  
22 Exhibit C-18/R-16 at tab 21 of the Core Bundle. So  
23 this is a letter from Patel to the Government dated  
24 28 November 2012 addressed to Mr Paulo Zucula, the  
25 minister, and I would like you to turn, please, to



1 page 3 and 4 of this letter, so bottom of page 3 and  
2 beginning of page 4.

3 **PRESIDENT:** We will have -- this letter is  
4 in English. We will have the same problem.

5 **MS MARTINS:** Yes, I understand it's in  
6 English, and this was my next question.

7 Is your English good enough to understand  
8 what PPPs are being referred to in these paragraphs,  
9 so a PPP to be implemented with Vale to Resolution  
10 55/2011 of 4 November, then another PPP --

11 **PRESIDENT:** Ms Martins, I wonder if this  
12 line of questioning will be efficient.

13 **MS MARTINS:** Maybe I can rephrase the  
14 question.

15 Mr Chaúque --

16 **PRESIDENT:** What -- I don't know what you  
17 want the witness to depose, but going through this  
18 letter and having it translated into Portuguese will  
19 be very, very time consuming.

20 **MS MARTINS:** It's not necessary to  
21 translate. I can rephrase the question.

22 **PRESIDENT:** What is -- I don't know what  
23 the point is you would like to raise with the  
24 witness.

25 **MS MARTINS:** I will rephrase the question.

1 I wanted Mr Chaúque to let us know if he can confirm  
2 that, within one year from the enactment of the PPP  
3 Law, which as he pointed out names the direct award  
4 as the exception, there are at least six direct  
5 award procedures with the MTC.

6 **MR CHAÚQUE:** I don't confirm that.

7 **PRESIDENT:** This is an important question,  
8 Mr Chaúque. What counsel is asking you is whether  
9 you remember that there were a number -- six or  
10 five, but a number of direct concessions, direct  
11 negotiations of concessions -- in the initial years  
12 of the new legislation.

13 Do you have a recollection of that?

14 **MR CHAÚQUE:** I remember some. I don't  
15 know if it's all of them. But one of the cases was  
16 the contract of the northern corridor. That was an  
17 addendum to an existing contract. It wasn't a  
18 direct award in the true sense of the word. It was  
19 the company Vale participating in an existing  
20 company, and we had to have changes, adjustments  
21 made to certain contracts and these took the form of  
22 addendums.

23 I remember the concession of the Beira  
24 terminal, there we had public tender, and it was  
25 cancelled because the two bidders didn't meet the

1 requirements to participate in the public tender.

2 I don't remember any other direct awards which led  
3 to contracts. I don't remember.

4 **MS MARTINS:** But these direct awards would  
5 be approved and published through resolutions  
6 published in the Official Gazette?

7 **MR CHAÚQUE:** Correct.

8 **MS MARTINS:** So we established, and you  
9 replied to my question, that there are two different  
10 procedures, a direct award and tender. We both  
11 agree on that. Now I would like to ask you a few  
12 questions about the process to see if you agree with  
13 me. Now, to that effect I would like to show you  
14 first, so that we know what we're both talking  
15 about, the PPP regulations, so the Portuguese  
16 version is exhibit CLA -- is CLA-41, tab 120 for the  
17 witness, please. If anyone wants to follow in  
18 English, Claimant has provided a translation at  
19 CLA-64A, and I would like you to have a look first  
20 at article 17(3) of this law.

21 So you confirmed, Mr Chaúque, that the  
22 procedure for direct award and a tender are the  
23 same, although obviously duly adapted to the fact  
24 that there is no tender. There are no multiple  
25 bids. That's what the law says, correct?

1           **MR CHAÚQUE:** Yes.

2           **MS MARTINS:** And this procedure is then in  
3 the same law, the one that is set out in article 9,  
4 is it not?

5           **MR CHAÚQUE:** I didn't understand your  
6 question.

7           **MS MARTINS:** This procedure that we have  
8 just seen -- according to article 17 the procedure  
9 for a direct award is the same as the procedure for  
10 a tender duly adapted to the circumstances that  
11 there is no tender, and that procedure for the  
12 tender is set out in article 9, is it not?

13           **MR CHAÚQUE:** Yes, stages of the process,  
14 of the proceedings.

15           **MS MARTINS:** That's what I'm referring to.  
16 So these are the stages of the procedure for a  
17 tender, which also apply to a direct award duly  
18 adapted to the fact that there are no multiple  
19 bidders, that it's not a tender, correct?

20           **MR CHAÚQUE:** Direct award is made with the  
21 necessary adjustments. The law lays down that we  
22 have to have a weighted view, analysis, as described  
23 in article 17 --

24           **MS MARTINS:** Mr Chaúque, the question is  
25 simple. Do you confirm that article 9 contains the

1 stages that both a direct award and a tender  
2 procedure shall take and that in the case of direct  
3 award, we have to adapt article 9 to the fact that  
4 it's a direct award and not a public tender.

5 **MR CHAÚQUE:** Yes.

6 **PRESIDENT:** Ms Martins, we have a problem.  
7 I think you said CLA-41, but CLA-41 is the old  
8 regulation, and I am not finding this document you  
9 have on the screen.

10 **MS REIMSCHUSSEL:** It's CLA-64.

11 **PRESIDENT:** 54? 64. Thank you.

12 **MS MARTINS:** My apologies for that.

13 **PRESIDENT:** I think because we were both  
14 on CLA-41 and quite lost. Thank you.

15 **MS MARTINS:** So the relevant provisions  
16 are article 17(3) and article 9 of that statute,  
17 which we have called in our pleadings the PPP  
18 regulations.

19 **PROFESSOR TAWIL:** Sorry, we have two  
20 CLA-64s. 64 and 64A.

21 **MS MARTINS:** The 64A should be the English  
22 translation, and 64 should be the original in  
23 Portuguese.

24 May I proceed?

25 **PRESIDENT:** You may proceed. I was also

1 wondering, since we have now a small interruption,  
2 how long do you have to go?

3 **MS MARTINS:** Not -- I think maybe half an  
4 hour. Half an hour.

5 **PRESIDENT:** We should try, yes.

6 **MS MARTINS:** I'm trying to speed this up  
7 --

8 **PRESIDENT:** I am sure the Tribunal has  
9 some questions.

10 **MS MARTINS:** I am trying to speed this up  
11 but I would appreciate it if the Tribunal could  
12 direct the witness to reply directly to my questions  
13 because, if he doesn't, I have to repeat them in  
14 another way until I get a response.

15 **PRESIDENT:** Let me get you a time check  
16 from the secretary.

17 **MS JALLES:** Claimant has used one hour and  
18 59 -- well, two hours in the interrogation of  
19 Mr Chaúque.

20 **PRESIDENT:** Very good. Please.

21 **MS MARTINS:** Thank you so much. So we  
22 both agree that this is the procedure and that in a  
23 direct award we have to adapt, so obviously there is  
24 no launch of the tender and obviously when the law  
25 says analysis and evaluation of the "proposals",

1 here it's only an evaluation of one proposal so that  
2 has to be adapted.

12:47

3 And as you stated earlier, I think we also  
4 both agree, that the PFS, the MOI and the PFS  
5 correspond to these initial stages, so the  
6 conception and the definition of the basic  
7 principles and so on.

8 With this in mind, I would like you to  
9 have a look at the MTC's letter dated 18 April 2013,  
10 which is at tab 29. This is Exhibit C-29 and R-26.

11 Mr Chaúque, what does it say in the  
12 subject of this letter of 18 April 2013 sent by the  
13 MTC to Patel?

14 **MR CHAÚQUE:** Yes, it's the --

15 **MS MARTINS:** Mr Chaúque, I'm sorry to  
16 interrupt but you have to answer my questions.

17 What does it say in the subject of this  
18 letter?

19 **PRESIDENT:** The "Assunto". Can you read  
20 the "Assunto"?

21 **MR CHAÚQUE:** I didn't understand your  
22 question.

23 **MS MARTINS:** "Assunto". What does it say  
24 in this letter that you have in front of you?

25 **MR CHAÚQUE:** Negotiation of the terms of

1 the concession of the port of Macuse with capacity  
2 to handle 25 million tons per year and 516 kilometre  
3 railway corridor from Macuse to Moatize.

4 **MS MARTINS:** Thank you. Can you look back  
5 to article 9 of the PPP regulations?

6 What is the stage following the award?

7 **MR CHAÚQUE:** As I said, article 9 is  
8 applied with the necessary adaptations. We are  
9 conveying a message that we negotiate after the  
10 award. The award is formalised by the Council of  
11 Ministers. There was never a direct award.

12 **MS MARTINS:** Mr Chaúque, I will repeat my  
13 question.

14 What is the stage after the award  
15 according to the Law, article 9? What does it say?

16 **MR BASOMBRIO:** Mr President, I object  
17 again to her interruption of the witness. The  
18 witness was explaining why this analogy that she's  
19 trying to draw is flawed. She cut him off before he  
20 could finish.

21 **MS MARTINS:** I'm not making any analogy,  
22 Mr Basombrio --

23 **MR BASOMBRIO:** Don't talk to me. Talk to  
24 the Tribunal, please. That's my objection. She  
25 should let the witness, who's an attorney, finish



1 his explanations, please.

2 **PRESIDENT:** OK. What -- I am now lost.

3 To which paragraph in article 9 do you refer?

4 **MS MARTINS:** Paragraph 1, subparagraph  
5 (g).

6 **PRESIDENT:** "Negociações".

7 OK. So after "adjudicação" in article  
8 9(1) of the PPP Law, the next step is "negociações".  
9 Very good. What is the question for the witness?

10 **MS MARTINS:** That was the question for the  
11 witness, if he could confirm what the stage after  
12 the award was, "negociações".

13 **PRESIDENT:** "negociações". OK. It's the  
14 same word as the "Assunto". Very good.

15 **MS MARTINS:** Exactly.

16 **MR BASOMBRIO:** Mr President?

17 **PRESIDENT:** Yes.

18 **MR BASOMBRIO:** No, I object on the same  
19 grounds. I'm going to read what he started to say  
20 when he was cut off. He said "We are conveying a  
21 message that we negotiate after the award. The  
22 award is decided by the Council of Ministers". Then  
23 she cut him off, and now she's assuming in her  
24 question that there's been an award when the witness  
25 said that there wasn't, and so she needs to let the

1 witness finish.

2 **MS MARTINS:** Mr President, I'm not  
3 assuming anything. I have questions to put to the  
4 witness regarding precisely this, and I should be  
5 allowed -- the witness has made legal statements in  
6 his fact witness statements, so I must be allowed to  
7 confront him with the law and with his statements,  
8 and with the documents he has referred to in his  
9 written witness statements.

10 **PRESIDENT:** I'm sure you can ask him in  
11 redirect whether there was "adjudicação". I think  
12 that's a very relevant question.

13 But let's go on.

14 **MS MARTINS:** Mr Chaúque, same letter.  
15 I would like you to read the second paragraph. This  
16 paragraph says that the Council of Ministers in its  
17 10th Ordinary Session made a decision, does it not?

18 **MR CHAÚQUE:** Yes.

19 **MS MARTINS:** So this letter had the  
20 purpose of informing PEL of this decision that was  
21 made by the Council of Ministers, correct?

22 **MR CHAÚQUE:** One thing is guidance,  
23 orientation. Another thing is decision. The  
24 decision of award is done based on a resolution of  
25 the Council of Ministers. That didn't exist.

1 I have no knowledge of that direct award. We are  
2 just following repeated attempt -- repeated contacts  
3 by Patel after the public tender. In January 2013  
4 they insisted that they should be given direct  
5 award, writing to the ministry, writing letters to  
6 the Prime Minister, and the Prime Minister is  
7 running the government. We, as a ministry, were  
8 always on the side of Patel. Our arguments in the  
9 Council of Ministers were that Patel is an  
10 interested party, they carried out the study, we  
11 approved that study, but we had to have the  
12 decision, and the Council of Ministers never  
13 approved.

14 We always informed and analysed everything  
15 that was discussed with Patel.

16 **PRESIDENT:** That was not really the  
17 question.

18 Did you write this letter for the  
19 minister? Did you prepare the draft of this letter?  
20 Do you remember?

21 **MR CHAÚQUE:** No, I don't remember.

22 **PRESIDENT:** It was not -- you did not  
23 write it? The minister --

24 **MR CHAÚQUE:** It could have been, but  
25 I don't remember. I'm sorry. It is a letter from

1 the ministry written or signed by the minister.

2 **PRESIDENT:** But here you see the words "O  
3 Conselho de Ministros ... decidiu convidar esta  
4 empresa para iniciar o processo". "Decidiu".

5 **THE INTERPRETER:** Council of Ministers  
6 decided to invite this company. "Decided".

7 **PRESIDENT:** ... (overspeaking) ... by the  
8 Council of Ministers. Is that correct?

9 **MR CHAÚQUE:** Yes.

10 **PRESIDENT:** Thank you.

11 **MS MARTINS:** Thank you so much,  
12 Mr Chairman. In this letter also the MTC  
13 requests -- besides informing that the negotiations  
14 would -- should start within seven days, it also  
15 asks for a guarantee in the amount of 0.1 per cent  
16 of the volume of the investment that is predicted,  
17 or foreseen, and that this guarantee should remain  
18 valid until the contract is signed, correct?

19 **MR CHAÚQUE:** Yes.

20 **MS MARTINS:** And this guarantee, as you  
21 are certainly aware, was presented by Patel, was it  
22 not?

23 **MR CHAÚQUE:** I believe so. I can't  
24 remember. I can't quite remember.

25 **MS MARTINS:** We'll return to them. But is

1 this guarantee of 0.1 per cent of the volume of the  
2 foreseen investment not also a requirement of the  
3 PPP Law? The regulations?

4 **MR CHAÚQUE:** Yes.

5 **PRESIDENT:** Which is the article?

6 **MS MARTINS:** It's article 33(1). 33(1).

7 **PRESIDENT:** Thank you.

8 **MS MARTINS:** Mr Chaúque, at this point in  
9 time -- and we're talking about 18 April 2013, just  
10 so we're sure that we have our facts correct, at  
11 this point in time the negotiation with the CFM, or  
12 the attempted negotiation with the CFM, had already  
13 come to an end, had it not?

14 **MR CHAÚQUE:** I can't remember.

15 **MS MARTINS:** You don't recall. But you  
16 recall that in the letter dated January 2013, which  
17 you quote in your witness statements, specifically  
18 says that the decision to proceed with the tender  
19 was a result of the fact that no agreement had been  
20 reached with the CFM. So this was four months  
21 earlier. The letter was four months earlier than  
22 this letter from the MTC.

23 **MR CHAÚQUE:** I didn't understand your  
24 question.

25 **MS MARTINS:** In your witness statements

1 you refer to a letter that was sent by the MTC in  
2 January. So you read that letter.

3 **MR CHAÚQUE:** Yes.

4 **MS MARTINS:** And that letter in January  
5 tells PEL that the reason why there had been a  
6 decision to launch a tender is because it had not  
7 been possible to set up a JV with the CFM.

8 **PRESIDENT:** You may wish to show him the  
9 letter, Ms Martins.

10 **MS MARTINS:** Can we please get the letter?  
11 Tab 22. So that's C-19. Exhibit C-19, paragraph  
12 number 3.

13 **MR CHAÚQUE:** Yes.

14 **MS MARTINS:** So this letter was written  
15 in January --

16 **MR CHAÚQUE:** I have read it.

17 **MS MARTINS:** And it says that because  
18 Patel was not able to set up a JV until the  
19 beginning of the last quarter of 2012, the Council  
20 of Ministers had decided to launch a tender.

21 And, yet, in April 2013, the Council of  
22 Ministers is now saying well, let's do something  
23 else. In your opinion this is not a direct award  
24 procedure, that's for the Tribunal to decide, but  
25 what I ask you is at this point in time,

1 in April 2013, was there any direction whatsoever  
2 that a JV had to be set up with the CFM. Can you  
3 look at the April 18th letter, please, and tell me  
4 is there anything in that letter that says that a JV  
5 has to be set up with the CFM?

6 **MR CHAÚQUE:** No, because the joint venture  
7 issue no longer makes sense when you launch a public  
8 tender. This was simply because Patel was insisting  
9 after the launch of the public tender, so it's no  
10 longer an issue. It's really a direct award. The  
11 Council of Ministers, as I was saying, is  
12 autonomous. It can take that decision. A joint  
13 venture is not a legal obligation. The Council of  
14 Ministers is autonomous in taking its decisions.  
15 That's what it did. It gave yet one more  
16 opportunity for there to be work done with Patel.

17 This is the same reason why, in the  
18 following month, the Council of Ministers, as Patel  
19 was not doing what it had been asked to do, and so  
20 they said let's go back to the public tender.

21 **MS MARTINS:** Mr Chaúque, we're still on  
22 18th April. We'll get to May, but we're still on  
23 18th April. So your testimony here today is that at  
24 this point in time the JV was not a legal  
25 obligation, correct?

1           **MR CHAÚQUE:** No, it wasn't.

2           **MS MARTINS:** Thank you very much. Now  
3 let's move to another topic that is indeed addressed  
4 in this letter, this 18th April letter, and to the  
5 statements that you make in your first witness  
6 statement, in particular at paragraph 64, if I'm not  
7 mistaken. Let me just confirm. So at paragraph 64  
8 of your first witness statement, you basically  
9 accuse PEL of not having secured memorandums or take  
10 or pay agreements with mining companies as was  
11 requested by the Council of Ministers in this  
12 letter. That's what you say in paragraph 64.

13           **MR CHAÚQUE:** Yes.

14           **MS MARTINS:** And basically also in this  
15 letter -- now, these negotiations -- it's stated in  
16 this letter that the negotiations would only start  
17 in seven days, is it not?

18           **MR CHAÚQUE:** Yes.

19           **MS MARTINS:** And so there's an invitation  
20 to PEL to contact the MTC to start the process  
21 within seven days.

22                   And five days later --

23           **MR CHAÚQUE:** No. Sorry. Contact the  
24 ministry, not contact CFM.

25           **MS MARTINS:** I'm sorry. I meant the MTC,



1 but I think I said the MTC. I think I said the MTC.

13:04

2 **MR CHAÚQUE:** Then I apologise to you.

3 **MS MARTINS:** No problem.

4 So basically we had this -- maybe you can  
5 have a look at the letter as well, it's tab 3,  
6 Exhibit C-30, five days later -- so you had given  
7 Patel seven days to initiate the proceedings, but  
8 five days later PEL wrote to the ministry saying  
9 that it would provide the bank guarantee and the  
10 other elements that had been requested as soon as  
11 possible.

12 So I do realise this letter is in English,  
13 but you reply to this letter and your reply is  
14 Exhibit C-32 at tab 32. If you could scroll down,  
15 I believe this letter is signed by you, so obviously  
16 that's you, correct? 32.

17 **MR CHAÚQUE:** Apologies for the references.  
18 I don't think it's this letter. I think it should  
19 be a letter 102, the one we're answering to.

20 **MS MARTINS:** It's C-31. It's just before.  
21 All these letters, so from 29 onwards, it's all  
22 chronological.

23 **MR CHAÚQUE:** Understood. OK. OK. Thank  
24 you. I don't understand your question.

25 **MS MARTINS:** I haven't made a question

1 yet.

2           You reply to PEL saying let's set the  
3 first meeting for 10th May. We're not available on  
4 8 May but we propose the meeting with the  
5 interministerial technical team on the 10th May.

6           So you were following through and setting  
7 up a meeting to begin negotiations of the terms of  
8 the concession agreement, correct? This was the  
9 purpose?

10           **MR CHAÚQUE:** Yes, correct.

11           **MS MARTINS:** Now going to the bank  
12 guarantee, I'd ask you to look at the next document,  
13 which is a letter dated 9th May, c-33, tab 33 of the  
14 Core Bundle, and then immediately after we have a  
15 letter from you again that's C-34, tab 34 of the  
16 Core Bundle, where you return that bank guarantee.

17           So does this jog your memory, that this  
18 guarantee was, in fact, provided and that you  
19 yourself returned it?

20           **MR CHAÚQUE:** Yes.

21           **MS MARTINS:** So basically the negotiations  
22 were supposed to begin one week after 18th April, so  
23 that is on 25th April, you yourself said that the  
24 first meeting would be only on the 10th.

25           You are aware -- and on the 13th May you

1 basically tell PEL well, sorry, this is not going  
2 ahead after all, so basically there were just over a  
3 week here in which PEL did provide the bank  
4 guarantee and said: I get the rest of the stuff  
5 that you asked for as soon as possible.

6 Now, under the Law, is the negotiation  
7 period not supposed to be 90 days?

8 **MR CHAÚQUE:** Not necessarily.

9 Negotiations can begin immediately. They can end at  
10 a very early date.

11 **MS MARTINS:** Well, article 21 paragraph 5  
12 of the PPP regulations say 90 days. That's the  
13 timeframe for conclusion of negotiations.

14 **MR CHAÚQUE:** Yes.

15 **MS MARTINS:** Have you ever negotiated as  
16 legal aide to the MTC an offtake agreement, a mining  
17 take or pay agreement or off-take agreement?

18 **MR CHAÚQUE:** I've participated in  
19 negotiations of concession agreements for all the  
20 last projects in Mozambique, if I may allude to  
21 that. I participated in the addendum to the  
22 northern line contract in 2012. I participated in  
23 the Nacala port contract 2020. Peer 13 contract,  
24 Beira 2013, addenda to the Maputo port contract,  
25 2011, 2021 -- I've taken part in a number of

1 different ones of this type. In this letter if  
2 I may --

3 **MS MARTINS:** Mr Chaúque, you're going off  
4 my question again. I just asked you have you ever  
5 negotiated, do you have experience, do you know what  
6 offtake take or pay mining agreements are? That was  
7 a simple question.

8 **MR CHAÚQUE:** Yes.

9 **MS MARTINS:** Would it be feasible to, in a  
10 week, provide anyone with a negotiated offtake or  
11 mining agreement?

12 **MR CHAÚQUE:** Depends on the situation.  
13 These contracts are negotiated by the interested  
14 parties. Here we're just showing the replies but  
15 Patel itself, in communications with the MTC, with  
16 the Prime Minister, was providing information  
17 indicating that there was progress to show why they  
18 should be granted the concession, and in this letter  
19 we are communicating the decision of the Council of  
20 Ministers on the 30th of April.

21 **MS MARTINS:** And you are asking Patel to  
22 provide you with offtake agreements, and there is an  
23 argument made by the Republic of Mozambique that the  
24 reason why the Council of Ministers reversed their  
25 decision to proceed this direct negotiation route is

1 because Patel failed to provide offtake agreements. **13:13**

2 Now, when was this decision by the Council  
3 of Ministers made, Mr Chaúque, the second decision?  
4 And I would like you to look at your letter of  
5 13th May.

6 **MR CHAÚQUE:** Based on the letter before  
7 me, the 30th of April 2013.

8 **MS MARTINS:** 30th April.

9 And is there any reference in that letter  
10 to the lack of offtake or take or pay agreements?

11 **MR CHAÚQUE:** No. Those were the arguments  
12 discussed in the Council of Ministers. We are  
13 called in to the Council of Ministers if required,  
14 and I don't recall --

15 **MS MARTINS:** You don't recall what, sorry?

16 **MR CHAÚQUE:** I do not recall all the  
17 elements used by the Council of Ministers to reach a  
18 decision. What I do know is that there are notes  
19 that Patel sent directly to the Prime Minister's  
20 office and not to the ministry. There was work done  
21 at Council of Ministers level, not technical level  
22 work. The Council of Ministers made its decision.  
23 All we had to do at this stage was communicate what  
24 had happened to Patel.

25 As I indicated, we were working -- always

1 working with Patel, and we kept them apprised of all  
2 progress made.

13:14

3 **PRESIDENT:** Sorry. Who -- you say here "O  
4 Conselho de Ministros", after hearing various  
5 stakeholders of the project in reference and after  
6 reviewing the legal framework of the PPPs, in its  
7 12th Session "concluiu", so "decided" that a public  
8 tender would be the correct option.

9 Who instructed you to write that?

10 **MR CHAÚQUE:** The minister.

11 **PRESIDENT:** So the minister told you that  
12 that was -- that -- to write that. And did he give  
13 you any --

14 **MR CHAÚQUE:** Yes.

15 **PRESIDENT:** -- reasoning or an explanation  
16 why -- you remember the 10th Session of the Council  
17 of Ministers, and you remember that there had been  
18 the letter we saw from the minister and then the  
19 commencement of the negotiations which you wrote  
20 then let's have a meeting on the 10th of May, and  
21 then this 30th April 12th Session of the Council of  
22 Ministers, which seems to be a different decision of  
23 the Council of Ministers.

24 Did the minister give you any explanation  
25 of why the Council of Ministers had changed its

1 opinion?

2           **MR CHAÚQUE:** When I worked with the  
3 minister the conclusion was that, in all the weekly  
4 sessions after that, the issue was assessed and this  
5 was the conclusion that the Council of Ministers  
6 came to and that was communicated to Patel that  
7 there would not be cancellation of the public tender  
8 already launched and that the public tender would be  
9 going ahead. I did not have more details that we  
10 could have placed in this -- we mentioned the  
11 decision and communicated this decision.

12           **PRESIDENT:** The minister did not give you  
13 any written decision from the Council of Ministers?

14           **MR CHAÚQUE:** I don't recall. I don't  
15 remember.

16           **PRESIDENT:** Would typically the minister  
17 come with written decisions from the Council of  
18 Ministers when he returned from the session?

19           **MR CHAÚQUE:** It would depend on the  
20 different situations. He is a member of the Council  
21 of Ministers, and he gives us instructions and we  
22 draw this up.

23           **PRESIDENT:** And would you leave in the  
24 file of the case a reference to the instructions  
25 given to you by the minister? This seems to be an

1 important instruction, no? That you now write to  
2 Patel and you tell them that this is the final  
3 solution of the Council of Ministers. Would there  
4 be a note in the file? Would you write a note to  
5 the file, the minister told me today to write this?  
6 Would you leave some administrative document  
7 somewhere so that it is possible to reconstruct  
8 exactly what the minister had told you?

9 **MR CHAÚQUE:** I can't confirm that now.  
10 I just know that there was some difficulty  
11 recovering the archives from that time. I don't  
12 know if we can locate some of the information. We  
13 did find it difficult to --

14 **PROFESSOR TAWIL:** I'm going to make a  
15 follow-up question from our chairman. One imagines  
16 that in general instructions -- write a letter is a  
17 general instruction, "Please, Mr Chaúque, write a  
18 letter and tell them X".

19 This letter is quite precise. It says  
20 "After hearing several stakeholders of the above  
21 mentioned project". Who were the stakeholders?

22 **MR CHAÚQUE:** This refers to different  
23 public and private entities interested in the  
24 project. One of the public entities would have been  
25 CFM that already knew about this project, but also



1 the private sector. There was some interest in the  
2 project. And there was a decision made in the  
3 Council of Ministers -- I didn't take part in the  
4 session -- at least I don't recall having taken part  
5 in the session so I don't have those details with  
6 regards to this guidance given.

7           **PROFESSOR TAWIL:** Very precise language,  
8 and I assume that, when writing that, you talked to  
9 the minister and asked him what happened. Can you  
10 explain us in more detail?

11           **MR CHAÚQUE:** Yes, I did speak with him.  
12 As I indicated we were committed to this process and  
13 we were monitoring it. As I said, this letter was  
14 signed by me, but I was given instructions from  
15 above by a member of the Council of Ministers, so  
16 the text of this letter was not specifically  
17 authored by me. This is guidance given to me with  
18 regard to what had happened and I was told that we  
19 needed to communicate with our partner Patel, with  
20 whom we were already committed. I had to  
21 communicate this decision to them.

22           **PROFESSOR TAWIL:** I understand that you  
23 needed to communicate, but I'm asking about this  
24 specific language, "after hearing several  
25 stakeholders of the above mentioned projects".

1 I would like more details on that.

2 **PRESIDENT:** Was this language given to you  
3 by the minister? Is it your own language? Do you  
4 remember?

5 **MR CHAÚQUE:** This was indicated to me.

6 **PRESIDENT:** Mr Perezcano has some  
7 questions for you, Mr Chaúque.

8 **MR PEREZCANO:** Mr Chaúque, a follow-up  
9 question. To whom would the stakeholders complain?  
10 Would it be to the Ministry of Transportation and,  
11 if so, to whom? The minister, the legal department  
12 or some other agency? Or would it be directly to  
13 the Council of Ministers and where would the records  
14 of such complaints be found?

15 **MR CHAÚQUE:** If you'd allow me, your  
16 Honour, in the ministry the entity that had been  
17 indicated was the Office for Studies and Projects  
18 that was working on the specific project because  
19 that was the specific area.

20 But normally communication to the ministry  
21 would go to the minister. In this case we know that  
22 communication went directly to the minister --  
23 sorry, to the Prime Minister, including letters from  
24 Patel. I don't know who did, when they sent them.  
25 I don't have that information.

1           **PRESIDENT:** A final question -- you have a  
2 question?

**13:24**

3           **PROFESSOR TAWIL:** It's related to the  
4 question by Dr Perezcano.

5           You say the letters were sent to the  
6 minister but your letter says the Council of  
7 Ministers heard several stakeholders, so one assumes  
8 that the letters were sent to the minister and then  
9 these several stakeholders appeared before the  
10 Council of Ministers? Was there a session here to  
11 hear the several stakeholders? How does that work?  
12 What are you saying in the letter?

13           **MR CHAÚQUE:** Various stakeholders -- had  
14 there been various stakeholders they would have  
15 contacted the ministers who are members of the  
16 Council of Ministers, and that would include the  
17 Prime Minister.

18           I confirm that I saw letters from Patel to  
19 the Prime Minister. Whether or not a session was  
20 held with these entities, including Patel, that  
21 I cannot confirm. I can't confirm if Patel was  
22 heard. But I saw the letter by Patel to the  
23 minister, who's a member of the Council of  
24 Ministers, and to the Prime Minister. I don't  
25 recall if they did go to the Council of Ministers,

1 if there was a session -- that I cannot recall.

13:25

2 I don't know that.

3           **PROFESSOR TAWIL:** Sorry, you are saying  
4 letters were sent to the minister and to other  
5 ministers now and also to the Prime Minister. Where  
6 are those letters? Are they in a dossier? Where  
7 are they?

8           **MR CHAÚQUE:** As I had already said, I was  
9 given an instruction by the minister indicating  
10 this, indicating that there had been these contacts.  
11 I cannot confirm who these people are, I don't have  
12 that information, but in the conversation with the  
13 minister when this letter was written, the  
14 understanding was that there were several entities  
15 interested in the project and that the Council of  
16 Ministers had analysed the situation again and had  
17 come to this decision. I have no proof of anything.

18           The only document I saw was Patel's  
19 letter, Patel's letters, to the Prime Minister.  
20 I saw a copy of those and also to the minister.  
21 I cannot confirm who the other entities were. That  
22 I do not know.

23           **PRESIDENT:** I think the question comes  
24 because of the verb "ouvir".

25           You do not say that there was a public

1 hearing. What you are saying is that stakeholders  
2 sent letters to ministers and to the Prime  
3 Minister -- to the minister, to the Prime Minister,  
4 to the Council of Ministers, but the "ouvir" is not  
5 physical; it is written documents. That written  
6 letters were sent to them. Is that your  
7 explanation?

8 **MR CHAÚQUE:** Yes, at least with proof with  
9 regards to Patel. But in a conversation with the  
10 minister there may have been other entities, that's  
11 the various stakeholders. With regards to those  
12 I have no confirmation to give you. I didn't see  
13 those letters. All I can confirm is that I did see  
14 Patel's letters.

15 **PRESIDENT:** Very good. My last question  
16 is, if we can go very quickly to C-32, this meeting,  
17 did it take place on 10 May at 9 am, or was it  
18 cancelled?

19 **MR CHAÚQUE:** It was cancelled.

20 **THE INTERPRETER:** It was cancelled, says  
21 the president.

22 **PRESIDENT:** Please. Sorry for the  
23 interruption.

24 **MS MARTINS:** Absolutely no problem.

25 Mr Chairman, the other questions I had are not

1 relevant, so I will end here. I think we can all  
2 use some pause right now so I would finish my  
3 cross-examination at this point. Thank you.

4 And thank you, Mr Chaúque, for your time.

5 **PRESIDENT:** Is there any redirect?

6 **MS BEVILACQUA:** No. Thank you,  
7 Mr President.

8 **PRESIDENT:** Very good. Let me  
9 double-check with my colleagues if there is any  
10 further question? We're almost finished,  
11 Mr Chaúque. So there are a few questions.  
12 Questions by the Arbitral Tribunal

13 **MR PEREZCANO:** Mr Chaúque, the first  
14 meeting of the Council of Ministers took place  
15 on April 16, 2013, so that was the meeting where the  
16 Council of Ministers decided to invite Patel to  
17 continue the process.

18 Minister Zucula testified yesterday that  
19 he was the one who took the matter to the Council of  
20 Ministers, that he put it in the agenda and he was  
21 the one who presented the issue to the Council of  
22 Ministers for his decision.

23 Did Minister Zucula consult with you  
24 before doing that?

25 **MR CHAÚQUE:** No.

1           **MR PEREZCANO:** And when did you find out  
2 about this decision of the Council of Ministers?  
3 So, again, the first decision to invite Patel to  
4 negotiate.

5           **MR CHAÚQUE:** I'm sorry, I don't know  
6 whether I answered correctly. The question was  
7 whether the minister asked for my views before  
8 taking the matter to the Council of Ministers?

9           **MR PEREZCANO:** Yes, that was my question.

10          **MR CHAÚQUE:** No, he did not, but inasmuch  
11 as we worked in this file, the Council of Ministers,  
12 we jointly believed, was the entity that had  
13 determined earlier in November 2012 that a tendering  
14 procedure be launched and it therefore had to be put  
15 to this entity whether to uphold or to cancel the  
16 competition.

17                   That was what was taken to them, to the  
18 best of my understanding.

19          **MR PEREZCANO:** I'm referring to the first  
20 meeting of the Council of Ministers, so not the  
21 second minister where it is decided to put it to  
22 tender or to return to the tender. It is the first  
23 one where the Council of Minister invites Patel to  
24 begin negotiation of the concessions for a port and  
25 a railway corridor.

1           So, again, Mr Zucula told us yesterday  
2 that he was the one who took that matter to the  
3 Council of Ministers. So my first question to you  
4 was whether he had consulted with you prior to  
5 taking the issue to the Council of Minister, and  
6 I understood your answer to be no, he did not  
7 consult with you before he took it to the Council of  
8 Minister. Is that correct?

9           **MR CHAÚQUE:** Thank you, your Honour. I do  
10 confirm. In the meantime, allow me to say that at  
11 the ministry our work was to nurture, to cherish  
12 Patel's project, so much so that the minister did  
13 take the matter to the Council of Ministers for its  
14 decision.

15           **MR PEREZCANO:** I understand that. Thank  
16 you.

17           So my second question was when did you  
18 find out about the decision of the Council of  
19 Ministers? Did the minister inform you before he  
20 wrote the April 18 letter to Patel? Did you discuss  
21 the matter internally, or did you find out after the  
22 minister had sent the letter? You earlier told us  
23 that you -- well, you didn't recall having drafted  
24 the letter that the minister sent on 18 April so my  
25 question is, rather than when you find out, was this



1 discussed internally between the minister and you as  
2 the legal advisor to the minister?

3 **MR CHAÚQUE:** We did exchange views with  
4 the minister normally at the end of each sitting of  
5 the Council of Ministers. Normally there's guidance  
6 emanating from the council to be followed, and this  
7 project of Patel was indeed under the aegis of the  
8 studies and project unit, and we were involved  
9 therein as well.

10 What I can't tell you is whether the  
11 drafting was up to this study and project unit or to  
12 another of the minister's advisors. I don't recall,  
13 but in all sessions, at the end of the Council of  
14 Ministers sittings, we were made aware -- we are  
15 made aware of what went on, particularly when  
16 decisions touch upon matters that we're following  
17 and that call for immediate follow-up. We are made  
18 aware of that.

19 It can take place -- it can happen on the  
20 same day if the sitting ends early, or on the morrow  
21 if the sitting ends late, but right after the  
22 sitting, if matters were decided at that level which  
23 touch upon matters that we are following and  
24 involved with, the minister calls us in, advises us,  
25 shares documents, that's how we normally go about

1 it.

2           **MR PEREZCANO:** If you can show Mr Chaúque  
3 C-31, this letter is in English, I'll read you the  
4 passage I want to refer to so that it can be  
5 interpreted to you, but in this letter, which is  
6 addressed to the ministry but specifically to your  
7 attention, Mr Daga is saying, and I quote, "we would  
8 like to mention that as advised we have met with  
9 your good self to discuss the modalities of the  
10 negotiation process". I finish the quote.

11           Now I would assume that, because this  
12 letter is addressed or directed to you, you had met  
13 with Mr Daga likely -- well, between April 23 or  
14 probably April 24. I would like you to confirm  
15 whether you met with Mr Daga. Just to give you a  
16 little bit more context, there is a prior letter  
17 that has been shown, and that letter is  
18 dated April 23, this is a follow-up letter  
19 on April 24 that refers to that meeting, so that's  
20 why I'm saying that the meeting had to take place  
21 either on April 23 or April 24, and I'm wondering if  
22 the reference to "your good self" is you, whether  
23 you were at that meeting, did you meet with Mr Daga,  
24 and did you offer to hand over a draft concession  
25 agreement in Portuguese at the latest by that

1 date, April 24th?

2 **MR CHAÚQUE:** Your Honour, I do not  
3 remember any such meeting but, as I said, we worked  
4 with Patel, with Mr Daga. I just don't remember  
5 meeting on that date but, yes, we worked with Patel.

6 **PROFESSOR TAWIL:** You don't remember the  
7 meeting or the alleged meeting, but do you remember  
8 having worked on the draft concession agreement?

9 **MR CHAÚQUE:** Yes, I do.

10 **PROFESSOR TAWIL:** And what was the status  
11 of that concession agreement?

12 **MR CHAÚQUE:** We have a standard, a  
13 template. Our concession agreements are based  
14 thereon. All we do is for each project we negotiate  
15 the elements specific thereto, but the template  
16 stems from the law. All of the elements that must  
17 be found in a concession agreement are to be found  
18 in the law where they're spelled out, so we have a  
19 template covering everything that the law calls for  
20 and we then adapt, should that be the case, what  
21 needs to be adapted, such as location, timeline,  
22 amount to be invested -- all of that changes, but  
23 the template exists, and this was what we were going  
24 to make available to Patel so that during the  
25 negotiation, should negotiation have ensued, we

1 could work thereon. So we have such a template, and  
2 it stems from the law which lists the clauses that  
3 must be found in a concession agreement.

13:41

4 **MR PEREZCANO:** Now, I want to refer to  
5 your letter of April 24, and that is C-32. You  
6 refer to the Equipa Técnica Interministerial --

7 **THE INTERPRETER:** Interministerial  
8 Technical Team.

9 **MR PEREZCANO:** -- so my question is what  
10 ministries would comprise the Interministerial  
11 Technical Team, and what role would each of those  
12 ministries play in the negotiations with Patel?

13 **MR CHAÚQUE:** Thank you very much.

14 Whenever we are involved in a large  
15 project, an interministerial team is set up where  
16 the Ministry of Transport and Communications is  
17 represented, as is the Ministry for Economy and  
18 Finance, Ministry of Labour, Ministry for  
19 Environment, Ministry for Public Works and Housing,  
20 including the Bank of Mozambique, so we set up such  
21 a team, and that team works on the negotiation of  
22 the contract so as to cater for all specific  
23 matters.

24 **MR PEREZCANO:** And in addition to other  
25 ministries, what other agencies would participate --

1 let me -- I guess my question is would CFM be  
2 involved or be a part of the Interministerial  
3 Technical Team?

4 **MR CHAÚQUE:** Sometimes, yes, they would,  
5 at the request of -- under the aegis of the Ministry  
6 for Transport and Communication, but also could be  
7 under the aegis of the agency for the promotion of  
8 investment when we're dealing with foreign  
9 investment. The interministerial designation covers  
10 not just ministries but also other entities such as  
11 the Central Bank or CFM should that be the case, as  
12 well as the railway regulatory bodies.

13 **MR PEREZCANO:** Yes. But my question is  
14 not just generally but specifically for this 10 May  
15 meeting, because you're telling Patel that you have  
16 contacted these agencies and given their respective  
17 schedules, their respective agendas, so my  
18 question -- given their respective schedules, then  
19 the meeting cannot take place on May 8th but,  
20 rather, on May 10. So you've talked to them, and my  
21 question is whether CFM was part of this specific  
22 Interministerial Technical Team that was going to  
23 meet, along with the MTC, with Patel on May 10 at  
24 nine o'clock in the morning.

25 **MR CHAÚQUE:** I believe so. But inasmuch

1 as the meeting did not take place on May the 10th,  
2 contacts were made but the meeting did not take  
3 place. I don't remember whether CFM was indeed  
4 involved in these contacts, but when the committee  
5 was first set up, contacts are made.

6 **MR PEREZCANO:** Now, there has been some  
7 discussion here about negotiations with CFM, and  
8 I take it you're aware of -- that there was -- that  
9 Patel approached CFM and they had some discussions  
10 at least. Are you aware of that, Mr Chaúque?

11 **MR CHAÚQUE:** I'm very sorry. I didn't  
12 quite understand your question.

13 **MR PEREZCANO:** Well, Patel approached CFM  
14 at the direction of Minister Zucula to at least  
15 explore the partnership or a joint venture. Those  
16 negotiations did not succeed but -- or those  
17 discussions did not succeed, but they talked.

18 So my first question is whether you are  
19 aware that those discussions took place?

20 **MR CHAÚQUE:** Yes, I was.

21 **MR PEREZCANO:** Both Minister Zucula and  
22 you have referred to CFM's autonomy in terms of  
23 their decisions on whether to agree to enter into a  
24 joint venture or a PPP and in what manner to  
25 participate in the projects.

1           So that I understand. But my question is  
2 given that CFM would play a technical role -- and  
3 from my understanding perhaps would share in the --  
4 would contribute economically to the project itself,  
5 my question is, in light of that, what role would  
6 the MTC play in these negotiations that were due to  
7 begin on May 10? What was the ministry's role in  
8 these negotiations? What could the ministry itself  
9 agree to? Could it make an economic offer? Could  
10 it, would it have signed a concession agreement?  
11 What was the ministry's role separate from whatever  
12 economic or technical role CFM would have played?

13           **MR CHAÚQUE:** Thank you very much.

14           I did not take part in Patel's CFM  
15 negotiations. Allow me to underscore this. From  
16 the point of view of an institutional organisation,  
17 back then we did not have a regulatory body for port  
18 and railways. Now we do. It has been recently  
19 approved. We have now a regulatory authority. Back  
20 then we did not have such a body.

21           The Ministry of Transport, at headquarters  
22 across its directorates, does not have port or  
23 railway engineers. Within the ministry there are no  
24 railways or port experts. In order to bring this  
25 technical knowledge on port and railways, the

1 ministry has recourse to the experts that are at the  
2 CFM. It's that technical aid that prompted us to  
3 bring in technical staff from that company to sit on  
4 the interministerial committee, because if only the  
5 ministry, ie the headquarters, were represented  
6 there, we would lack technical knowledge when it  
7 came to port and railway authority, so it's on that  
8 basis that we asked technical experts from CFM to  
9 take part in the interministerial committee. Just  
10 like the case is when we bring in experts in the  
11 environment or tax matters or whatever, we go get  
12 them from where they exist so that each  
13 interministerial committee, when discussing the  
14 elements of a concession, can take into account all  
15 elements.

16 **MR PEREZCANO:** Thank you, Mr Chaúque. And  
17 I understand that role of CFM and that is consistent  
18 with what Minister Zucula told us yesterday about  
19 CFM. So my question is, in light of that, given  
20 that the experts are at CFM, what was the Ministry  
21 of Transportation's role or what would have been the  
22 Ministry of Transportation's role in these  
23 negotiations?

24 **MR CHAÚQUE:** In the Patel CFM  
25 negotiations?



1           **MR PEREZCANO:** In these negotiations that  
2 the MTC, following a decision of the Council of  
3 Ministers, invited Patel to begin and that you were  
4 setting up with the Technical Interministerial. So  
5 I want to understand what role the Ministry of  
6 Transportation would have played in these  
7 negotiations.

**13:52**

8           **MR CHAÚQUE:** Right. Got you.

9           The MTC is the supervisory authority of  
10 the transport and communications sector. It's the  
11 ministry that takes the proposal to the Council of  
12 Ministers. It's the ministry that chairs the  
13 technical negotiation process with the interested  
14 party, in this case Patel, and once the technical  
15 negotiation is concluded it is the ministry again to  
16 take the results thereof up to the Council of  
17 Ministers for ultimate approval of the concession  
18 terms. This is the role of the ministry:  
19 supervision. This would be about two contracts, one  
20 for railways, one for ports, and it's up to the  
21 ministry, as a member of the Council of Ministers,  
22 to take those documents to the Council of Ministers.  
23 The ministry sets the committee up, the committee  
24 must include experts in different fields to  
25 negotiate technical aspects, and then the resulting

1 proposal is taken by the ministry to the Council of  
2 Ministers. That's the role to be played by the  
3 ministry.

4 **MR PEREZCANO:** One last question. Would  
5 the Ministry of Transportation have been able to  
6 make an economic offer for the government to  
7 participate in the project, and did the ministry  
8 have a budget for those purposes?

9 **MR CHAÚQUE:** No.

10 **MR PEREZCANO:** So that would have fallen  
11 to CFM again?

12 **MR CHAÚQUE:** Had there been an agreement  
13 with CFM, a joint venture -- a specific or special  
14 purpose joint venture -- would be set up between  
15 Patel and CFM, and this would be the entity  
16 implementing the project.

17 May I? Allow me. Irrespective of  
18 contacts we held with Patel, we exchanged several  
19 communications, we never went as far as  
20 materialising the negotiation mentioned in this  
21 letter. It never came to pass. Because in the week  
22 after this letter, we had a Council of Ministers  
23 decision which took the matter out of our hands, so  
24 we never started the negotiation this letter is all  
25 about.

1           **PRESIDENT:** Thank you very much,  
2 Mr Chaúque.

3           You have come from Maputo to help us with  
4 the facts, I understand?

5           **MR CHAÚQUE:** I'm very sorry, I did not  
6 understand the interpreting.

7           **PRESIDENT:** And so thank you for the  
8 effort.

9           **MR CHAÚQUE:** Yes, I did.

10          **PRESIDENT:** To come all the way from  
11 Mozambique, and we wish you safe travel back home.

12          **MR CHAÚQUE:** Thank you very much.

13          **PRESIDENT:** So with that we close the  
14 morning session. It is now 2 pm so we'll --

15          **MS MARTINS:** Could I just -- sorry, just  
16 for the record, I would like just to recall, because  
17 of the question that was asked to the witness by the  
18 Tribunal on eventual documents from stakeholders,  
19 I would refer the Tribunal to Claimant's document  
20 Production Request No 16. This was asked by  
21 Claimant, was requested by Claimant and -- well, in  
22 Request for Production No 16 you have Respondent's  
23 and the Tribunal's decision, so this was requested  
24 at a point in time and was not provided.

25          **PRESIDENT:** Thank you. So, Mr Chaúque,

1 thank you very much for having been here with us,  
2 and you are liberated of all your duties to the  
3 Tribunal. We wish you safe travel back home.

4 **MR CHAÚQUE:** Thank you very much, sir.

5 **PRESIDENT:** We will come back at 3 pm.

6 (Short break from 1.57 pm to 3.03 pm)

7 DAVID BAXTER

8 **PRESIDENT:** Very good. We resume the  
9 hearing and we do so in order to examine Mr David  
10 Baxter. Mr Baxter, good afternoon to you.

11 Mr Baxter, you are here as an expert, and  
12 the first thing we have to do is to take your  
13 declaration as an expert witness. Can I kindly ask  
14 you that you stand up?

15 Do you solemnly declare upon your honour  
16 and conscience that you shall speak the truth, the  
17 whole truth, and nothing but the truth, and that  
18 your statement will be in accordance with your  
19 sincere belief?

20 **MR BAXTER:** I do.

21 **PRESIDENT:** Thank you, sir.

22 So I think you have a slide presentation  
23 which you have prepared.

24 **MR BAXTER:** I do.

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

1 We will give it H-5 as a number.

2 Ms Vasani, would you like to introduce the expert,  
3 or shall we give him the floor directly?

4 **MS VASANI:** Yes. Ms Kuznetsova will be  
5 introducing the expert?

6 **PRESIDENT:** Very good.

7 **MS KUZNETSOVA:** Thank you. Mr Baxter is  
8 Claimant's PPP expert, and before turning Mr Baxter  
9 to conduct the direct presentation for the Tribunal,  
10 I would like to ask him a couple of questions.

11 Examination by Claimant

12 **MS KUZNETSOVA:** Mr Baxter, do you have a  
13 clean copy of your expert report dated 5 August,  
14 2021 in front of you.

15 **MR BAXTER:** Yes, I do.

16 **MS KUZNETSOVA:** And is it your signature  
17 on page 46 of your expert report?

18 **MR BAXTER:** That's correct.

19 **MS KUZNETSOVA:** Do you have any additions,  
20 clarifications or amendments to your expert report?

21 **MR BAXTER:** Just three aspects that I  
22 would like to mention, since this was a year -- just  
23 over a year ago that I did the expert report.

24 Since then I have become a PPP expert,  
25 support member of the Trans African Railway

1 Corporation. I also have been working currently  
2 with the Asian Development Bank on a coastal port,  
3 railway and inland port PPP project in Bangladesh,  
4 and then the last thing I wanted to mention is that  
5 I've also been working with US aid in the Maldives  
6 on a port ferry inter-island system. So those are  
7 three aspects or qualifications that I wanted to  
8 introduce.

9 **MS KUZNETSOVA:** Thank you, Mr Baxter.

10 I now turn you to the Tribunal for direct  
11 presentation.

12 **PRESIDENT:** Thank you. Please.

13 Presentation

14 **MR BAXTER:** I'd like to say good day to  
15 the Tribunal. My name is David Baxter and I do not  
16 wish to take up valuable time, so you do have access  
17 to my CV resumé should there be any aspects but  
18 there are some professional highlights that I would  
19 like to just mention. I was born in Africa. I'm an  
20 African native. My experience over 30 years has  
21 included infrastructure planning, I'm a procurement  
22 expert (policy and best practice), and also I have  
23 worked as a PPP consultant.

24 I will say this is my first time in front  
25 of a tribunal, so I am not nervous but I am learning

1 the procedures as we go, so I hope that I can be of  
2 assistance to the Tribunal. I'm a recognised peer  
3 of the World Association of PPP Units and  
4 Professionals, and you can see the certificate on my  
5 presentation.

6           Currently I also work as a senior advisor  
7 to the International Sustainable Resilience Centre  
8 in New Orleans as a PPP advisor and expert.

9           Additionally, I'm a steering committee  
10 member of WAPPP. I'm on the international committee  
11 of that. Over the years I've also been a  
12 contributor to numerous World Bank initiatives on  
13 PPP including their APMG certification programme, as  
14 well as some PPP guidelines and PPP procurement and  
15 benchmarking reports that they have established.

16           I have international experience. I have  
17 worked I think almost everywhere except Antarctica  
18 because they're not doing many PPPs there, but one  
19 thing that is important for me to note is that  
20 I have also worked in Mozambique on some very large  
21 infrastructure projects which have been procured  
22 with the Government of Mozambique through the  
23 Millennium Challenge Corporation, and this took  
24 place at the same time approximately when this case  
25 was occurring.

1           As I mentioned, I have worked with the  
2 TRC -- slower? Sorry. As I said I've also been  
3 working with the Asian Development Bank in  
4 Bangladesh.

5           I am going to start looking at my slides  
6 and on slide 2 I have a bit of a discussion or  
7 introduction to PPP procurements. There are  
8 typically two -- well, governments typically will  
9 issue a PPP procurement and this is initiated by the  
10 government or the public sector, as they're often  
11 referred to, which is the preferred way that they  
12 initiate procurements. And this is usually an  
13 internal idea. But there are situations where there  
14 are external ideas which are introduced by the  
15 private sector, and usually it's an innovative or a  
16 new approach, and it is referred to typically as a  
17 USP or as an unsolicited proposal.

18           There are benefits that can be associated  
19 with unsolicited proposals. Typically they will  
20 allow the government to identify and prioritise new  
21 projects. Secondly, they can introduce innovative  
22 solutions to problems that the government hasn't  
23 considered, and, third of all, they can also help  
24 overcome challenges to projects that the government  
25 might have been contemplating but didn't have a



1 clear path forward on how to proceed.

2 Both government initiated procurements and  
3 USPs can be initiated through either a direct award  
4 or a competitive public tender, and this is at the  
5 discretion of the government, and it's up to the  
6 governments to decide which processes they would  
7 apply and also which best practices they would  
8 consider.

9 I would like to just state that, according  
10 to Mr Zucula's testimony yesterday, the government  
11 in this case attempted to pursue two opposite  
12 processes or two mutually exclusive processes,  
13 I suppose.

14 This is unusual. In my many years of  
15 experience I have never been involved in a situation  
16 where the government has pursued two paths or two  
17 procurements at the same time.

18 On slide 3 there's one thing that I would  
19 like to point out and this is that best practices  
20 aren't binding and they are at the discretion of the  
21 government. Much is said about best practices, and  
22 if I had to add them up globally there would be  
23 thousands of them, but the governments will always  
24 decide which ones they are going to refer to of  
25 these generic or global practices, and in this sense

1 it needs to be recognised that governments have  
2 always the discretion on a decision which best  
3 practices they would apply.

4           There is no one-size-fits-all approach to  
5 PPP procurements, and this really needs to be  
6 remembered because every project is different, every  
7 country is different, and every one is unique.

8           There are exceptions of awarding a PPP  
9 through a tender process, and this occurs basically  
10 contrary to what Mr Ehrhardt had said, and there are  
11 exceptions, different ways of doing it. It's hard  
12 to say there's just one way.

13           There are no definitive best practices,  
14 I've said, and there are many, but decisions on this  
15 approach on how it is driven forward are based  
16 typically on governments' exceptional circumstances  
17 or urgent needs, especially in the case of  
18 unsolicited proposals where they can decide that  
19 they are going to waive normal rules or procedures  
20 because of a need.

21           There are recent examples of unsolicited  
22 proposals being increasingly used. During the  
23 global pandemic governments used, in the case of  
24 urgency and in national strategic interest,  
25 countless and many, many unsolicited proposals to

1 move forward with procurements of drugs,  
2 infrastructure -- you name it. I think one of the  
3 most recent examples is the fast tracking of PPP  
4 procurements that's taking place in the Ukraine  
5 because of the war there.

6 Just to reiterate, it's incumbent upon the  
7 government to decide how to award a project to a  
8 private entity, whether it's direct or sole source,  
9 and governments have the prerogative to pursue  
10 procurement options such as direct awards developed  
11 from unsolicited proposals and that they can be  
12 awarded upon their decisions, either by a direct  
13 award, sole source, or competitive tenders.

14 I'd like to transition to the next slide,  
15 slide number 4. One of the things that I always  
16 talk to and instruct governments when I work with  
17 them is that there needs to be procurement clarity.  
18 There also needs to be predictability and there  
19 needs to be transparency, because this is essential  
20 in creating government trust or environment of trust  
21 in a procurement process.

22 There should be no conjecturing on what is  
23 intended by the government. It should be crystal  
24 clear. Governments should ensure clarity,  
25 predictability, and transparency at all times, and

1 I just want to reiterate that.

2 In the case of unsolicited proposals,  
3 there is a need for clarity regarding the following:  
4 A decision of whether a USP proponent will bear the  
5 cost of the time intensive resource studies, and  
6 this is something that has been raised. It's  
7 costly, it takes time, and it takes patience.  
8 Whether the project would be awarded directly or  
9 through a public tender, and what the benefits would  
10 be for an unsolicited proponent in the case of  
11 tender processes.

12 It's important to reiterate again that an  
13 understanding is required from the very beginning,  
14 the onset, from initial conversations, initial  
15 agreements, so that the precise advantages will be  
16 understood and that all parties agree to this.

17 Clarity of these issues is essential so  
18 that a private party can make a calculated decision  
19 to proceed or not with the project. So the  
20 government has its prerogatives; the private sector  
21 also has decisions that it has to make.

22 On slide 5, there was original intent, as  
23 far as I could read and understand from the  
24 documents that I was presented with regarding an  
25 unsolicited proposal award. Examination of the MOU

1 document signed by both parties that I was provided  
2 with as well as the required submittals of a PFS  
3 indicate the intent of an agreement that the  
4 government intended to initiate the USP procurement  
5 through a direct award, and this is what I was able  
6 to extract from the Memorandum of Understanding.

7           And the Memorandum of Understanding is a  
8 simple one but it's direct, and it states some very  
9 basic ground rules, that they were in the first  
10 place PEL agreeing to conduct a PFS at its own cost,  
11 which is typical for these types of approaches.  
12 Understanding under the MOU the concession would be  
13 granted in the language that I read in the case of  
14 the PFS being approved by MTC, and that PEL could  
15 exercise it's right of first refusal. It also was  
16 important that there was a confidentiality provision  
17 so that information wouldn't be shared. It also  
18 included an exclusivity provision that designated to  
19 protect PEL as the private proponent of the USP.  
20 Nowhere when I referred to the document could I find  
21 any mention of the possibility of a public tender.

22           It must be pointed out again for  
23 clarification that there is no mention made of a  
24 public or a competitive public tender. And  
25 subsequent actions by the government to

1 simultaneously pursue a sole source procurement and  
2 to explore an open public tender can only be  
3 described as confusing, in my terms peculiar, and  
4 definitely not a best practice.

5           On slide 6 there's just a brief review of  
6 Mozambique's subsequent conduct regarding the USP  
7 direct award. The parties' conduct after signing  
8 the MOI also confirms that the government intended  
9 to award the project through a direct award to PEL.  
10 Subsequent actions by the Government of Mozambique  
11 only strengthened PEL's understanding that the  
12 project would be awarded through a direct award,  
13 again stressing that never was during these early  
14 initial processes any mention made of a competitive  
15 procurement, and notable actions including the  
16 following.

17           Mozambique approved the PFS and requested  
18 PEL to exercise its right of first refusal.  
19 Mozambique instructed PEL to negotiate with CFM to  
20 create a project company to implement the project,  
21 and PEL confirmed that it wished to proceed to  
22 implement the project by exercising its right of  
23 first refusal.

24           This is what I was able to ascertain from  
25 documents that I read.

1           Also, PEL confirmed that it would proceed  
2 once it exercised this to incorporate a project  
3 company with CFM to implement the project, and  
4 sought authorisation to form an SPV. You can also  
5 refer to it as Special Purpose Vehicle, or project  
6 company in relationship to the project.

7           It must be noted that the government  
8 recognised the existence of exceptional  
9 circumstances for direct award. With the language  
10 "considering the urgency of the project" and the  
11 "national strategic interest" the government invited  
12 PEL to negotiate the terms of the concession  
13 agreement and was able to make this decision.

14           They had the authority, the decision  
15 making in this regard.

16           The Government of Mozambique  
17 correspondence confirmed this approach in a letter  
18 of the 18th of April 2013, inviting PEL to negotiate  
19 the project concession because it had met its MOI  
20 obligations, which was simple and straightforward in  
21 the MOI, whilst writing specifically that PEL has  
22 carried out all the feasibility and engineering  
23 studies.

24           In slide 7 there was a situation that  
25 Mozambique's actions became irregular after a while.

1 The government following unilateral and irregular  
2 actions led to an eventual reversal of what had been  
3 agreed to. The following actions can only be  
4 described as unconventional and contrary to the  
5 intent of the MOI. The unravelling and the renegeing  
6 on negotiated MOI terms started when the government  
7 unilaterally reversed its course from a direct award  
8 to a competitive public tender several times. This  
9 erratic behaviour by the government caused PEL  
10 confusion and concern, and this is how it played  
11 out.

12 In January 2013, about six months after it  
13 had approved PEL's USP, MTC notified PEL that the  
14 government had decided to put the project on a  
15 public tender. This was news to PEL and not  
16 mentioned in the MOI.

17 On the 18th of April, three months later,  
18 strangely enough the MTC then informed PEL that  
19 considering the urgency of the project and the  
20 national strategic interest the government invited  
21 PEL to negotiate the terms of a concession agreement  
22 for the project, so what was happening is there were  
23 two processes that were starting to occur at the  
24 same time.

25 Less than a month later, on the 13th



1 of May, the MTC informed PEL that the direct  
2 negotiations could not continue and that the  
3 government had decided to use the public tender  
4 process. At best, this contradictory or  
5 flip-flopping decision on a parallel procurement  
6 approach can only be described as irregular.

7 In all the years that I have worked in  
8 this field of public procurement, PPP procurement,  
9 I have never heard of parallel actions taking place.  
10 This was new. And the government's conduct was at  
11 worst confusing, I think irresponsible, irregular  
12 and contradicts industry best practice.

13 As a procurement consultant, I would never  
14 advise any government to proceed with a dual  
15 procurement approach. This would cause confusion  
16 and could open up all parties to challenges,  
17 especially any approach which is ambivalent on its  
18 procurement strategy and did not harmonise its  
19 approach with its internal stakeholders because it  
20 seemed, from what I could ascertain in my readings,  
21 that at times different agencies in the Mozambican  
22 government weren't on parallel course.

23 On slide 8 I would just like to say that  
24 one of the most important things is Mozambique did  
25 not keep or did not have tender files that were

1 available. It's best practice typically for  
2 governments to keep a comprehensive tender archive.  
3 I'm an advisor to some organisations around the  
4 world which are working on software to create  
5 comprehensive tender files, and this is one of the  
6 most important things. It is important.

7           In the spirit of full transparency the  
8 government should keep all procurement documents,  
9 including all communications that take place with  
10 bidders but also with their internal parties. The  
11 government typically has a competitive tender file  
12 that includes the bidding documents submitted by  
13 bidders, the rules and procedures applied to the  
14 evaluation of bids, minutes and notes of meetings  
15 during which they were scored and discussed, as well  
16 as attendees' lists in respect of meetings. And  
17 these would be any meetings of any type.

18           A complete tender file is required to  
19 provide a full analysis of the tender process.  
20 Unfortunately Mozambique could not provide a  
21 complete tender file so a lot of information,  
22 important information was missing.

23           On slide 9 --

24           **PRESIDENT:** You are going fast. You are  
25 putting stress on the interpreters. Let's go

1 slowly.

2 **MR BAXTER:** On slide 9, I feel that the  
3 tender was not conducted in a fair and transparent  
4 manner and that it was replete with irregularities.

5 In summary, Mozambique did not disclose to  
6 the other bidders that PEL was the original  
7 proponent of the project, also that PEL had  
8 conducted the PFS, and that PEL was therefore  
9 entitled to a scoring advantage. Another aspect is  
10 that tender documents issued by Mozambique, I feel,  
11 were vague, missed consistent detail, and did not  
12 include critical information that is typically  
13 provided for a project of this size.

14 This was meant to be a multibillion dollar  
15 project and in my experience I have reviewed many  
16 procurement notices for extremely large projects, or  
17 megaprojects as they refer to them, and there is  
18 usually much more documentation and information made  
19 available.

20 It is unclear whether PEL was provided  
21 with the 15 per cent scoring advantage, especially  
22 when it comes to the financial aspect, because the  
23 information provided in the financial evaluation was  
24 very scant at best.

25 I would just like to stress overall, and

1 it's important, that in my experience of many years  
2 it is unheard of to pursue two different mutually  
3 exclusive procedures or strategies for a procurement  
4 simultaneously.

5 In conclusion, it's my opinion that  
6 opportunities to implement international best  
7 practices and a consistent transparent procurement  
8 approach were missed by the Government of  
9 Mozambique. I believe that the Government of  
10 Mozambique had many opportunities to implement the  
11 procurement better and to have better best  
12 practices.

13 And this is the end of my presentation.

14 Thank you.

15 **PRESIDENT:** Thank you, Mr Baxter.

16 Ms Kuznetsova, do you have any follow-up questions?

17 **MS KUZNETSOVA:** No, we do not. Thank you,  
18 Mr President.

19 **PRESIDENT:** Very good. Mr Basombrio, will  
20 you be leading the cross-examination?

21 **MR BASOMBRIO:** Yes. Thank you,  
22 Mr President.

23 Cross-examination by Respondent

24 **MR BASOMBRIO:** Hello, Mr Baxter. It's a  
25 pleasure to meet you. My name is Juan Basombrio.

1 I'm one of the attorneys for the Republic of  
2 Mozambique. I'm going to be asking you some  
3 questions today. You told us this is the first time  
4 you've acted as an expert witness, or at least that  
5 your testimony has been taken, so let me give you  
6 some licence here and suggest to you if I ask you  
7 any question that you think is vague or you don't  
8 understand, please let me know. I'll try to clarify  
9 it for you.

10 It's really important that you listen to  
11 my questions so the court reporters can take it  
12 down, and then I'll afford you the same courtesy and  
13 let you answer before I start asking again.

14 It's important to try to answer our  
15 questions yes or no first, or I don't know, and  
16 then, you know, if you want to clarify further,  
17 we're happy to hear what else you have to say.

18 If I could ask you to move the microphone  
19 a little bit closer to you, I think that would help  
20 everyone because we would hear you a little bit  
21 better.

22 **MR BAXTER:** Thank you.

23 **MR BASOMBRIO:** So let me start by asking  
24 you just some background questions. Do you speak  
25 Portuguese?

1           **MR BAXTER:** I don't.

2           **MR BASOMBRIO:** I assume you're not an  
3 attorney licensed in Mozambique?

4           **MR BAXTER:** No, I am not.

5           **MR BASOMBRIO:** Do you consider yourself to  
6 be a PPP expert specifically on Mozambican law?

7           **MR BAXTER:** I don't.

8           **MR BASOMBRIO:** Do you consider yourself to  
9 be a PPP expert specifically on Mozambican PPP  
10 practice?

11           **MR BAXTER:** I don't, but in general  
12 practice globally, yes.

13           **MR BASOMBRIO:** So, to clarify things, the  
14 testimony that you're providing here, your expert  
15 testimony, is based on your expertise on  
16 international PPP practice, would that be correct?

17           **MR BAXTER:** That's correct. I was asked  
18 and my brief was to provide international best  
19 practice and perspectives, and not from a legal  
20 perspective based on any laws or practices in  
21 Mozambique, because I'm not qualified to answer  
22 those type of questions.

23           **MR BASOMBRIO:** So you would agree that  
24 there may be a difference between Mozambican PPP  
25 practice and Mozambican PPP Law that may be

1 different from what you indicate to be international  
2 practice?

3           **MR BAXTER:** There are always differences,  
4 but I would say from my experience that about 80  
5 per cent of laws in countries tend to follow global  
6 practices, and I did have the opportunity, for  
7 example, to review the World Bank's reports on the  
8 practice of PPPs in Mozambique, and that helped me  
9 clarify some of the situations or understandings  
10 that I developed.

11           **MR BASOMBRIO:** So why don't we start going  
12 through some of the general principles that you  
13 discussed in your report, if you don't mind.

14           So I will turn, and the report will be  
15 placed on the big screen, but you have it, so I'll  
16 start with page 20, section 6, which is the  
17 beginning of your expert opinion.

18           I'll refer to those paragraph numbers.

19           First I'm going to refer to paragraph  
20 number 99, and I'm focusing on the first part where  
21 you say: "Governments enjoy large discretion in how  
22 they choose to award infrastructure projects". Do  
23 you see that?

24           **MR BAXTER:** Yes.

25           **MR BASOMBRIO:** Could you please explain

1 why it is that governments enjoy such large  
2 discretion?

3 **MR BAXTER:** Every country has its legal --  
4 or PPP legal framework, and these are determined or  
5 developed internally by the government, and that is  
6 what drives how they would implement or interpret  
7 their PPP best practices.

8 And again, you know, I agree that this is  
9 true, but my brief here was to report on general  
10 best practices.

11 **MR BASOMBRIO:** In the next paragraph, 100,  
12 you referred to a USP, and I think you might have  
13 defined it but if you could just reiterate what that  
14 acronym stands for, please?

15 **MR BAXTER:** Unsolicited proposal.

16 **MR PEREZCANO:** Excuse me to interrupt.

17 Mr Baxter, could you speak a little louder, please,  
18 or closer to the mic so we can hear you clearly?

19 **MR BAXTER:** It represents -- the acronym  
20 USP stands for unsolicited proposal.

21 **MR BASOMBRIO:** And we're talking here  
22 again in general terms?

23 **MR BAXTER:** That's correct.

24 **MR BASOMBRIO:** We're not talking first  
25 about the specifics of this case, so that's what I'm



1 going to ask you about.

2 So in the general example of a USP that  
3 was to go into a country, in deciding whether they  
4 want to make a proposal, what kind of local expert  
5 should they hire to assist them in that  
6 determination?

7 **MR BAXTER:** My understanding is that they  
8 would typically hire local legal experts.

9 **PRESIDENT:** I think he said he would  
10 typically hire local legal experts.

11 **MR BASOMBRIO:** I'm not seeing the  
12 transcription. OK, now it is. Maybe you could pull  
13 the microphone a little bit closer, if that's OK.  
14 Thank you.

15 And what would be the purpose of hiring  
16 local legal experts?

17 **MR BAXTER:** I think to contextualise the  
18 approach that would be followed.

19 **MR BASOMBRIO:** Would the legal experts  
20 also explain to the USP what the local PPP laws and  
21 regulations are?

22 **MR BAXTER:** Yes, if they existed at that  
23 time, and my understanding is that the law was being  
24 revised at that time, so that there was  
25 understanding of what the new law would have but it

1 hadn't been defined yet.

2 **MR BASOMBRIO:** I'm talking -- I'm  
3 concentrating first on your general understanding.

4 **MR BAXTER:** Yes.

5 **MR BASOMBRIO:** Of the general practice.

6 **MR BAXTER:** OK.

7 **MR BASOMBRIO:** So would it be accurate to  
8 say that one of the reasons why you hire a local  
9 legal expert, if you are a USP interested in a  
10 country and a potential idea, is to get an  
11 understanding of what the local PPP laws and  
12 regulations are?

13 **MR BAXTER:** I would say partially in the  
14 sense of once you were entering very concrete  
15 negotiations, a legal expert would be useful, but in  
16 this case PEL approached the government and numerous  
17 government officials and had the discussions with  
18 them, so I don't think it was absolutely essential  
19 at that time that it was necessary to confer with  
20 the legal experts when they were exploring the  
21 unsolicited proposal idea.

22 **MR BASOMBRIO:** Again, I'm trying to get  
23 first your general understanding. I want to have an  
24 understanding of international PPP practice as you  
25 understand it, and then we can turn to what PEL did

1 or did not do.

2 So in the case where you have a USP going  
3 into a country where they have not had a PPP  
4 concession before, would you advise them to hire a  
5 legal expert to lay out what the local PPP laws and  
6 regulations are?

7 **MR BAXTER:** I would.

8 **MR BASOMBRIO:** Now, going back to  
9 paragraph 100, and you indicated in your  
10 introduction that USPs can take many forms,  
11 including direct awards and through competitive and  
12 transparent public tenders -- do you see that?

13 **MR BAXTER:** Yes.

14 **MR BASOMBRIO:** If you could please clarify  
15 for me, because here you say USPs can take many  
16 forms, are you suggesting that the USP is the entity  
17 that proposes to the government down which route  
18 they want to go, or did you mean something different  
19 here?

20 **MR BAXTER:** Which line are you referring  
21 to?

22 **MR BASOMBRIO:** The last clause in your  
23 paragraph 100 that says "USPs can take many forms,  
24 including direct awards or through competitive and  
25 transparent public tenders".

1           **MR BAXTER:** Yes, but a USP is not a  
2 company or an organisation, as I think you  
3 mentioned. Basically an unsolicited proposal is  
4 exactly that, a proposal that was not solicited by  
5 the government. It's not an entity or an  
6 organisation or a company.

7           **MR BASOMBRIO:** So you're saying that the  
8 actual proposal will normally say: This is going to  
9 be a direct award or a tender process?

10           **MR BAXTER:** No. What would happen is a  
11 proponent -- not a USP but a proponent -- would go  
12 to the government with an idea and say we have a  
13 proposal -- hence, the term "unsolicited" -- and  
14 they would share that with the government, enter  
15 into discussions with the government, and then the  
16 government would then consider the proposal and  
17 enter -- continue the discussions, and only  
18 afterwards, when an MOI or an agreement was  
19 understood, there would be clauses or conditions  
20 included in it which would set the ground rules.

21           It's not -- I think it's really important  
22 to point out that an unsolicited proposal is not the  
23 proponent; it's a proposal that was not requested by  
24 a government, so it wasn't in a pipeline, it wasn't  
25 in their -- you know, in any project that they were

1 contemplating; it's the private sector approaching  
2 the government with an idea which I'd said in my  
3 presentation, something that was innovative, unique,  
4 a new idea offering a solution to a problem that the  
5 government couldn't address.

6 **MR BASOMBRIO:** So the decision -- and  
7 that's what I was getting at -- the decision whether  
8 to go a direct award route or to go through a public  
9 tender, that's not in the USP. That is something  
10 that the government will decide in response to a  
11 USP?

12 **MR BAXTER:** When you suggest an  
13 unsolicited proposal, one of the things that is  
14 important to determine -- and this would be  
15 determined by the government -- is which award  
16 process would take place, and that would be part of  
17 the discussions.

18 **MR BASOMBRIO:** And in making that  
19 determination, the government would look towards its  
20 local laws and regulations to make sure that they  
21 are complying with those?

22 **MR BAXTER:** It would look at its laws as  
23 well as exceptions to its laws, which I understood  
24 existed as well, under certain circumstances, if I  
25 remember correctly, based on national interest and

1 urgency that unsolicited proposals could be  
2 considered. So that was within the legal  
3 parameters -- I'm not a lawyer but within the  
4 parameters of the law.

5 **MR BASOMBRIO:** But, again, not turning to  
6 what may be the case here in Mozambique, staying  
7 first at the higher international level, it would be  
8 in your opinion, correct, for the government to  
9 refer to its laws and its regulations in the PPP  
10 area in order to decide which avenue to take? The  
11 tender process or the direct award?

12 **MR BAXTER:** As a general practitioner,  
13 yes, but from a legal perspective, I wouldn't know.

14 **MR BASOMBRIO:** Now, in paragraph 101, you  
15 indicate that there is -- you say: "There is also  
16 no single 'best practice' -- like a code or statute  
17 -- that the Tribunal can use as a guide".

18 I'm assuming there that you're referring  
19 to the fact that there's no international code or  
20 statute, right?

21 **MR BAXTER:** That's correct.

22 **MR BASOMBRIO:** In the last sentence you  
23 say, "But at the end of the day, if a specific  
24 government desires to run a USP procurement in a  
25 different way to an 'international best practice' of

1 any particular institution, then there is nothing to  
2 stop that government from doing so (subject to any  
3 prohibition in its own domestic law)".

15:41

4           Could you explain that, please?

5           **MR BAXTER:** I think what I was trying to  
6 say in simple terms is that the government has the  
7 discretion to decide how it would apply its laws.

8           **MR BASOMBRIO:** Are you also saying here  
9 that a local government has also the discretion to  
10 carry out a USP procurement in a way that's  
11 inconsistent with international best practice,  
12 whatever that may be?

13           **MR BAXTER:** I would not say so because if  
14 you're insinuating that unsolicited proposals are  
15 inconsistent international practices, that is wrong  
16 because there are many cases, continuous cases, of  
17 unsolicited proposals being considered by  
18 governments all around the world.

19           I believe I gave statistics that in a  
20 World Bank report there were only two countries that  
21 prohibited unsolicited proposals, and that even  
22 though the majority of unsolicited proposals --  
23 I mean most governments abstain -- I think it was in  
24 the 70 per cents, I can't remember exactly, they  
25 abstained from it. There is a good amount of

1 unsolicited proposals that take place. This is  
2 common in places like Saudi Arabia and, as I  
3 mentioned, in war situations.

4           So an unsolicited proposal is not unusual,  
5 hence why I think the World Bank also developed  
6 guidelines on how you could implement unsolicited  
7 proposals, because if they didn't believe they were  
8 common enough to occur, they would not have gone to  
9 the effort of creating guidelines for countries to  
10 follow, and voluntarily to follow.

11           **MR BASOMBRIO:** I appreciate your answer.  
12 We're going to get to those points of your citation  
13 of the guidelines and the percentages of tender  
14 versus direct award. You talk about that. We'll  
15 get to that. But let me try to clarify better if  
16 I can what I was getting at.

17           In the previous paragraph, 100, you said  
18 that USPs can take many forms, and two ways are it  
19 can be done through a public tender, through that  
20 route, so to speak. Another route is direct award.

21           Jumping on to the next paragraph, 101, you  
22 first reiterate that which route you take is very  
23 much within the discretion of the government, and in  
24 the last paragraph you say "if a specific government  
25 desires to run a USP procurement in a different



1 way", quote unquote, to an "international best  
2 practice", that's OK. So my question to you is by  
3 this sentence -- excuse me.

4           Considering this sentence, would you agree  
5 that a local government could decide to run a USP  
6 procurement in a way that is quote "different" from  
7 an international best practice?

8           **MR BAXTER:** I would, with the caveat that  
9 it follows its own law, its domestic law, which in  
10 the case of Mozambique allowed unsolicited proposals  
11 as well to be awarded as sole source as well as  
12 competitively.

13           So Mozambique was following its own  
14 practice, which in many ways is concurrent with  
15 international best practice.

16           **MR BASOMBRIO:** But if it were not the  
17 same, if it were different, that still would be OK,  
18 according to you?

19           **MR BAXTER:** That would be because the  
20 government has a sovereign right, but I don't think  
21 it was inconsistent practice because they did allow  
22 unsolicited proposals.

23           **MR BASOMBRIO:** Now, you mentioned the  
24 policy guidelines of the World Bank a second ago.

25           **MR BAXTER:** Yes.

1           **MR BASOMBRIO:** And why don't we talk about  
2 that next?

**15:45**

3           So I'm looking at paragraph 102, and you  
4 refer to the World Bank's 2018 Policy Guidelines for  
5 Managng Unsolicited Proposals for Infrastructure  
6 Projects. Do you see that?

7           **MR BAXTER:** Yes.

8           **MR BASOMBRIO:** We'll just call it World  
9 Bank USP or World Bank Guidelines, all right?

10          **MR BAXTER:** Correct.

11          **MR BASOMBRIO:** We're talking about these  
12 two options right now, the option of a tender  
13 process and the option of a direct award.

14          Do the World Bank Guidelines recommend for  
15 governments one over the other?

16          **MS VASANI:** Could we show him the document  
17 that you're discussing?

18          **MR BASOMBRIO:** No, I don't want to show  
19 him. I just want to get his understanding of what  
20 the documents say.

21          **MR BAXTER:** Can you repeat the question,  
22 please?

23          **MR BASOMBRIO:** Yes. Let me read it back,  
24 OK? I'm going to read back my question.

25          We're talking about these two options

1 right now, the option of a tender process and the  
2 option of a direct award. Do the World Bank  
3 Guidelines recommend for governments one over the  
4 other, in your understanding?

5 **MR BAXTER:** I think that's a difficult  
6 question to answer directly. The reason the World  
7 Bank Guidelines were instituted, because the World  
8 Bank warns against dangers associated with the  
9 unsolicited proposal approach which is a sole  
10 source. But then it gives specific guidance on  
11 should you consider an unsolicited proposal, these  
12 are the steps you have to follow, so I don't think  
13 the World Bank recommends against it but it says  
14 it's not always the best and should you decide to do  
15 it, you need to follow those steps.

16 And there are three documents that fall  
17 under those guidelines, and they go in great detail  
18 of what you can do to mitigate risk, what you can do  
19 to ensure -- and I think if I remember correctly,  
20 the interests of both parties are protected.

21 **MR BASOMBRIO:** Let me try to state my  
22 question a different way so you understand what I'm  
23 trying to get at.

24 You've testified that there are -- let's  
25 just say at least two ways of dealing with a USP if

1 you're a government. You can put it through the  
2 public tender process, or you can go through your  
3 direct award process.

4 My question to you is, in your  
5 understanding of the World Bank Guidelines, when  
6 there is a USP proposal, do the guidelines recommend  
7 that governments prefer one over the other? For  
8 example, that a tender process is recommended as the  
9 general approach over a direct award. Or  
10 conversely?

11 **MR BAXTER:** I don't think they recommend.  
12 I think they talk about the pros and cons of each.

13 And just, for example, in the World Bank  
14 benchmarking reports which are put out annually,  
15 those are 2017, 2018, and 2020 reports which  
16 I assisted the World Bank with, they have a section  
17 on unsolicited proposals and performance of  
18 countries, of how they're doing, and this is also to  
19 give an indication of how well they are performing,  
20 so it's a consideration that they're looking at  
21 both.

22 **MR BASOMBRIO:** You mentioned that -- I'm  
23 sorry. Let me just ask you this question directly.

24 You have worked with the World Bank  
25 Guidelines before?

1           **MR BAXTER:** Yes.

2           **MR BASOMBRIO:** You mentioned that the  
3 World Bank Guidelines warn about certain risks  
4 associated with unsolicited proposals. Could you  
5 illustrate for us what are some of those risks,  
6 please, in your understanding?

7           **MR BAXTER:** I can, but I would also just  
8 make sure that in the context it's understood that  
9 while they talk about risks, they also talk about  
10 opportunities.

11                   So the risks are, you know, determining  
12 whether the government is going to get a good deal,  
13 for example, whether the government understands the  
14 USP. Are parties both protected? It goes on and  
15 on. But on the same side, you know, it's sort of a  
16 balancing act or a balancing approach, they also  
17 say, that it can, if done carefully, with clarity  
18 and purpose, introduce innovation, so I don't think  
19 it's a clearcut yes or no answer.

20           **MR BASOMBRIO:** Thank you.

21                   And I think one of the things you just  
22 mentioned was to make sure that the government  
23 understands the USP. What should a USP proponent do  
24 in terms of informing the government regarding the  
25 company's own background, about them?

1           **MR BAXTER:** So the proponent would suggest  
2 a concept -- OK, that's essentially what an  
3 unsolicited proposal --

**15:50**

4           **MR BASOMBRIO:** I'm sorry. Maybe I didn't  
5 say it clearly enough.

6           As opposed to the USP itself, if company A  
7 came to a country and said here's our USP, should  
8 that USP or that approach contain information about  
9 company A for the government to consider, and if so  
10 what kind of information should be included? What  
11 should be disclosed by the proponent about  
12 themselves to a government?

13           **MR BAXTER:** That would be whatever the  
14 government asked. I don't think it's a voluntary  
15 approach that they would say here's information.  
16 They would come -- I mean, basically the unsolicited  
17 proposal as it's presented to the government is a  
18 concept or an idea. If the government is interested  
19 in this concept or idea, then there would be a  
20 process where the government, I feel, should  
21 exercise its caution and do due diligence,  
22 et cetera, on the company that's proposing or ask  
23 specific questions, but I don't believe that a  
24 company would automatically give its whole pedigree  
25 in an unsolicited proposal. They would be focusing

1 on their idea.

2 **MR BASOMBRIO:** Under international  
3 practice, would you agree that the company would  
4 have an obligation of transparency towards the  
5 government?

6 **MR BAXTER:** If it was so required and if  
7 it was asked specifically. Transparency on what  
8 would be a very important question for the proponent  
9 to understand, and it would be important for the  
10 proponent to ask those specific -- I mean not the  
11 proponent, sorry, for the government to ask those  
12 specific questions.

13 **MR BASOMBRIO:** And, again, from an  
14 international perspective, during these initial  
15 conversations between a proponent and the  
16 government, do you believe that under international  
17 practice there are obligations of good faith going  
18 back and forth between the two?

19 **MR BAXTER:** Yes.

20 **MR BASOMBRIO:** Now, in paragraph 105, you  
21 mention -- well, you reiterated a second ago that  
22 there are only a few countries that prohibit USPs,  
23 and one of them is India.

24 As you know, Patel is from India, so I'm  
25 curious to ask you, do you know why it is that India

1 prohibits USPs?

2 **MR BAXTER:** I don't. I'm not an expert on  
3 India.

4 **MR BASOMBRIO:** Let's turn to paragraph  
5 107, please. You say: "As stated above, the  
6 project proposed by a private entity could be  
7 awarded either as a sole source project (direct  
8 award) (this typically occurs if the project is of  
9 national interest or is innovative enough) or  
10 through a public tender process".

11 Do you see that?

12 **MR BAXTER:** Yes.

13 **MR BASOMBRIO:** A project that's awarded  
14 through a public tender process can also be a  
15 project of national interest, right?

16 **MR BAXTER:** That's correct.

17 **MR BASOMBRIO:** So it's not exclusive to a  
18 direct award project?

19 **MR BAXTER:** Can you restate that question?

20 **MR BASOMBRIO:** I had asked you whether in  
21 this sentence -- let me say it another way. In this  
22 sentence you seem to be saying that a direct award  
23 typically occurs if the project is of national  
24 interest, and my inquiry to you is isn't that also  
25 true of a public tender process? It can also be a



1 project typically of national interest.

2           **MR BAXTER:** It could, but I think we  
3 should refer to paragraph 106, the previous one,  
4 where we are looking at a situation that the USPs  
5 can offer benefits to governments, as I state, and  
6 it's also an opportunistic scenario for introducing  
7 new ideas, so in the sense of unsolicited proposals  
8 as well as these, you know, direct awards versus  
9 competitive procurements, it depends on the  
10 circumstance, the situation.

11           And one thing I also say is that  
12 governments usually welcome the input of innovative  
13 and ambitious private proponents, which was  
14 definitely the case in this because of the  
15 discussions that took place with the Government of  
16 Mozambique. They seemed intrigued and interested in  
17 pursuing an unsolicited proposal because -- not an  
18 unsol -- an award because of the ideas and  
19 opportunities that the unsolicited proposal  
20 highlighted towards the Government of Mozambique.

21           **MR BASOMBRIO:** The national interest and  
22 innovation nature of a USP could be run through a  
23 public tender anyway. It doesn't marry you to a  
24 direct award.

25           **MR BAXTER:** So typically governments

1 develop or have a sense of their national  
2 priorities. It could be their sustainable  
3 development goals, et cetera, so, yes. I don't  
4 think any government would ever procure or attempt  
5 to procure a project that was not in their interest.  
6 It would make no sense. But there are exceptions  
7 where, as I said in paragraph 106, that a private  
8 sector procurement organisation could come forward  
9 with an idea that is also in the interest of the  
10 government and would receive contemplation, so both  
11 apply, but they're not mutually -- or they don't  
12 exclude each other.

13 **MR BASOMBRIO:** And even when a private  
14 entity comes forward as the proponent, you still can  
15 go down the tender road.

16 **MR BAXTER:** If a decision is made and that  
17 is shared with the private proponent, then I would  
18 say yes because it would give the proponent a better  
19 understanding of which path would be followed. But  
20 not -- so typically what occurred, and this occurred  
21 in this case, is the unsolicited proposal was  
22 presented, the ideas were shared, there was enough  
23 interest from the government to consider it, and the  
24 memorandum of intent or MOI was signed, which set  
25 down the ground rules on how they were going to

1 approach this implementation of the USP, and at no  
2 case, as I read in the memorandum, did it ever state  
3 that a competitive tender would be considered.

4 **MR BASOMBRIO:** And, again, just to remind  
5 you, so we can move along faster, we'll get to the  
6 MOI and the facts of this case, I'm just getting  
7 your general understanding because you're presenting  
8 yourself as an international PPP expert.

9 **MR BAXTER:** Yes.

10 **PRESIDENT:** Can I -- I'm looking at the --  
11 we have been going on for an hour with the expert.  
12 Do you have very much longer to go? You remember we  
13 promised that we would see three experts tonight.

14 **MR BASOMBRIO:** Yes. I can try half an  
15 hour. But I'll do my best.

16 **PRESIDENT:** Please, yes, because I think  
17 it is excellent that we have Mr Baxter here because  
18 he can give us, let's say, the overall picture of  
19 PPP in the world and how PPP is done in the world.  
20 Whether on this specific case, on his specific  
21 analysis of these documents, I think we have gone in  
22 quite a detail through the documents of this case --

23 **MR BASOMBRIO:** Right.

24 **PRESIDENT:** -- and I wonder if Mr Baxter  
25 really can help us there.

1           **MR BASOMBRIO:** Sorry, I didn't hear the  
2 last part. Oh, that's correct.

3           **PRESIDENT:** You see, I would not I would  
4 discourage from you starting a discussion of the  
5 specific documents of this case --

6           **MR BASOMBRIO:** Oh, no, no.

7           **PRESIDENT:** -- with Mr Baxter. Mr Baxter  
8 is very helpful, so it must be a wonderful  
9 profession being an expert on PPP and trying to  
10 develop and to bring development to developing  
11 countries, but he is an expert on how you structure  
12 these deals worldwide, and I think we should accept  
13 his experience on those aspects.

14           **MR BASOMBRIO:** Right. I agree --

15           **PRESIDENT:** You are doing very well  
16 because you are on a very high level and it's very  
17 interesting, but I just discourage you from going  
18 down into discussing the documents with Mr Baxter.

19           **MR BASOMBRIO:** Mr President, you and I are  
20 thinking exactly the same way. That's why I'm  
21 trying to keep him to his understanding at the  
22 30,000-foot level.

23           **PRESIDENT:** That's excellent,  
24 Mr Basombrio. Thank you.

25           **MR BASOMBRIO:** And I'm going to try to

1 keep it to an hour and a half, which was my plan.

2 **PRESIDENT:** If you can keep it a bit  
3 shorter.

4 **MR BASOMBRIO:** That would be great, too,  
5 yes.

6 Now, in paragraph 108 -- and you mentioned  
7 this before -- you suggest that the decision as to  
8 whether the USP should be treated as a direct award  
9 or through a tender process should be made -- and  
10 this is your wording "upfront".

11 When is "upfront" from an international  
12 perspective?

13 **MR BAXTER:** So typically what would occur  
14 is a proponent would approach a government with an  
15 idea contained within an unsolicited proposal. The  
16 government would then contemplate whether they wish  
17 to proceed with the idea, and this is a chance where  
18 they could right from the beginning say no, or they  
19 could say yes. In this case they said yes, they  
20 were interested, because this is why this proceeded,  
21 and from that point onwards that's upfront to me.

22 **MR BASOMBRIO:** In your opinion, that  
23 decision should be made by the government before a  
24 prefeasibility study is provided?

25 **MR BAXTER:** No. The decision should be

1 made on how they're going to proceed. The  
2 prefeasibility study is not a condition for  
3 considering an unsolicited proposal.

4 **MR BASOMBRIO:** So you are saying that the  
5 decision whether to proceed via tender or via direct  
6 award should be made before the PFS is prepared?

7 **MR BAXTER:** Not quite. What I'm saying is  
8 before any conditions are established on what should  
9 be done, it's important that both parties understand  
10 clearly how the procurement is going to proceed,  
11 whether it would be a direct procurement or a  
12 competitive procurement. That's what I'm saying.

13 Nothing about the details. That would be  
14 negotiated in an agreement such as an MIO, which was  
15 worked on, with the conditions where, the conditions  
16 on how to proceed were established.

17 **MR BASOMBRIO:** Is it your position that  
18 under international practice, the decision whether  
19 to go through a tender process or to go through a  
20 direct award should have been made by the Government  
21 of Mozambique before it executed the MOI?

22 **MR BAXTER:** Its intent of how it was going  
23 to proceed should have been shared with PEL.

24 **MR BASOMBRIO:** Its intent or its decision?  
25 Picking one of the two or just saying there might be

1 two ways?

2 **MR BAXTER:** No, I don't think they were  
3 saying there were two ways. The discussions were on  
4 how it was going to approach. Negotiations took  
5 place on what would be in the MOI, and nowhere in  
6 the MOI does it ever state that there would be a  
7 consideration of a competitive tender process.

8 I've read the points numerous times, and  
9 it doesn't say that, so if the government didn't do  
10 it, they can't introduce that intent afterwards.

11 **MR BASOMBRIO:** That's not what I'm trying  
12 to ask. You say in your report upfront the  
13 government has to make a decision whether to go with  
14 a tender or whether to go with a direct award. I'm  
15 trying to identify what's the point in time --

16 **MR BAXTER:** I think what I say is that  
17 it's important that the government upfront declare  
18 what process and what's going to happen. I don't  
19 specifically say on what tender process is going to  
20 take place. There's a difference. You are setting  
21 up the conditions for a discussion, and what I would  
22 say is what happens upfront is setting the -- let's  
23 call it the ground rules or the practice or the  
24 process that's going to take place. That would also  
25 be included in a process of negotiations which then

1 is -- and, as I see it, the MOI being the result of  
2 that.

3 **MR BASOMBRIO:** But under the international  
4 practice that you have experienced, the government  
5 does not have to indicate upfront before signing an  
6 MOI which route it will ultimately take? Tender or  
7 direct award?

8 **MR BAXTER:** I disagree. I would advise  
9 every government to make it clear what tender route  
10 it was going to follow.

11 **MR BASOMBRIO:** OK.

12 **MR BAXTER:** Because that influences the  
13 decision of the proponent of how it's going to  
14 proceed.

15 **MR BASOMBRIO:** So that's exactly what  
16 I was getting at.

17 So, in your opinion, that decision has to  
18 be made by the government before it ever sees a PFS?

19 **MR BAXTER:** No.

20 **MR BASOMBRIO:** Here in the MOI the PFS is  
21 not provided until later.

22 **MR BAXTER:** In the MOI it states that when  
23 the PFS was provided, if it was approved, then they  
24 would move forward. It doesn't say that we will  
25 make the decision on what route we're going to



1 follow after a PFS is completed.

2 **MR BASOMBRIO:** So the MOI, as you  
3 understand it from an international perspective,  
4 it's a conditional document?

5 **MR BAXTER:** No. To me, it's a document  
6 that both parties signed and agreed to. It's more  
7 than conditional. It has the stamp of the  
8 Government of Mozambique on it; it indicates its  
9 intent to follow the content of the MOI; not to  
10 decide later on what would happen.

11 **MR BASOMBRIO:** The MOI which you read does  
12 not impose a condition that the government must  
13 approve the PFS before anything else happens?

14 **MR BAXTER:** It does.

15 **MR BASOMBRIO:** That doesn't make the  
16 document --

17 **MR BAXTER:** That doesn't mean that --

18 **MR BASOMBRIO:** Excuse me. Let me just  
19 finish my question.

20 That doesn't mean that the document is  
21 conditional in that sense, that it has conditions  
22 preceding to performance obligations?

23 **MR BAXTER:** I can only comment on the face  
24 value. I'm not a legal expert, so I can't answer  
25 your question.

1           **MR BASOMBRIO:** OK. Did Patel instruct you  
2 that there were other versions of the MOI?

3           **MR BAXTER:** I was instructed by counsel to  
4 refer to the documents that were provided to me, and  
5 that's the one I looked at. I didn't look at any of  
6 the other translations in Portuguese, or et cetera,  
7 because I don't speak Portuguese and I don't  
8 understand Portuguese and it wouldn't have helped.

9           So the document that I refer to was the  
10 one that was provided to me by counsel.

11           **MR BASOMBRIO:** Were you told by counsel  
12 that there are two different versions of the English  
13 translation of the MOI?

14           **MR BAXTER:** It was mentioned, but I did  
15 not --

16           **MR BASOMBRIO:** Did you ask to see the  
17 other English version of the MOI?

18           **MR BAXTER:** No, because I was instructed  
19 by counsel to look at the document that I looked at.

20           **MR BASOMBRIO:** As an international expert,  
21 if you were approached by a client and you were told  
22 that there are two different English versions of an  
23 MOI, would you ask them to review both?

24           **MR BAXTER:** That was not my brief.

25           **MR BASOMBRIO:** I'm sorry?

1           **MR BAXTER:** That was not my brief or my  
2 instructions.

3           **MR BASOMBRIO:** No, I'm asking -- I'm not  
4 talking about this case.

5           I'm talking if a company came to you and  
6 asked you to analyse the MOI that they've signed  
7 with a government and they tell you there are two  
8 English versions, would you ask to review both of  
9 them before rendering an opinion?

10          **MR BAXTER:** I'm unable to answer that  
11 question. That was not my instruction.

12          **MR BASOMBRIO:** I'm not --

13          **PRESIDENT:** I don't think that this --

14          **MR BASOMBRIO:** I'm sorry.

15          **PRESIDENT:** I do not think this line of  
16 questioning will lead us very much further. He says  
17 he was instructed to look at this document.

18                 Very frankly, I don't think ...

19                 The importance of his opinion is in the  
20 practice of PPP more than in the documentation which  
21 was used in this case.

22          **MR BASOMBRIO:** Right. And, Mr President,  
23 that's what I'm trying to ask him. In the practice  
24 of PPP in the world, in his experience, if a company  
25 came to him and said there are two different

1 versions of the MOI in English and they asked him to  
2 evaluate the MOI, would he review both of them.

3 **PRESIDENT:** Let's ask him different. Is  
4 it the first time in your experience that there are  
5 two different documents, two different documents of  
6 the PPP MOI? That there are two documents which  
7 differ and which the parties discuss which one of  
8 them is the authentic one?

9 **MR BAXTER:** I would say in this case it is  
10 my first experience because I have not been  
11 confronted with this situation before because I've  
12 always been provided with a document that was signed  
13 and stamped.

14 I don't know the history or the processes  
15 behind it, and that's why I say I can only refer to  
16 the document that I was provided with.

17 **MR BASOMBRIO:** And in your normal work --  
18 I'm not talking about this case again, I'm talking  
19 your normal experience -- if you're told by a client  
20 that a document was signed in a foreign language,  
21 would you want to see that document and ask for a  
22 translation if you didn't understand?

23 **MR BAXTER:** This would never happen to me  
24 because I would not be given a contract or a  
25 document. I'm not a legal expert. I am a policy

1 and practice person, not an interpreter of  
2 documents.

3 **MR BASOMBRIO:** But isn't that what you're  
4 doing here? In your presentation you interpreted  
5 this MOI.

6 **MR BAXTER:** No, I'm interpreting the  
7 document that I was provided with. I was not  
8 provided with Portuguese. It would have been of no  
9 use to me. I was not provided with contradictory  
10 documents; I was provided with one document.

11 **MR BASOMBRIO:** In paragraph 133 of your  
12 opinion you indicate --

13 **MR BAXTER:** Sorry, which paragraph?

14 **MR BASOMBRIO:** 133, please.

15 You indicate that a proponent will have an  
16 advantage over other bidders if it moves on to a  
17 public tender and this would typically be seen as a  
18 reward for its efforts.

19 You understand that the Government of  
20 Mozambique in this claim, in this case, indicates  
21 that the reward, to use your words, that was  
22 provided was a 15 per cent scoring advantage? This  
23 is my specific question. Would a scoring advantage  
24 be one way to provide a so-called reward to the  
25 proponent if it moves on to a tender?

1           **MR BAXTER:** That's not what I'm referring  
2 to. What I'm referring to is the knowledge that  
3 they would have gained during preparing an  
4 unsolicited proposal, and supporting documents would  
5 be their reward because they would have insights.  
6 I'm not referring to any conditional percentage  
7 reward. I am just referring to in a general global  
8 practice, that knowledge that they had which other  
9 parties didn't have because of what they had done,  
10 is a reward. Or you could use the word if -- and  
11 I know we can't always change what we say -- an  
12 advantage.

13           **MR BASOMBRIO:** And that's an advantage  
14 that the proponent of the unsolicited proposal would  
15 carry into the tender process versus the other  
16 bidders?

17           **MR BAXTER:** Yes.

18           **MR BASOMBRIO:** OK.

19           **MR BAXTER:** But it's not related to the 15  
20 per cent whatsoever.

21           **MR BASOMBRIO:** Can a government, in its  
22 discretion, award a 15 per cent, as in this case,  
23 scoring advantage to an unsolicited proponent as  
24 part of a tender process to provide it an advantage  
25 over the other bidders?

1           **MR BAXTER:** So from a global perspective,  
2 it wouldn't be 15 per cent; it would be based on  
3 whatever the government decided its percentage was.

4           But from what I understand -- and this is  
5 fleetingly because I was not asked to look at the  
6 Mozambican law -- I do understand that they  
7 allocated, for whatever reason, a 15 per cent  
8 advantage.

9           However, that is disputed as well because  
10 it was difficult to determine or ascertain whether  
11 it was allocated or how it was allocated.

12           **MR BASOMBRIO:** But the concept of awarding  
13 that scoring advantage would be consistent with  
14 international practice?

15           **MR BAXTER:** The concept but not the  
16 percentage.

17           **MR BASOMBRIO:** In paragraph 135, you refer  
18 to "competitive dialogue" and "Swiss Challenge" --

19           **PRESIDENT:** You said the concept but not  
20 the percentage, and the question was international  
21 practice, was the reference.

22           Would, in your international practice, the  
23 percentage be higher or lower?

24           **MR BAXTER:** In many instances much lower.

25           **PRESIDENT:** Lower?

1           **MR BAXTER:** Yes. It's not uncommon for it    **16:14**  
2 to be around 4, 5 per cent.

3           **PRESIDENT:** Thank you.

4           **MR BAXTER:** I think it's important, just  
5 if I could state, that a 15 per cent incentive is  
6 only an incentive if that is declared upfront, not  
7 afterwards.

8           **MR BASOMBRIO:** Let me go back to -- I only  
9 have a few more questions for you.

10                   In paragraph 135 you refer to the Swiss  
11 Challenge.

12           **MR BAXTER:** Yes.

13           **MR BASOMBRIO:** That is not part of  
14 Mozambican law, is it?

15           **MR BAXTER:** I understand that there have  
16 been references made to the Swiss Challenge, and if  
17 I remember in Mr Ehrhardt's comment he made that as  
18 well, but one thing that is important is that we  
19 need to look at the last sentence of the Swiss  
20 Challenge comment that I made on paragraph 135, that  
21 "In this case, the bidder must match the bid of the  
22 highest proposal tendered".

23                   I do not believe that PEL was given this  
24 opportunity.

25           **MR BASOMBRIO:** Do you have an



1 understanding whether that's a requirement under  
2 Mozambican law?

3 **MR BAXTER:** I don't, and I can't opine  
4 upon it because I'm not an expert.

5 **MR BASOMBRIO:** You also don't have an  
6 opinion whether a competitive dialogue is a  
7 requirement under Mozambican law, correct?

8 **MR BAXTER:** As I said, I understood that  
9 there were opportunities for this, but I would have  
10 to refer that to legal counsel. That's not my area  
11 of expertise.

12 **MR BASOMBRIO:** You had mentioned that you  
13 believe that most of the USP tenders in the world  
14 are dealt in one way or the other. Let me point  
15 your attention to paragraph 113.

16 **MR BAXTER:** 113?

17 **MR BASOMBRIO:** Yes, please. You indicate  
18 that "The World Bank's 2020 Benchmarking  
19 Infrastructure Development Report reveals that 78  
20 per cent of the economies that use USPs require them  
21 to be procured using a competitive mechanism (public  
22 tender)".

23 Do you see that?

24 **MR BAXTER:** Yes.

25 **MR BASOMBRIO:** Do you have an

1 understanding of why it is that there's a heavy  
2 favour towards the public tender as opposed to a  
3 direct award?

4 **MR BAXTER:** Because it's in the public  
5 interest.

6 **MR BASOMBRIO:** And why is it in the public  
7 interest?

8 **MR BAXTER:** Because it's important that  
9 the government understand what it is getting and  
10 what is being proposed. And, however, that cannot  
11 be taken in isolation to the other option that there  
12 are -- and if you take 22 per cent, I can't tell you  
13 the statistics but there are hundreds, if not  
14 thousands, of unsolicited proposals that are  
15 submitted annually, and if you just take 21 per cent  
16 -- well, let's say there's thousands of PPPs that  
17 are procured annually, and so 22 per cent of that  
18 would be a substantial amount, so this is an option  
19 that is considered for whatever reason. And, again,  
20 from what I understand from the information that was  
21 shared with me by counsel is that this was an option  
22 under certain circumstances of national interest, so  
23 it's not unique, and it's not unusual to Mozambique.

24 I also understand that there are also  
25 other projects that subsequently have been awarded

1 in Mozambique through unsolicited proposals.

2 **MR BASOMBRIO:** I was trying to get your  
3 understanding as to why there's such a heavy  
4 emphasis in the world in favour of public tenders as  
5 shown by your statement here, that 78 per cent tend  
6 to go the public tender route.

7 So your answer before you got into the  
8 other issues was because it's important that the  
9 government understand what it is getting and what is  
10 being proposed.

11 Could you elaborate how a public tender  
12 would further those goals as opposed to a direct  
13 award?

14 **MR BAXTER:** So typically a public tender  
15 is an initiative of the government, so we shouldn't  
16 confuse that, OK?

17 An unsolicited proposal is an innovative  
18 idea from the private sector generally based on  
19 something the government isn't contemplating or  
20 thinking at that time, but the government then has  
21 the discretion to consider this process and they  
22 have two options, either through a sole source or  
23 through a competitive tender. Both would be  
24 considered public tenders. You don't just award a  
25 contract to a government and say it's done.

1           So, yes, there are various reasons, but  
2 I cannot read the mind of the Government of  
3 Mozambique. I wasn't there. All I know is that a  
4 provision was made that would allow it under  
5 circumstances.

6           I think from the discussions taken in  
7 these previous days that this area has been covered  
8 but it's not my area of expertise so I can't answer  
9 that question.

10           **MR BASOMBRIO:** This will be one of my  
11 final questions, but apparently I didn't ask my  
12 question clearly enough.

13           My question was not what Mozambique did,  
14 not what Mozambique law requires, you've already  
15 told us that's not your field. Again, I'm trying to  
16 understand from an international expert perspective,  
17 why is it that a public tender is preferable to a  
18 direct award as demonstrated by this World Bank  
19 benchmark statistics?

20           **MR BAXTER:** I think I answered that  
21 question previously when I said it was in the public  
22 interest, but there are exceptions, and this is why  
23 unsolicited proposals are also considered.

24           **MR BASOMBRIO:** OK. Those are all my  
25 questions. Thank you.

1           **PRESIDENT:** Thank you, Mr Basombrio.

2           Ms Vasani, do you have any follow-up  
3 questions?

4           **MS VASANI:** No questions for redirect.  
5 Thank you, Mr President.

6           **PRESIDENT:** Very good. Let me double  
7 check with my esteemed colleagues. No?

8           No, I don't think we have. Mr Baxter,  
9 thank you very much for introducing us to the  
10 concept of PPP and its impact on development. It's  
11 always interesting to know all these instruments  
12 which help to fight poverty. We thank you for your  
13 effort and for having illustrated to us, and, with  
14 this, we finalise your deposition.

15           **MR BAXTER:** Thank you for the opportunity,  
16 and now I can say I have been an expert witness.  
17 That's something new for me! Thank you.

18           **PRESIDENT:** So it's now 4.22. Let's come  
19 back in a quarter of an hour for 4.35? What do you  
20 prefer 4.35 or 4.40? 4.35 pm.

21           (Short break from 4.22 pm to 4.37 pm)

22                           ANDREW COMER  
23                           (via videolink)

24           **PRESIDENT:** Let us resume the hearing and  
25 do so in order to examine Mr Andrew Comer.

1 Mr Comer, are you there?

2 **MR COMER:** I am. Thank you.

3 **PRESIDENT:** Where are you? Is it good  
4 morning? Good afternoon?

5 **MR COMER:** It's good evening. I'm in  
6 London, and my apologies that I couldn't make it  
7 across to see the Tribunal in person.

8 **PRESIDENT:** Very good. You know you are  
9 here as an expert and the first thing we have to do  
10 is take your declaration as a witness.

11 Do you solemnly declare upon your honour  
12 and conscience that you shall speak the truth, the  
13 whole truth and nothing but the truth, and that your  
14 statement will be in accordance with your sincere  
15 belief?

16 **MR COMER:** I do.

17 **PRESIDENT:** Thank you. Thank you very  
18 much.

19 Let me give Mr Brown, I think -- or yes,  
20 it is Mr Brown who will lead and introduce.

21 **MR BROWN:** Actually it's the other  
22 direction.

23 **PRESIDENT:** Ms Reimschussel?

24 **MS REIMSCHUSSEL:** Thank you, Mr President.

25 Examination by Claimant

1           **MS REIMSCHUSSEL:** Hello, Mr Comer. Do you     **16:39**  
2 have before you a copy of your expert report,  
3 appendix or annexe C to the expert report of David  
4 Dearman?

5           **MR COMER:** I do.

6           **MS REIMSCHUSSEL:** Can you look at the last  
7 page of that report and confirm whether that's  
8 your --

9           **MR COMER:** Sure. Yes, I can confirm it  
10 is.

11          **MS REIMSCHUSSEL:** That is your signature?

12          **MR COMER:** It is.

13          **MS REIMSCHUSSEL:** And, Mr Comer,  
14 I understand that during the course of your direct  
15 presentation to the Tribunal, you will make a  
16 correction to your report, is that correct?

17          **MR COMER:** That's correct, yes.

18          **MS REIMSCHUSSEL:** All right. No further  
19 questions.

20          **PRESIDENT:** Thank you. Now you have the  
21 floor, Mr Comer.  
22 Presentation

23          **MR COMER:** Thank you very much indeed. I  
24 have a representative of CMS in the room with me who  
25 is going to be just turning the pages of my

1 presentation.

2 First of all, I would like to say thank  
3 you to the members of the Tribunal for allowing me  
4 this direct presentation.

5 My name is Andrew Comer. I'm a civil  
6 engineer and have 45 years plus of experience.

7 I won't go through my academic  
8 qualifications or professional qualifications. They  
9 are included in my statement. I'm more than happy  
10 to answer questions on them if you have them, so to  
11 move on, I also include in my statement details of  
12 my employment history. I won't go through those.

13 I would like to dwell just briefly, if  
14 I may, upon some of the projects and geographical  
15 experience I have gained over those 45 years.

16 A lot of my recent work has been in major  
17 urban regeneration development programmes in the UK,  
18 Malaysia, Turkey, Middle East but predominantly I'm  
19 a civil engineer --

20 **MS VASANI:** Mr Comer, sorry, but we're  
21 having some technical difficulties.

22 **PRESIDENT:** You are coming through  
23 garbled.

24 **MS REIMSCHUSSEL:** Our end. The sound is a  
25 little loud here. I think they're going to turn



1 down the volume.

2 **MR COMER:** I can try turning it down this  
3 end as well. (Pause)

4 **PRESIDENT:** Please continue.

5 **MR COMER:** Thank you very much. Can you  
6 hear me OK now? Thank you.

7 So in terms of major projects, as I say,  
8 I've been working predominantly over the last couple  
9 of decades on major urban regeneration development  
10 programmes, but I am first and foremost a civil  
11 engineer and my background is in planning and design  
12 of infrastructure systems.

13 From a geographic experience I've worked  
14 in the UK extensively, in Europe extensively, North  
15 America, Asia, Middle East and in Africa in five  
16 countries, Libya, Tanzania, Kenya, Egypt and  
17 Nigeria. Just for the record, I have not worked in  
18 Mozambique.

19 In terms of relevant experience, my broad  
20 background is in general transportation. I have  
21 been involved in a number of rail projects,  
22 predominantly in the UK and Europe and the Middle  
23 East, and in a number of port projects in the UK,  
24 Europe, Middle East and in Asia, and in addition to  
25 that, a number of maritime projects including a

1 rather large canal in Turkey and probably one of the  
2 world's largest waterfront developments in Kuwait.

3 Next slide, please.

4 My statement was prepared in response to  
5 two questions and I've set those on the slide here.  
6 Is it an accepted industry practice for civil  
7 engineering consultants to be remunerated on a  
8 percentage of the total project cost? And, if so,  
9 what percentage of the total cost is usual and how  
10 is that total cost calculated?

11 And what is the purpose of the Association  
12 for the Advancement of Cost Engineering (AACE)  
13 International Recommended Practice 98R-18? Where  
14 would the PFS fall within that classification  
15 system?

16 So in response to the questions posed,  
17 I've reviewed a number of key documents provided by  
18 legal counsel to Patel Engineering Limited, who  
19 I hope you won't mind me referring to as PEL in the  
20 future; an assessment in particular of the PFS study  
21 prepared by PEL; I've considered the approach taken  
22 for the PFS with respect to the AACE IRP document  
23 I've just referred to, and with reference to  
24 Guidelines for Services for Estimating Fees, which  
25 was produced and prepared on behalf of the

1 Engineering Council of South Africa, which I'll  
2 refer to in the future as RSA Guidelines. Also  
3 obviously on using an application of key principles  
4 based on my 45 years of experience and knowledge.

5 In response to Mr Dysert's rebuttal  
6 report, I accept his assertion that, and I quote,  
7 "The overall purpose of the recommended practice is  
8 to provide the road and rail transportation  
9 infrastructure industries with a project definition  
10 deliverable maturity matrix".

11 With this insight, I would wish to change  
12 clause 1.3.2.2 in my statement as mentioned earlier.  
13 I'll read it out. This will be my change that I've  
14 suggested. "The overall purpose of the AACE  
15 recommended practice document is to provide the road  
16 and rail transportation infrastructure industries  
17 with a project definition deliverable maturity  
18 matrix. The document is based upon, A, the key  
19 principle that the overall risk to any project  
20 reduces as more information, datasets and assessment  
21 work become available, and, B, a stochastic analysis  
22 of past projects to establish expected accuracy  
23 range. The document uses these to provide guidance  
24 on the likely level of accuracy of budgeted  
25 construction costs based upon the level of data

1 gathered, knowledge gained, and design work  
2 undertaken for projects of a transportation nature.  
3 In my opinion the PFS would fall between Class 4 and  
4 Class 5 of the AACE classification system".

5           So whilst I conceived the modifications of  
6 those points, I think I just really want to  
7 highlight some of the key perspectives from my  
8 position in terms of my original statement.

9           The document itself -- this is the AACE  
10 document number 98, and I'm quoting here -- says  
11 "... guidelines for applying the principles of  
12 estimate classification specifically to project  
13 estimates for engineering ..." and it also states  
14 "... communications among all the stakeholders  
15 involved with preparing, evaluating, and using  
16 project cost estimates..."

17           So guidelines and communication.

18           The document is based on the key premise  
19 that the more data gathered and assessed on a  
20 project, the less level of risk there is and the  
21 greater level of confidence in outcomes. This is a  
22 general principle in any major engineering  
23 programme.

24           The process of gathering data, making  
25 assessments and test to go confirm assessments,

1 et cetera, continues through the life of the  
2 planning and design of a project in order to  
3 establish the confidence to build. This is an  
4 ongoing process.

5 The "gateways" or classes which are  
6 described in the documents are based upon, and  
7 I quote again, "... characteristics (which) are  
8 typical but may vary depending on the  
9 circumstances".

10 The range of accuracy of construction cost  
11 estimates identified will have been based upon  
12 research. So given the above, I do not wish to  
13 change my opinion regarding where the PFS document  
14 might be deemed to sit.

15 Next slide, please.

16 So a key component of the AACE document in  
17 question is the diagram opposite. The decay lines  
18 (each identified on this diagram as a continuum on  
19 the graph) highlights the key principle that I just  
20 referred to, that increasing the level of scope  
21 definition, that is better knowledge and data  
22 points, reduces the project risk and improves the  
23 accuracy of cost estimates. That's what it shows.  
24 The estimate classes cover a wide range of scope  
25 definition and overlap significantly.

1           In the documents the description of  
2 Class 5 states "Class 5 estimates, due to the  
3 requirements of end use, may be prepared within a  
4 very limited amount of time and with very little  
5 effort expended -- sometimes requiring less than an  
6 hour to prepare".

7           This is a quote from the document on  
8 transportation projects. It also includes  
9 alternative names for Class 5 estimates including  
10 "seat of the pants, rough order of magnitude,  
11 guesstimate, rule of thumb". Class 4 estimates, on  
12 the other hand, are typically used for, and I quote  
13 again, "project screening, determination of  
14 feasibility, concept evaluation".

15           Go to the next slide.

16           So in terms of the general content of the  
17 PFS, the pre-feasibility, PFS as it has been called,  
18 is not a defined term in the industry. A number of  
19 alternative titles could have been used for this  
20 document. A pre study or a feasibility study, for  
21 instance. It just happens to be the name agreed  
22 between PEL and the Mozambique government.

23           The document covers nearly all of the  
24 scope 5 items that the AACE document recommends and  
25 significant scope items recommended for Class 4. In

1 AACE guidance document number 01, which is a  
2 separate document that provides additional guidance,  
3 it states that a class is intended as a threshold,  
4 but experience suggests that risk continues to  
5 reduce as more knowledge is accrued. In other  
6 words, as I said earlier, the more knowledge you  
7 gain, the more the risks are reduced on the projects  
8 and the closer one gets to a more accurate estimate  
9 of costs and of outcomes.

10           The areas covered by the PFS address the  
11 riskier aspects of the programme of the planned  
12 works. The route identification, ground conditions,  
13 bathymetric and topographical considerations,  
14 physical features to cross or avoid, the general  
15 basis of design for the key infrastructure, and so  
16 on. They are significant challenges that need to  
17 be, and risks that need to be identified and views  
18 taken.

19           Those areas of Class 4 that are included,  
20 identified as potentially to be included in Class 4  
21 service, those not covered tend to be either of a  
22 lesser risk in terms of the impact upon cost  
23 variance, processes/procedures, costs of equipment,  
24 scheduling, logistics and so on, or areas which  
25 would not be promoted until an intent to commit to

1 the project had been agreed. So issues around  
2 intrusive ground investigations or detailed surveys  
3 which take a long time to organise and are very  
4 expensive, especially on very large scale projects.

5 Hence, in my opinion -- this is my  
6 opinion -- the PFS would fall somewhere between  
7 Class 5 and Class 4 of the AACE classification  
8 system.

9 Next slide.

10 I now move on to the RSA Guidelines which  
11 discuss remuneration. There are a number of  
12 engineering and other services fee guidelines for  
13 construction projects used around the world. They  
14 provide guidance and improved communications between  
15 designs and clients. Again, going back to the  
16 communications with clients.

17 In a search of the internet for guidelines  
18 for Mozambique I was able to find none. However,  
19 the RSA guidelines, South African guidelines did  
20 appear in the search. They are very similar to the  
21 other guidelines I have seen, and geographically  
22 close to Mozambique.

23 There are other guidance documents in  
24 existence that I could have used. The Royal  
25 Institute of British Architects produces guidance,



1 the territory of British Columbia in Canada also  
2 produces a very similar document to the RSA  
3 guidelines. The key engineering institutions in the  
4 UK also produced similar guidelines until the late  
5 1990s.

6 From experience my view on the likely  
7 level of fees, when I was first approached about  
8 this project and discussed it, would be that the  
9 design of the rail and port project would be  
10 somewhere between 4 and 7 per cent of the overall  
11 construction costs.

12 I consider the work undertaken by PEL for  
13 the PFS fulfils the requirements within the RSA  
14 Guidelines of the initiating, planning, studies,  
15 investigations and assessments and stage 1 inception  
16 services, and in areas it covers scope and  
17 deliverables within stage 2, concept and viability,  
18 including concept designs, schedule of required  
19 surveys, tests and other investigations, and related  
20 reports, preliminary designs and cost estimates.

21 In common with other guidelines, the RSA  
22 document provides guidance on the percentage of  
23 overall effort required for each of those six stages  
24 that are identified in the document. Completion of  
25 the inception stage -- that's stage 1 -- represents

1 around 5 per cent of the overall design fee and, in  
2 my opinion, represents a conservative estimate of  
3 the design work undertaken for the PFS by PEL.

4           The graph on the right-hand side of this  
5 page is an extract from those RSA Guidelines. It's  
6 an approach that illustrates the notion of  
7 efficiency of scale. As the scale and cost of the  
8 project increases, so the fees for a basic level of  
9 service reduces, in this case to 4 per cent. And  
10 that's a common figure that one finds in  
11 construction.

12           However, additional fees are due and  
13 identified within the document for additional  
14 services, for instance, being the design lead,  
15 obtaining approvals, procurement of surveys and so  
16 on. Fees may also increase for specialist areas of  
17 engineering design and for projects that are complex  
18 or difficult. Given the scale of the two projects,  
19 and there are two in this programme, rail and port,  
20 and the additional services that PEL would need to  
21 allow for, a conservative fee level estimate would  
22 be 4 per cent of base fees and 1 per cent additional  
23 services.

24           A few other points that I believe are  
25 pertinent on fees in my statement, there are many

1 ways for design consultants to be remunerated for  
2 their fees, and I have identified those and stated  
3 them. They are normally negotiated with the client  
4 but they tend to depend upon information available,  
5 clarity of brief and scope of works to be  
6 undertaken, time period over which the work will  
7 take place, and the complexity of the projects.

8 For a programme of works such as that  
9 being promoted by PEL and the Government of  
10 Mozambique, the normal way of assessing the cost of  
11 design of the works during the early stages will be  
12 as a percentage of the overall construction costs.  
13 There's very little else you can do to get to that  
14 sort of estimate of the fees.

15 In their PFS PEL have based their forecast  
16 design fees for the programme of works on 5 per cent  
17 of construction costs at \$107 million. This is in  
18 line with both the RSA Guidelines and my initial  
19 view of the likely level of design fee. The PFS  
20 would itself have constituted in the order of 5  
21 per cent of the overall fee.

22 Sorry, that diagram at the bottom was an  
23 extract from my earlier appendices in the PFS.

24 So in summary, I consider the PFS document  
25 fulfils the guideline requirements for an estimate

1 Class 5 within the AACE documents and a number of  
2 guideline requirements for an estimate class 4, with  
3 a focus on those requirements which carry higher  
4 levels of risk.

5 From my own experience, the level of  
6 design fees to undertake this programme of works  
7 would have been between 4 and 7 per cent. A fee  
8 level of 4 per cent for basic services plus an  
9 additional 1 per cent for additional services is  
10 typical of fee guidance in guidelines on engineering  
11 fees, including the RSA Guidelines, and would be a  
12 conservative approach to adopt based on the  
13 guidelines themselves.

14 PEL themselves has used a design fee  
15 estimate of 5 per cent within their overall cost  
16 estimate for the combined rail and port programme.

17 And that, I think, concludes my statement,  
18 so I'd just like to say thank you to the members of  
19 the Tribunal for listening. One thing I should have  
20 added at the outset is that, as with Mr Baxter, this  
21 is my first time as an expert witness, and I hope to  
22 be of help to the Tribunal. Thank you.

23 **PRESIDENT:** Thank you, Mr Comer. That I  
24 understand with that, you have finalised your  
25 presentation. Have you finalised?

1           **MR COMER:** I'm sorry. Yes, I have  
2 finished my statement.

3           **PRESIDENT:** Very good. Ms Reimschussel,  
4 do you have any further questions for the expert?

5           **MS REIMSCHUSSEL:** No, we do not,  
6 Mr President.

7           **PRESIDENT:** Very good. So I think it is  
8 now your turn, Mr Brown. I see you there.

9           Mr Comer, Mr Brown, who is counsel for the  
10 Republic of Mozambique and whom you will see in a  
11 second, has some questions for you.

12           **MR COMER:** Thank you.

13           **MR BROWN:** Very good. Thank you,  
14 Mr President.

15 Cross-examination by Respondent

16           **MR BROWN:** Good afternoon, Mr Comer.

17           **MR COMER:** Good afternoon to you.

18           **MR BROWN:** Thank you for joining us today.  
19 I think you said it a little earlier, you  
20 have not worked in Mozambique, correct?

21           **MR COMER:** That's correct.

22           **MR BROWN:** And you are not a licensed  
23 engineer in Mozambique, correct?

24           **MR COMER:** That's correct.

25           **MR BROWN:** I know you've got two opinions

1 we're going to talk about today. I'd like to talk  
2 about your second opinion first. OK?

3 **MR COMER:** Of course.

4 **MR BROWN:** And that would be the opinion  
5 regarding the 98R-18, correct?

6 **MR COMER:** OK.

7 **MR BROWN:** Let's just introduce ourselves  
8 to 98R-18. That guideline is a cost estimating  
9 guideline, correct?

10 **MR COMER:** It is.

11 **MR BROWN:** It is not a revenue estimating  
12 guideline --

13 **MS REIMSCHUSSEL:** Sorry, Mr President.

14 Can we get the exhibit number for the record?

15 **MR BROWN:** Actually, I'm just asking him a  
16 question. I wasn't asking anything about an  
17 exhibit.

18 **PRESIDENT:** Please proceed.

19 **MR BROWN:** Thank you.

20 I'm sorry, I was just asking about 98R-18.

21 Are you with me still, Mr Comer?

22 **MR COMER:** I am.

23 **MR BROWN:** 98R-18 is a guideline about  
24 costs, not revenues, correct?

25 **MR COMER:** That's correct.

1           **MR BROWN:** It has nothing to do with  
2 whether or not a project will earn profits, correct?

3           **MR COMER:** It is not, correct.

4           **MR BROWN:** It does relate to costs, yes?

5           **MR COMER:** It relates to project -- the  
6 accuracy, the estimates, the costs of the project  
7 and the accuracy of those costs, yes.

8           **MR BROWN:** And your concern about --

9           **MR COMER:** Sorry, I'd also, as Mr Dysert  
10 suggested, it also acts as an example of a gateway  
11 process that entities can use to promote major  
12 transportation projects.

13           **MR BROWN:** Can we turn to your report?

14 That is in the record as CER-8.

15           **MR COMER:** Yes, I have a copy here in  
16 front of me.

17           **MR BROWN:** Very good. And I think  
18 we'll -- I wonder if we could ask -- we'd like to be  
19 able to share our screen so that the folks in the  
20 room can see it here.

21           **MR COMER:** Sure.

22           **MR BROWN:** That's lovely and small at this  
23 point. Are you able to see that a little bit? Here  
24 we go, we're going to get it fixed. There we go. I  
25 think we need to actually turn to -- your report is

1 about three quarters of the way through this report.

2 **MR COMER:** It is.

3 **MR BROWN:** I'm going to ask you a couple  
4 of questions about this page of the report. I don't  
5 think this is one we'd seen yet. But you were  
6 talking earlier about these maturity levels called  
7 classes in 98R-18, correct?

8 **MR COMER:** Correct. Could you just --  
9 sorry, there's the page.

10 **MR BROWN:** We'll make that chart a lot  
11 bigger for you.

12 **MR COMER:** I have a copy in front of me so  
13 I can refer to my report. Thank you.

14 **MR BROWN:** And the classes that you were  
15 talking about --

16 **PROFESSOR TAWIL:** Excuse me, counsel.  
17 Which page is that? Because I couldn't see the  
18 page.

19 **MR BROWN:** In Mr Comer's report, it's page  
20 15. In appendix C it's actually in that report as  
21 well.

22 **PROFESSOR TAWIL:** OK.

23 **MR COMER:** Yes.

24 **MR BROWN:** So these classes actually  
25 describe various stages of maturity in the project,



1 correct?

2 **MR COMER:** They do.

3 **MR BROWN:** On the right-hand side we've  
4 got something called an expected accuracy range?

5 **MR COMER:** Yes.

6 **MR BROWN:** And in those instances you  
7 actually have a whole lot of percentage numbers with  
8 plus and minus, right?

9 **MR COMER:** We do.

10 **MR BROWN:** Those are, generally speaking,  
11 describing at various stages of a project how much  
12 variability there would be in cost estimates for  
13 that stage of the project, correct?

14 **MR COMER:** How much there could be, yes.

15 **MR BROWN:** I'm sorry, I did not hear your  
16 last answer.

17 **MR COMER:** I beg your pardon. I qualified  
18 it slightly and I said they show how much variance  
19 there could be, not what they would be.

20 **MR BROWN:** And as a project develops, the  
21 risk reduces in the project, correct?

22 **MR COMER:** Provided you're gaining more  
23 knowledge and more data and more assessment, yes.

24 **MR HO:** I'm so sorry to interrupt,  
25 Mr Brown, I think Mr Comer is quite difficult at

1 least for me to hear. I think it may be an issue of  
2 having your microphone while he responds. I know  
3 it's very annoying but it may be for lengthier  
4 answers it might be worth turning your microphone  
5 off.

6 **PROFESSOR TAWIL:** What we found is  
7 convenient if you put this on you can hear.

8 **MR HO:** Thank you. That may be a better  
9 solution. I'm sorry to have interrupted.

10 **MR BROWN:** I'm sorry, Mr Comer, we're just  
11 arranging for a second here.

12 **MR COMER:** No, no. No worries.

13 **MR BROWN:** So, Mr Comer, when we're  
14 looking at the expected accuracy ranges in a Class 5  
15 accuracy range, what that's describing is in fact  
16 that cost estimates could be exceeded by something  
17 like 20 per cent to 50 per cent on the low end going  
18 down, but could be exceeded on the high end as cost  
19 overruns of 30 per cent to 100 percent at a Class 5,  
20 correct?

21 **MR COMER:** That's what it states, yes.

22 **MR BROWN:** In a Class 4 those accuracy  
23 ranges described as the potential that a project  
24 that is estimated at Class 4 would still have cost  
25 overruns or could have cost overruns of 20 per cent

1 to 50 per cent, correct?

2 **MR COMER:** That's correct.

3 **MR BROWN:** I wonder if we could look at  
4 Dysert Exhibit 6 for a moment, please. I think it's  
5 actually 8, sorry.

6 We've put in front of you what Mr Dysert  
7 included as his Exhibit 8. I wonder if we could  
8 just blow up the title of that for a moment so  
9 everyone can see. Dysert Exhibit 8?

10 **MR COMER:** Indeed. OK.

11 **MR BROWN:** This is an article from Love  
12 and several other authors. Have you seen this  
13 article before?

14 **MR COMER:** I believe it was included in my  
15 bundle, yes.

16 **MR BROWN:** If we go to the second page of  
17 that article, and if you would just blow up the  
18 figure that's there, Mr Comer, this is essentially  
19 another way of depicting the same type of phenomenon  
20 that we're talking about, correct?

21 **MR COMER:** It is.

22 **MR BROWN:** The idea here is that when  
23 you're very early on in a project, in sort of a  
24 feasibility study mode, you have about a 25 to 40  
25 per cent potential for cost overruns, correct?

1           **MR COMER:** That's what it states on this  
2 report, yes.

3           **MR BROWN:** And that's very similar to the  
4 98R-18 practice that you are referring to, which  
5 says that it's 20 per cent to 50 per cent, correct?

6           **MR COMER:** This states it's 20 to 50  
7 per cent, yes, in the AACE documents.

8           **MR BROWN:** What that really is describing,  
9 that very early on in a project there is a lot of  
10 opportunity for cost overruns, correct?

11           **MR COMER:** There is the potential. It  
12 depends how one undertakes the elements of work but  
13 yes, there is that potential. That's what the AACE  
14 documents suggest as well.

15           **MR BROWN:** Are you familiar, Mr Comer,  
16 with how much cost was estimated in the  
17 pre-feasibility study that PEL created in this  
18 matter?

19           **MR COMER:** I have seen the figures  
20 mentioned in the PFS, yes. \$3.115 billion.

21           **MR BROWN:** You said \$3.115 billion,  
22 correct?

23           **MR COMER:** That's correct.

24           **MR BROWN:** And even on your understanding  
25 that the PFS is a Class 4 project, the answer is

1 that right now a Class 4 project at \$3.1 billion  
2 could have cost overruns up to about \$4.6 billion.  
3 Isn't that true?

4 **MR COMER:** Certainly not under Class 4,  
5 no, cost overruns were up to 50 per cent. So in  
6 total -- in total it could go up to 4-point  
7 something billion. The other thing to bear in mind,  
8 of course, is that as one progresses a project of  
9 this nature, the actual basic cost of the -- the  
10 central forecast of the cost of the project doesn't  
11 necessarily remain at that same order of magnitude.

12 Improvements can be made to reduce the  
13 level of costs, the basic level of costs in any  
14 case, so there's a -- there is the risk that there  
15 are cost overruns. There are other opportunities  
16 for reducing the level of costs.

17 **MR BROWN:** Right now I'm only going to  
18 focus on that stage of the project that you've  
19 described the PFS at as stage 4. Are you with me,  
20 Mr Comer?

21 **MR COMER:** I am.

22 **MR BROWN:** And the upper range for cost  
23 overruns under the 98R-18 guideline is 50 per cent,  
24 correct?

25 **MR COMER:** Correct.

1           **MR BROWN:** If I multiply \$3.1 billion  
2 times another 50 per cent, that's \$4.6 billion, is  
3 it not, sir?

**17:10**

4           **MR COMER:** It is.

5           **MR BROWN:** To be clear for a moment, if  
6 the PEL proposed project in the PFS was still a  
7 Class 5 stage project estimate at that point, in  
8 fact, the accuracy ranges of 98R-18 on which you  
9 rely would suggest that the cost overruns could  
10 exceed \$6 billion in total, correct?

11           **MR COMER:** I would -- that is the  
12 potential to get to that level according to this  
13 document, yes. I wouldn't say I'm relying entirely  
14 on this document, however.

15           **MR BROWN:** Well, in any event, the whole  
16 point of these ranges is to indicate that it's just  
17 too early to know exactly where the costs will land  
18 on a project, correct?

19           **MR COMER:** That is the whole purpose of  
20 having a process for understanding how the accuracy  
21 of the project improves as one gains more  
22 information, yes.

23           **MR BROWN:** Have you reviewed Mr Larry  
24 Dysert's report in this matter?

25           **MR COMER:** I have.

1           **MR BROWN:** I wonder if we could show that  
2 to you? It's RER-15 in the record.

3           Have you ever met Mr Larry Dysert?

4           **MR COMER:** I haven't, no.

5           **MR BROWN:** I wonder if we could focus your  
6 attention on paragraph 9 on the second page of this  
7 report? Sorry, it's the second page as they're  
8 numbered.

9           **MR COMER:** Second, yes. Number 9. OK.

10          **MR BROWN:** Yes, sir. Mr Dysert was  
11 actually one of the primary contributors to 98R-18,  
12 correct.

13          **MR COMER:** So I gather.

14          **MR BROWN:** And he was a primary  
15 contributor on actually 14 different recommended  
16 practices for the AACE, yes?

17          **MR COMER:** I'm sure that's correct.

18          **MR BROWN:** I wonder if we can focus for  
19 just a moment, then, on why it is that your opinion  
20 is that the PFS that PEL proposed is a Class 4  
21 instead of a Class 5. OK?

22          **MR COMER:** I didn't state that.

23          **MR BROWN:** All right. What did you say?

24          **MR COMER:** I stated that in my opinion,  
25 the PFS falls somewhere between a Class 5 and a

1 Class 4.

2 **MR BROWN:** OK. So it's not clearly a  
3 Class 4. Is that true?

4 **MR COMER:** It's not clearly a Class 4, but  
5 it -- well, let me -- no. Let me rephrase that.

6 First of all, it depends on how one  
7 establishes the class systems, and Mr Dysert --  
8 sorry, not -- the document itself, the AACE  
9 document, makes it quite clear that there is a wide  
10 variance in the services and deliverables associated  
11 with classes, and it's up to the entities that are  
12 negotiating these gateways, if you'd like to call  
13 them, as to what goes into them. So there's a wide  
14 variance.

15 So one can -- you know, the fact that  
16 there may be a class with some recommended services  
17 and deliverables within this document, it states  
18 quite clearly this is just guidance, it's not a  
19 standard. It's something that is recommended.

20 **MR BROWN:** Let me take a look with you for  
21 a moment at page 19 of your report, please.

22 **MR COMER:** Sure.

23 **MR BROWN:** This is pretty dense on the  
24 small screen here but we'll try to blow it up as  
25 much as we can, Mr Comer.



1 Mr Comer, you actually prepared this chart  
2 to track which deliverables within the PFS were  
3 meeting either a Class 5 or a Class 4 classification  
4 deliverable in your estimation, correct?

5 MR COMER: That was my intent, correct.

6 MR BROWN: And there are certainly some  
7 lines in your charts that are empty for Class 4  
8 deliverables. Is that true?

9 MR COMER: It is true.

10 MR BROWN: For instance, we see in the  
11 bottom third of the page that there are several  
12 deliverables that would be required of a Class 4 to  
13 have been progressed that are empty on the right  
14 side, correct?

15 MR COMER: Well, let me restate my  
16 previous point.

17 This is in accordance with the  
18 classification that's recommended or provided as  
19 guidance by the AACE documents, so it's not a  
20 standard. It's not an absolute requirement. It's  
21 up to those that negotiate, the entities that are  
22 negotiating on a classification system if one -- if  
23 one is actually promoted, whether these should be in  
24 or out.

25 The point on these particular ones are

1 that they are very -- they're secondary order of  
2 magnitude, third order of magnitude risks to the  
3 overall costs of a project of this scale and nature.  
4 They are missing, but I don't consider them to be of  
5 the same order of magnitude of risk as, for  
6 instance, understanding bathymetry or topography or  
7 ground conditions. They are the big major risks on  
8 a programme of this nature.

9 **MR BROWN:** Mr Comer, would you please look  
10 with me at page 21 of your report. There's a second  
11 line, environmental impact sustainability  
12 assessment, do you see that?

13 **MR COMER:** I do.

14 **MR BROWN:** It is required in order to be a  
15 Class 4 estimate that there would be progress on the  
16 environmental impact sustainability assessment. Do  
17 you see that?

18 **MR COMER:** If one were going by the  
19 specific requirements of the AACE guidance, it  
20 requires that the environmental impacts and  
21 sustainability assessments should be progressed,  
22 yes.

23 **MR BROWN:** In fact, you entered section  
24 10.3 into that line item, correct?

25 **MR COMER:** I did.

1           **MR BROWN:** And that indication was meant  
2 to suggest that in fact this environmental impact  
3 sustainability assessment deliverable had  
4 progressed, correct?

5           **MR COMER:** It was meant to identify the  
6 fact that there had been considerations given to  
7 environmental impact assessment and  
8 sustainability -- well, I'm not sure about  
9 sustainability, but certainly in terms of  
10 environmental impact work.

11           Part of the process of walking the routes  
12 was to understand the nature of the land that was  
13 being crossed by the rail or the marine environments  
14 that the port would be impacted from.

15           **MR BROWN:** Mr Comer, we can look at it if  
16 we want to, but do you recall that the PFS in  
17 section 10.3 says essentially that an environmental  
18 study will eventually need to be done?

19           **MR COMER:** It does say that indeed, and in  
20 the PFS there is a cost estimate, how much that  
21 would cost.

22           **MR BROWN:** And that you consider would be  
23 enough to have progressed?

24           **MR COMER:** I think that's enough to  
25 suggest that there is an awareness that

1 environmental appraisal would be required and that  
2 through the ground proofing that had been undertaken  
3 through the walkover surveys, that they would have  
4 had a good understanding at least of the base of the  
5 environmental impact -- sorry, of a basic  
6 environmental position.

7 **MR BROWN:** Mr Comer, can we take a look at  
8 slide 8 that you used to present your comments  
9 today? I wonder if we could do the favour of just  
10 blowing up that portion of the curve that includes  
11 Class 4 and Class 5 for me for a moment.

12 Mr Comer, you said earlier that there is  
13 overlap between the classes, correct?

14 **MR COMER:** That's correct, according to  
15 this document, yes.

16 **MR BROWN:** And, for instance, a study that  
17 has cost estimates that would be considered a Class  
18 5, in the heart of Class 5, might actually have more  
19 accuracy than a study on the low end of Class 4  
20 according to this diagram that you relied upon,  
21 correct?

22 **MR COMER:** Yes, it does, but it doesn't  
23 necessarily mean in that same project, does it?  
24 These are referring to you can't compare Class 4 and  
25 Class 5 projects -- sorry, classes on the same

1 project and suggest that if one's progressed to  
2 Class 4, the accuracy is diminished. These are  
3 referring to different types of projects that can be  
4 classified under this system.

5 **MR BROWN:** In fact --

6 **MR COMER:** So let me give you an example.

7 Sorry to interrupt.

8 But it quite rightly points out within the  
9 document that, for instance, if a project is  
10 undertaken in an urban environment, there are far  
11 more risks than one undertaken in a rural  
12 environment, simply because of all the existing  
13 infrastructure that's around.

14 So, for instance, a Class 4 project  
15 undertaken in an urban environment classification  
16 may well be riskier than one project in a rural area  
17 in a Class 5.

18 Just for the record this is --  
19 predominantly the work in this project is in rural  
20 areas.

21 **MR BROWN:** Mr Comer, have you read  
22 Mr Dearman's report in this matter?

23 **MR COMER:** I have read Mr Dearman's  
24 report, yes.

25 **MR BROWN:** Did you know that your report

1 was going to input into a damages calculation when  
2 you generated your report?

3 **MR COMER:** I was aware that Mr Dearman  
4 would be relying on some aspects of my statement,  
5 yes. I was not aware of how he would use those --  
6 the statements I was making, but I was aware he was  
7 using some of those statements.

8 **MR BROWN:** Can we take a look at exhibit  
9 Claimant's 381 for a moment? That's the 98R-18 cost  
10 estimate guidance that we've been talking about.

11 **MR COMER:** Sure.

12 **MR BROWN:** This is the document that you  
13 were relying on, correct?

14 **MR COMER:** This was a document I was asked  
15 to review and comment on, yes.

16 **MR BROWN:** Page 7 of this document,  
17 please.

18 **MR COMER:** Page 7 of the pdf?

19 **MR BROWN:** It's actually page 9 of the  
20 pdf. Thank you for asking.

21 **MR COMER:** I have it.

22 **MR BROWN:** I need to pull up my copy or  
23 I'll never be able to read it.

24 **MR COMER:** Sure.

25 **MR BROWN:** Apologies. Let me switch pages

1 actually for a moment.

2 **MR COMER:** All right.

3 **MR BROWN:** I apologise. It's page 26 of  
4 the pdf. I had given you the wrong number before.  
5 Page 24 of the document, page 26 of the pdf.

6 **MR COMER:** The last page. OK.

7 **MR BROWN:** If we could blow up maybe the  
8 first full paragraph there ahead of the examples,  
9 you recognise this appendix to 98R-18, correct?

10 **MR COMER:** Correct.

11 **MR BROWN:** And this appendix actually has  
12 a specific example in the recommended practice, yes?

13 **MR COMER:** It has.

14 **MR BROWN:** And what this appendix says, in  
15 fact, is that there's often a misunderstanding about  
16 the class of estimate as defined in the recommended  
17 practice in that it would define an expected  
18 accuracy range for each estimate, and that's  
19 incorrect. Isn't that true?

20 **MR COMER:** That's what it states.

21 **MR BROWN:** And in fact --

22 **MR COMER:** I miss -- I didn't  
23 misunderstand but I missed part of the points of the  
24 document itself, so I guess there will be  
25 misunderstandings with this document. I think it's

1 quite -- whilst it's very helpful -- and sorry for  
2 making this point -- it's also very flabby in a way  
3 in terms of the definitions that are applied and the  
4 wide ranges that can be applied to the various  
5 classes.

6 **MR BROWN:** Well, let me focus on the third  
7 line down that we have blown up right there that  
8 says "the accuracy range should always be determined  
9 through a risk analysis of the specific project",  
10 correct?

11 **MR COMER:** That's what it says.

12 **MR BROWN:** And there is such a thing as a  
13 qualitative risk analysis for a project, correct?

14 **MR COMER:** There is such a thing as a  
15 qualitative and a quantitative risk analysis, yes.

16 **MR BROWN:** The PFS was not a qualitative  
17 risk analysis, right?

18 **MR COMER:** On the contrary. I believe  
19 there was quite a lot of qualitative thought that  
20 had gone into the PFS. Would you like me to give  
21 you some examples?

22 **MR BROWN:** Actually, I'm going to ask you  
23 another question.

24 Was there a risk register in the PFS?

25 **MR COMER:** There was not a specific risk



1 register in the PFS, no.

2 **MR BROWN:** Then you've answered my  
3 question.

4 **MR COMER:** Well, perhaps you'd allow me to  
5 just explain my views on why I believe there was a  
6 qualitative and quantitative assessment undertaken  
7 in the PFS?

8 **MR BROWN:** I would respectfully suggest  
9 that perhaps if redirect cares to do that, we can do  
10 that, but I'd rather move on.

11 **MR COMER:** OK. Thank you.

12 **MR BROWN:** I want to focus for just a  
13 moment on your second opinion.

14 **MR COMER:** Sure.

15 **MR BROWN:** Your second opinion relates to  
16 the use of a South African guideline and an estimate  
17 of a percentage-based remuneration for engineering  
18 services, correct?

19 **MR COMER:** I would rephrase it somewhat.

20 **MR BROWN:** All right.

21 **MR COMER:** In terms of -- if I may, in  
22 terms of explaining the approach that would normally  
23 be adopted to gain estimates for things, you've used  
24 an indicative guideline that is very similar to a  
25 number of others that I've used. It was simply to

1 illustrate a point or series of points, really.

2 **MR BROWN:** Can we go to slide 4 of your  
3 presentation, please?

4 **MR COMER:** Sure.

5 **MR BROWN:** In the first bullet of those  
6 two, to borrow the point you were attempting to  
7 illustrate, the question that was asked of you is  
8 whether it is an accepted industry practice for  
9 civil engineering for consultants to be remunerated  
10 based upon a percentage of the total cost, correct?  
11 That was the question?

12 **MR COMER:** That was the -- well, that was  
13 half the question.

14 **MR BROWN:** Yes.

15 **MR COMER:** Yes.

16 **MR BROWN:** And then you also provided a  
17 percentage base after that, correct?

18 **MR COMER:** Correct.

19 **MR BROWN:** But, just to be clear for a  
20 moment, you're not suggesting that the only accepted  
21 industry practice for civil engineering is to be  
22 remunerated on a percentage basis of the project  
23 cost, correct?

24 **MR COMER:** Not at all. No, not at all.  
25 And I state that quite clearly in my statements.

1           **MR BROWN:** You do agree that Mozambique is  
2 not South Africa, correct?

3           **MR COMER:** I do.

4           **MR BROWN:** And you in fact went looking on  
5 the internet for any guidelines that you could find  
6 related to Mozambique, right?

7           **MR COMER:** I did, yes. It's quite common  
8 practice nowadays.

9           **MR BROWN:** I am curious for just a moment.  
10 The South African guidelines that you found, those  
11 you found on the internet while you were doing that  
12 search, correct?

13           **MR COMER:** It came up in the search  
14 I did -- for guidelines for fees for Mozambique it  
15 came up as one of the Google -- whatever they're  
16 called, yes. References.

17           **MR BROWN:** Can we take a look for just a  
18 moment at Exhibit-- let's do -- well, I'll just ask  
19 you the question and see if we can move this along  
20 for a moment.

21           **MR COMER:** Sure.

22           **MR BROWN:** Do you recall how many -- how  
23 much the engineering costs were in the PFS?

24           **MR COMER:** They were probably --  
25 \$107 million was 5 per cent of their overall -- of

1 the engineering costs, so whatever -- I can't  
2 remember off the top of my head, but it's a figure  
3 that's effectively 20 times the -- the fees for  
4 engineering that were allowed.

5 **MS VASANI:** Sorry. Could we please take  
6 the expert to the document because I think it's  
7 unfair to ask him about specific numbers if he  
8 doesn't actually have the information in front of  
9 him. I think it would be helpful to pull up the PFS  
10 where you're referring him to, please.

11 **MR BROWN:** Actually, if you don't mind,  
12 I'll just use his slide. It's on his slide as well.

13 **MR COMER:** It is.

14 **MR BROWN:** If we can go to slide 11 -- no,  
15 sorry, 12 of your presentation.

16 **MR COMER:** Yes.

17 **MR BROWN:** If you see the last bullet of  
18 your slide on page 12, it attempts to support the  
19 idea that there's 5 per cent of construction costs  
20 which amounts to \$107 million. Do you see that?

21 **MR COMER:** I do. It doesn't purport. It  
22 states that, yes.

23 **MR BROWN:** And let me ask you. You  
24 support that by referencing another exhibit, C-6A,  
25 just below that, correct?

1           **MR COMER:** You mean referenced in the RSA  
2 Guidelines?

**17:32**

3           **MR BROWN:** No, no. I'm referencing the  
4 very document that's on this page of your slide that  
5 says C-6A.

6           **MS REIMSCHUSSEL:** Mr President, sorry.  
7 That is an incorrect reference. That's C-6B.

8           **MR BROWN:** OK. Regardless of whether it's  
9 C-6A or C-6B, your slide indicates that there's a 5  
10 per cent engineering consultancy and detail  
11 engineering line item. Do you see that?

12           **MR COMER:** I do, 5 per cent.

13           **MR BROWN:** I see, though, that that totals  
14 \$72 million.

15           **MR COMER:** Sure. That's because this  
16 extract is purely for the port project. It doesn't  
17 include the rail component of the project. I just  
18 extracted it to demonstrate that PEL have used  
19 5 per cent fee. If one takes the rail components  
20 and takes 5 per cent of the engineering and  
21 construction costs and adds it to that figure there  
22 of 72 million, you'll get to \$107 million more or  
23 less.

24           **MR BROWN:** In fact, Mr Comer, \$107 million  
25 is substantially less than 5 per cent of

1 \$3.1 billion?

2 **MR COMER:** That is correct. But that  
3 \$3.15 billion is comprised of a number of other  
4 components that one wouldn't necessarily attribute  
5 engineering design costs to.

6 **MR BROWN:** That's right. There would be a  
7 lot of numbers in that 3.1 billion that you should  
8 not in fact be multiplying times anything to get to  
9 an engineering cost, correct?

10 **MR COMER:** Correct. But on the other  
11 hand, one would probably allow for it in other  
12 components of an estimate. For instance, projects  
13 and programme management, or contingencies and  
14 sundries, so I'm just -- I was asked to comment on  
15 engineering fees.

16 **MR BROWN:** You would agree with me that if  
17 the project is not, in fact, undertaken, there  
18 aren't any fees to pay the engineer either, correct?

19 **MR COMER:** I certainly wouldn't agree with  
20 that at all.

21 **MR BROWN:** All right. Well, in what  
22 circumstance would the project never be built but  
23 the engineer gets paid?

24 **MR COMER:** Several projects. I've  
25 probably worked on dozens myself. Projects get

1 terminated for all sorts of reasons and, depending  
2 on the way in which the contract is established, in  
3 terms of payment, the approach that's being taken,  
4 consultants can get -- will be paid for the work  
5 they've undertaken.

6 **MR BROWN:** That's correct, isn't it,  
7 Mr Comer? What you're referring to is if you can  
8 find a contract that describes the consultancy fees  
9 for an engineer, then the engineer can be paid,  
10 correct?

11 **MR COMER:** I'm sorry, I don't quite  
12 understand the question. If you undertake -- it  
13 depends what type of contract one undertakes but  
14 effectively -- you asked me the question whether  
15 consultants would get paid for work that was  
16 undertaken but the project never went ahead, and it  
17 happens in a number of cases, yes.

18 **MS MARTINS:** In any event, Mr Comer,  
19 Mozambique is not required to follow the  
20 South African guidelines, correct?

21 **MR COMER:** Correct.

22 **MR BROWN:** There are plenty of other ways  
23 to pay an engineer, correct?

24 **MR COMER:** And I have stated that. I  
25 think the point I was making was not that this would

1 necessarily be the way in which the engineers were  
2 paid, it's the method of establishing what the fee  
3 estimates would be for the engineering content,  
4 design engineering content for these two programmes  
5 of work. There's a difference.

6 **MR BROWN:** Can we look at Claimant's  
7 C-382?

8 Mr Comer, this is the South African  
9 guidelines that you relied upon, correct?

10 **MR COMER:** It's -- it is the design -- fee  
11 guidelines for design that I have used to illustrate  
12 the reasons why I believe that a range of 4 to 7  
13 per cent for a project like this would be  
14 appropriate, yes.

15 **MR BROWN:** Can I focus your attention on  
16 the pdf page 6? It's page 4 of the guideline.

17 There's a paragraph near the bottom. It's  
18 the last full paragraph before the one that also has  
19 the numbers in it and it begins "It remains the  
20 prerogative".

21 Do you see that? We'll get the blow-up  
22 done a little differently.

23 **MR COMER:** Yes.

24 **MR BROWN:** In fact, the guidelines that  
25 you rely on take care to confirm that it remains a



1 prerogative of the client and the engineer to  
2 utilise this document as a basis for the negotiation  
3 or to utilise any other means to reach an agreement  
4 on the fee and services offered, correct?

5 **MR COMER:** Correct.

6 **MR BROWN:** Because, in fact, any contract  
7 is going to take negotiation, correct?

8 **MR COMER:** Correct.

9 **MR BROWN:** And if the fees haven't been  
10 set for the engineer, then we don't know what the  
11 engineer is going to be paid, do we?

12 **MR COMER:** That's correct, but -- I'm not  
13 sure what the point of that is because the whole  
14 point of my -- the purpose of what I was trying to  
15 illustrate is that the only way of estimating what  
16 the likely design fees (audio distortion) for a  
17 project of this nature at the stage they were at  
18 would be through the use of a percentage basis to  
19 calculate it.

20 **PRESIDENT:** Mr Brown --

21 **MR COMER:** Of course, you're right. There  
22 would have been negotiations on that point at some  
23 stage.

24 **MR BROWN:** I'm through, Mr President.

25 **PRESIDENT:** You are done?

1           **MR BROWN:** Yes.

2           **PRESIDENT:** I was starting to doubt what  
3 the South African rules on engineering really had to  
4 do with our case under international law. Thank  
5 you. Thank you for coming to an end.

6           Mr Ho, or Ms Reimschussel?

7 Ms Reimschussel?

8           **MS REIMSCHUSSEL:** Thank you Mr President.

9 Mr Comer, I just have one question for you.

10 Re-examination by Claimant

11           **MS REIMSCHUSSEL:** Earlier you were having  
12 a discussion with Mr Brown about the quantitative  
13 and qualitative analysis that you saw in the PFS,  
14 and I just wanted to give you an opportunity to  
15 finish your comment.

16           **MR COMER:** Thank you very much. I think  
17 the point I was trying to make is that both the work  
18 undertaken by MTC and by PEL and their consultants  
19 themselves identified a number of options for both  
20 the rail route and for the port. They went through  
21 the process of identifying the risks associated with  
22 each of those options and ruled out a number of  
23 options based on those risks to come up with in each  
24 case a preferred location for the port and a  
25 preferred route for the rail line.

1           So that was, in my opinion, both a  
2 qualitative assessment and a quantitative  
3 assessment. They took the trouble walking the  
4 routes and looking at the locations for the  
5 potential port, talking with locals, and then going  
6 through the process of assessing it through a cost  
7 estimation to determine which of those options would  
8 be a preference. So that, in my opinion, is a good  
9 basis for both -- at this stage for both the  
10 quantitative and qualitative approach.

11           **MS REIMSCHUSSEL:** Thank you, Mr Comer.

12 Mr President, we have no further questions.

13           **PRESIDENT:** Very good. Let me  
14 double-check with my colleagues. Any question for  
15 Mr Comer?

16           Mr Comer, thank you very much for having  
17 made yourself available, and with that, we are  
18 finished with your examination. Thank you very  
19 much.

20           **MR COMER:** Thank you.

21           **PRESIDENT:** Have a good afternoon in  
22 London.

23           **MR COMER:** Thank you. Good afternoon from  
24 London.

25           **PRESIDENT:** Very good. So this is now off

1 the record.

2 (Short discussion off the record)

3 **PRESIDENT:** Let me get a time check for  
4 you so both parties know how much time they have  
5 left for their examinations.

6 **MS JALLES:** Claimant has used so far seven  
7 hours and six minutes, and Respondent has used seven  
8 hours and 37 minutes, so it's 16.5 hours -- 16 and a  
9 half hours each, right? So nine hours approximately  
10 each, a little bit.

11 **PRESIDENT:** So how much time do they have  
12 left?

13 **MS JALLES:** Nine hours -- exactly? I'll  
14 do the calculations.

15 **PRESIDENT:** Nine hours each. Very good.  
16 So what shall we do now? Ms Reimschuessel or Mr Ho?

17 **MR HO:** I think it's me up next to cross  
18 examine. Mr Mendonça, I understand, is the next  
19 witness. Obviously it's now a quarter to 6. I  
20 think even with a fair wind to do his direct  
21 presentation, for me to cross-examine him, and then  
22 anything at the end, I would have thought it would  
23 be at least an hour or an hour and 15 minutes,  
24 I suspect, so I'm in the Tribunal's hands.

25 I'm happy to carry on, but I appreciate

1 it's been a long day for everybody else who's been  
2 doing the speaking while I haven't.

17:44

3 **PRESIDENT:** Shall we start with the direct  
4 examination, and then probably we will finalise?  
5 Very good.

6 (Short break from 5.44 pm to 5.48 pm)

7 TIAGO DE MENDONÇA

8 **PRESIDENT:** Let me start with an easy  
9 question. How would you like --

10 **MR MENDONÇA:** Sorry?

11 **PRESIDENT:** Let me start with an easy  
12 question. How would you like that I address you?  
13 Is it Dr de Mendonça, is it Engineer de Mendonça? I  
14 think we share the same problem of having very long  
15 names.

16 **MR MENDONÇA:** I'll have Tiago Mendonça is  
17 good.

18 **PRESIDENT:** Thank you, Mr Mendonça. You  
19 are here as an expert, and the first thing we have  
20 to do is to take your declaration as an expert. Can  
21 I kindly ask you that you stand up?

22 Do you solemnly declare upon your honour  
23 and conscience that you will speak the truth, the  
24 whole truth and nothing but the truth, and that your  
25 statement will be in accordance with your sincere

1 belief?

2 **MR MENDONÇA:** I do.

3 **PRESIDENT:** Very good. So will you be  
4 speaking in Portuguese or in English?

5 **MR MENDONÇA:** Mr President, I'll try to  
6 speak in English, and if I have some difficulties,  
7 I ask your patience for not being a good English  
8 speaker, but I think it will be better like this.  
9 I'll have to say some words in Portuguese but --

10 **PRESIDENT:** That's perfect. Very good.  
11 We will do the following. We will have your  
12 presentation, and then your direct examination, and  
13 after that we'll break for the day.

14 So I give the floor now to Respondent.

15 **MS BEVILACQUA:** Thank you, Mr President.  
16 Examination by Respondent

17 **MS BEVILACQUA:** Good afternoon,  
18 Mr Mendonça.

19 **MR MENDONÇA:** Good afternoon to you all.  
20 Thank you.

21 **MS BEVILACQUA:** You have on the table next  
22 to you copies of your reports that you have  
23 authored, and would you start with the first one on  
24 top of the pile and confirm for me that this is  
25 your March 2021 report? If you would look at

1 page 11.

2 **MR MENDONÇA:** Yes, this is my report.

3 **MS BEVILACQUA:** And is that your signature  
4 at page 11?

5 **MR MENDONÇA:** It's my signature, yes.

6 **MS BEVILACQUA:** Is there anything you wish  
7 to change or amend in this March 2021 report?

8 **MR MENDONÇA:** No, thank you.

9 **MS BEVILACQUA:** And the next report you  
10 issued in this matter was in November 2021.

11 **MR MENDONÇA:** Yes.

12 **MS BEVILACQUA:** If you look at page 5, is  
13 that your signature, sir?

14 **MR MENDONÇA:** Yes, it's my signature.

15 **MS BEVILACQUA:** Is there anything in  
16 your November 2021 report that you wish to change or  
17 amend?

18 **MR MENDONÇA:** No, thank you.

19 **MS BEVILACQUA:** And, last, we have  
20 an August 2022 report. And is that your signature  
21 on page 5, sir?

22 **MR MENDONÇA:** Yes, it is my signature.

23 **MS BEVILACQUA:** Anything you wish to  
24 change or amend in that report?

25 **MR MENDONÇA:** No, thank you.

1           **MS BEVILACQUA:** If you would then like to  
2 introduce yourself to the panel and give your  
3 presentation.

**17:52**

4 Presentation

5           **MR MENDONÇA:** Good afternoon to you all.  
6 Again, I'll talk in English, and you have to be all  
7 of you patient because I'm a Portuguese language --  
8 I'm Portuguese. I work in Mozambique so -- but I'll  
9 try to talk in English.

10           I'm a civil engineer for 37 years. I have  
11 a Masters in Structural Engineering. I am the CEO  
12 of a consulting group called Betar that works here,  
13 in Mozambique, in Angola, Brazil and Malawi. I'm  
14 also CEO of MZ Betar which is the company we have in  
15 Mozambique. This company has the highest permit --  
16 it's called in Portuguese "alvará" -- to work in  
17 Mozambique. In Mozambique consultant companies,  
18 they need to have a permit to work and only  
19 consultant permits -- consultant companies with  
20 permits, they should work in Mozambique.

21           I'm also a licensed engineer in  
22 Mozambique. In Mozambique, like in Portugal and  
23 many other countries in the world, in order to  
24 practice engineering, you have to be a licensed  
25 engineer and you have to be in the Mozambican



1 Association of Engineers, which I am.

2 What do I do in Mozambique or elsewhere?

3 We design roads, bridges, railways, and we do  
4 project management, and I've been involved in the  
5 biggest infrastructure projects in Mozambique. I've  
6 been involved -- I've designed two bridges over the  
7 Zambezi river, which I'm very proud of, the biggest  
8 bridge in Mozambique which is the bridge of Katembe  
9 in Maputo. I've started with that. I've done the  
10 prefeasibility study, the subsequent studies, I've  
11 done the project management. But what do I do also  
12 in Mozambique?

13 I deal with tenders. We are a company, a  
14 private company, I'm the biggest shareholder of my  
15 company, and we tender, and we tender according to  
16 the laws of Mozambique, and there are two important  
17 laws. The procurement law, it's the most important  
18 law for us consultants, and of course the laws  
19 that -- and the design criterias, all of that,  
20 technical things I'm not going to talk about that  
21 here, and in Mozambique we have also PPP Law, and  
22 we'll talk about that later.

23 I'm not, like Mr Baxter, it's not the  
24 first time I'm in a court. It's the first time I'm  
25 in a tribunal in English, and it's not my -- I'm not

1 a professional expert. My expertise comes from what  
2 I do in a daily basis in Mozambique. So I deal with  
3 all these matters in Mozambique. I've done a lot of  
4 prefeasibility studies -- some of them went well,  
5 others stopped -- whatever.

6 So I would like to share with you four  
7 issues. The first issue is the Memorando de  
8 Entendimento. The translation to English, it's MOU.

9 We all know there are three versions of  
10 the Memorando de Entendimento, one version in  
11 Portuguese and two versions in English.

12 And the two versions in English, the  
13 biggest difference is the clause 2.1. Can someone  
14 share the version in Portuguese and the version in  
15 English which is -- it's very difficult to -- as  
16 there are two versions in English, I don't know if  
17 you have any classification for the two versions in  
18 English. I don't know. But please share the  
19 version in English which is I think accepted by  
20 Patel, because this is important. This is one of  
21 the key issues of this problem. But if we look at  
22 clause 2.1 in those versions, we see clause 2.1, we  
23 see clause 2.1 in Portuguese has two lines, and --  
24 has two lines, and the clause 2.1 in English has  
25 five lines, one is 18 words and another is 53 words.

1 Well, it's not a translation because what  
2 is written in clause 2.1 is not the same that is  
3 written in clause 2.1 in Portuguese. It's not the  
4 same thing.

5 If we go to the other version, this is  
6 very important because I deal with this every day.  
7 We need to know what is -- what are the documents  
8 will guide us, and we have here three versions.

9 So what I'm saying is the version in  
10 English has nothing close to .1. It's not the same  
11 thing. It's completely different. It's not a  
12 translation. Not even similar to a translation.  
13 It's nothing, I would say. Sorry to say that.

14 Please, Mr President, when I'm going out  
15 of the rule, please call me. I'm an undisciplined  
16 engineer sometimes, so I'm sorry.

17 So this is very important and in my  
18 opinion this cannot be accepted, because it's not a  
19 translation of the Portuguese version. It's another  
20 thing. And in my opinion also in the Law 1510,  
21 which is the Law for Procurement used in  
22 Mozambique -- maybe you could -- Theresa, maybe you  
23 could put that law.

24 **MS BEVILACQUA:** For the record, this is  
25 RLA-3 at page 8 of the pdf.

1           **MR MENDONÇA:** Sorry?

2           **MS BEVILACQUA:** You go ahead.

3           **MR MENDONÇA:** OK.

4           The Law 1510, the procurement law, in  
5 article 5 says that even -- I'll try to translate --  
6 even there are two -- there are two versions, what  
7 the -- more than one version, the prevailing  
8 version, it's the Portuguese version. This is in  
9 the law.

10           So in my opinion, Portuguese version is  
11 the only one who can be used to analyse this  
12 situation.

13           Now we go to the MOI -- memorandum of  
14 understanding, sorry.

15           In clause 1, what does it say? It says  
16 that it's about a port, 500 kilometres of railway,  
17 and it says also there should be a prefeasibility  
18 study -- I'm not reading in Portuguese -- and then  
19 under a private -- under a PPP it's very clear  
20 saying that this is under a PPP and it should -- the  
21 proponent should present the prefeasibility study  
22 and the definitions "Definicao dos termos e  
23 condicoes basicas para atribuicao da concessao".

24           I would say the terms and basic conditions  
25 to grant the concession. So three things.

1 Prefeasibility study, under a PPP, and basic terms  
2 and conditions in order for the government to grant  
3 the concession.

4 Clause 2, I'm talking -- I'll only talk  
5 about the Portuguese version -- which is similar to  
6 one of the English versions. The clause 2, what  
7 does it say?

8 It says that should be presented a  
9 prefeasibility study in 12 months, and the  
10 government will give the *direito de preferência* --  
11 I cannot. I'm sorry I'm not going to translate  
12 this, because *direito de preferência*, it's very  
13 difficult when we are in a certain respectable  
14 Tribunal, if we go into translations about concepts  
15 that are within the country and within the law,  
16 I lost my -- I lost -- how do you say when you get  
17 water upon you. So I lost my foot -- well, never  
18 mind. Sorry.

19 So this is clause 2. And let's talk about  
20 *direito de preferência*. What is  
21 *direito de preferência*?

22 *Direito de preferência*, it's a very well  
23 known legal figure -- I don't know if you can tell  
24 figure, a legal framework, whatever, in Mozambique.  
25 I know this for more than 25 years. I'm 25 -- for

1 25 years I work in Mozambique. Why do I know this?

2 Because I'm a private company, and in the  
3 law, even in the 15 -- in the procurement law, what  
4 does it say? And in many of the tenders it says  
5 there's a *direito de preferência* for national  
6 companies, which is normal in some of less developed  
7 countries. What do they say? National companies,  
8 they have a *direito* and *margem* of 15 per cent. This  
9 is -- I'm not talking about the PPP Law yet; I'm  
10 talking about the concept which is very common in  
11 Mozambique that I know since the day I've got there  
12 because I was not a national, at that time I did not  
13 have a national company, so it's an ancient concept  
14 in Mozambique.

15 And this also in the PPP Law, could I ask  
16 Theresa to have the PPP Law article 13, please.

17 **MS BEVILACQUA:** Mr Mendonça, we are on a  
18 clock and it's been a long day. I'm going to ask  
19 you to move to your next point.

20 **MR MENDONÇA:** OK. So what does article 13  
21 say? I was here, I've heard unsolicited proposals,  
22 the article 13 says that you can have unsolicited  
23 proposals, yes. It's in the law. It's normal.  
24 It's not the thing international. It's in the law.  
25 You can have unsolicited proposals, of course.

1           And those unsolicited proposals must be  
2 subjected to public solicitation, which is a public  
3 tender. And why? To evaluate the technical -- and  
4 it's like a benchmarking for the technical and the  
5 price. Yes? And also says in the law in this  
6 article that unsolicited proposals have a right and  
7 margin of preference of 15 per cent in the  
8 evaluation of technical and financial proposals, and  
9 it says again one thing, and with no right to  
10 compensation by the costs of the proponent when  
11 doing the proposal. Sorry for the lousy  
12 translation, but this is the spirit. It's in the  
13 law.

14           So all of this is in the law that  
15 unsolicited proposals, I have heard a lot about  
16 that, and, again, the letter of approval of PFS of  
17 15 June of '12, what does it say? It says that the  
18 proponent can "exercer expressamente o seu direito  
19 de preferencia". I don't know how to translate.  
20 Can somebody help me here? Exercise its right of  
21 preference.

22           So when the government approves the PFS,  
23 said that Patel could "excerse" [exercise] its right  
24 of preference. So MOU under a PPP. In Law 1511  
25 also, clause 1 says the PPP Law, the juridical

1 regime for PPP is public tender.

2           So it's impossible that the government  
3 could give a direct award. I assume that -- and  
4 everywhere, of course, it's a rhetorical question --  
5 I assume that we all know that the government has to  
6 accomplish with the Mozambican law, and in order to  
7 accomplish with the Mozambican law, there was no way  
8 to do it in other forms. And I -- I'll go later to  
9 that.

10           So also in the PPP Law, not in the law --  
11 in the regulamento -- how do you call regulamento,  
12 the regulations of law, in all of the countries you  
13 have the law and then we have the regulations of the  
14 law, and in the regulations of the law, we come in,  
15 16 of 12 says in article 17 that you can go to a  
16 direct award as a measure of last resort in  
17 ponderosa -- I don't know how to -- situation.  
18 Ponderosa is a very, very strong word in Portuguese.  
19 It's very, very strong. Only in "situacoes  
20 ponderosas" and fully fundamented by the government,  
21 which is the "entidade contratante" [contracting  
22 party].

23           So in my opinion, according to the legal  
24 framework in Mozambique, it was completely  
25 impossible to do it otherwise because it's so clear,



1 so clear, I understand those international issues,  
2 but we're talking about Mozambique. We're talking  
3 about the law in Mozambique and how it is applied,  
4 and this -- I deal with this every day. We have to  
5 tender. And -- well, another thing. Two more  
6 points.

7           Definition of the terms and conditions in  
8 order to grant a concession. Clause 1, defining the  
9 basic terms and conditions for the granting of  
10 concession by the Government of Mozambique. So I've  
11 never seen what did Patel propose in order to define  
12 the basic terms and conditions to have a concession  
13 granted. It's amazing. I have been involved in a  
14 lot of this process and what do we do when we are  
15 with this? You know, I'm not talking about illegal  
16 things. Normally proponent first, they have to know  
17 the law and they have to propose to the government  
18 things that, first, are according to the law but  
19 sometimes it's normal -- it's very normal in  
20 Mozambique and all over the world that everyone  
21 wants to be direct award. It's normal. All the  
22 private companies do that. I also do that when  
23 I can and if it is possible.

24           But in order for us to do this, we have to  
25 create a scenario. We have to be within the legal

1 framework. It's not proposing the government, you  
2 have to do this because you have signed a letter.  
3 It's not this. It's you have to do this because the  
4 legal framework in Mozambique allows you to do it,  
5 and in this process, in the prefeasibility study,  
6 I've seen nothing about these definitions and  
7 conditions in order to -- the contract be awarded to  
8 Patel. It's -- you have to help. If there's a  
9 private company wants to be awarded, it's normal,  
10 it's very legitimate, they have done this which is  
11 in the law. First, this is not an idea of Patel.  
12 That doesn't exist. I know Macuse for many years,  
13 and it's in a document of the government of 2009,  
14 which says that there's a possibility of a port in  
15 Macuse.

16           So this idea that this is a new thing that  
17 was invented, no, it's not a new thing that's  
18 invented, and there are documents that prove that.  
19 It's not my opinion. My opinion is whatever.

20           So Patel didn't ever present the basic  
21 terms and conditions. They didn't -- they should  
22 have put a legal framework. They should have  
23 accomplished the law which says again the PPP Law  
24 project action social development on the local  
25 communities, adaptation to legal existing

1 frameworks, adaptation to "proceedments"  
2 [procedures] and measures of supervision, of  
3 legality and conformity by Tribunal Administrativo.  
4           So when we want to enforce and we want  
5 to -- it's normal for private companies to try to  
6 get a direct award. Normal. But we have to work  
7 for that, and we have to help the government to do  
8 it in a legal way, and I've seen no proofs of that  
9 action done by Patel. I do it many times. If  
10 I want, I have to help myself with the national  
11 consultants, with national lawyers, because lawyers  
12 also need to be -- like us engineers -- lawyers need  
13 to be in the professional association. They need to  
14 be registered and licenced in Mozambique. It's  
15 not -- it's a country with laws and we have to  
16 respect the country and the laws. I don't know if  
17 I can say this, but, Mr President, you tell me if  
18 it's not good, please, to say this, but I've heard  
19 today that Mozambique government act as an  
20 irresponsible way. This is a very strong -- some  
21 things we have to respect also countries, and  
22 Mozambique has its laws and we have to respect the  
23 laws. And if you don't know the laws, we cannot --  
24 this is, sorry to say -- I'll not say nothing --  
25 sorry. Well, so it was impossible for -- Patel put

1 himself in a position that it was impossible for the  
2 government to proceed. They didn't give the  
3 government a way, a pass, a legal framework, a  
4 technical thing. Nothing. It's -- and now I'll go  
5 to the PFS.

18:13

6 I know the government approved the PFS,  
7 the prefeasibility study. Of course I know this.  
8 And the government approved the prefeasibility study  
9 and told Patel that Patel could exercise its right  
10 of preference. Period. Nothing more. And the  
11 right of preference, it's in the law. Something is  
12 known in Mozambique. This is the normal situation.

13 But cost estimation. Now I'll talk about  
14 prefeasibility study. It's my life. I do it many  
15 times. Cost estimations, one page, 15 rows.

16 We're talking about a 3 billion-dollar  
17 project, 20 per cent of the GDP of Mozambique.  
18 20 per cent of GDP of Mozambique. One page.  
19 Technical team. Who's the technical team? Who  
20 signed this project? This is a very important  
21 thing. 3 billion, it's really important for  
22 Mozambique -- 3 billion-dollar is a lot of money.  
23 There's no technical team. Who did this work? Who  
24 are the people? It's mandatory to have in a  
25 prefeasibility study.

1           In section 2 it says need for a port. I'm  
2 not going to ask you to present the section 2. One  
3 and a half pages. Economical, financial viability,  
4 environmental viability. We are in the 21st  
5 century. It's impossible to do -- propose something  
6 like that. But, first, it's in the law that we have  
7 to fulfil in the regulation 1612, it's in the law  
8 that the main principles -- article 4 in the  
9 Mozambican law, the main principles in the law of  
10 15 -- article 1511 must -- I'm a lousy translator  
11 but I'll try. Must show the way to all the process  
12 of elaboration, the studies of technical viability,  
13 environmental viability and economic and financial  
14 viability. I saw nothing of this in the  
15 prefeasibility study.

16           I saw nothing -- I saw a study which is --  
17 I don't like to make adjectives but I've never seen  
18 this in my entire life. There's no one word on what  
19 does it cross. In order to do this, it's not  
20 talking about impact environmental study, it's not  
21 that we're talking about. Impact environmental  
22 study must be done in another phase. But in this  
23 phase it was mandatory to have a viability  
24 environmental. Viability. If we have sacred  
25 forests, are we crossing conservation areas. Do we

1 have problems of flood? It's near the Zambezi  
2 river. And about the communities. Who are the  
3 communities we are going to pass? Who are those  
4 people? Have we talked to -- there's no proof -- no  
5 proof in the study that they have spoken to  
6 stakeholders, and the stakeholders, I mean the  
7 ministers of agriculture, culture -- I put them here  
8 so I cannot forget, the minister of agriculture,  
9 culture, infrastructure, environmental, public  
10 works, health, education -- no. There's no proof  
11 they have talked -- there is no input of the real  
12 thing of Mozambique. It's amazing. I see a study,  
13 and as I am saying I do a lot of those things.  
14 I see a study who has no link to reality. No link.  
15 Zero link to reality. It's impossible to have a  
16 study that has no -- doesn't address this technical,  
17 finance and environment. We are in the 21st  
18 century. It's impossible to do this.

19 Have they talked to the government of the  
20 provinces? In the estimation cost they have --  
21 Patel has put \$115 million for social developments  
22 and rehabilitation. It's like this. Social  
23 developments of rehabilitation. Where did this come  
24 from? And this is the fees that are defined by  
25 Patel. I have heard the past presentation, which

1 I didn't understand, because the fees are in the  
2 proposal of Patel, \$107 million period. There's no  
3 need of calculation of fees as presented by the  
4 proponent, and this \$115 million for social  
5 development, it's bigger -- it's similar to the fees  
6 but -- and they say we're going to build hospitals,  
7 schools. But where? Why? Who asked them for that?  
8 When we go to a country -- this is a very important  
9 railway line. It's 500 kilometres that crosses the  
10 country from east to west. It will have a big  
11 impact on this development. And how can we cross  
12 this and we didn't talk to people, we didn't know --  
13 we don't know what the environmental -- of course  
14 they say we'll do this and -- but generalities.

15           But when we address a project like this,  
16 we have to -- it's not only we have to do it  
17 properly. Of course we have to do it properly. And  
18 doing what Patel did was not properly done. I am  
19 very sorry to say this, was not properly done nor  
20 addressed.

21           But even we have to get allies. Who are  
22 the allies of Patel? How wanted Patel to get a  
23 direct award? Who are their allies? Patel was  
24 connected to who? What was the local content? What  
25 were the companies that could help them? Maybe

1 public companies. I don't know. But they have to  
2 have a strategy in order if they could want to have  
3 a direct award. It's not I'm suggesting that the  
4 government shouldn't comply with the law. Of  
5 course. But if we want something, we have to build  
6 a strategy. And there's no legal framework, nothing  
7 on Patel proposal, prefeasibility study more than  
8 wording.

9 Again, I will go to --

10 **MS BEVILACQUA:** Mr Mendonça, in the  
11 interest of time, we need you to wrap up now.

12 **MR MENDONÇA:** OK.

13 So, article 9 Law of PPP. Article 9. The  
14 complete process of the Entendimento  
15 "empreendimento" has the same rules and phases.  
16 Phase 1, conception. Phase A, conception. B,  
17 definition of basic terms orientato. Elaboration of  
18 the studies -- it's not the environmental impact  
19 studies, it's the studies of viability, technical,  
20 "ambiental" [environmental] and economical and  
21 finance. I have not seen the finance model. Who  
22 are the oftakers? In order to build this, an  
23 operation like this, we have -- all of us would know  
24 this, we have to have oftakers, and the oftakers  
25 are the ones who say that they will pay for the next



1 years and they'll grant it a series of tons.

18:21

2 I don't know who are the oftakers.

3 And in the beginning of study, 50 to 60

4 millions of tons. Where did they get this? Now

5 there is today, the capacity today is about 6 to 8

6 in the Sena line, and about 12 in the Vale line. I

7 don't know -- sorry, I will not talk about that

8 right. One thing I must show -- sorry, Theresa.

9 **MS BEVILACQUA:** Sorry, we are out of time.

10 **MR MENDONÇA:** So what I saw -- what I saw,

11 it's a shame. What I saw, it's one -- you know

12 AutoCAD? It's a programme that all of us use,

13 engineers, to draw, to make drawings, and these

14 gentlemen who have done this, they have used

15 educational AutoCAD version, which is in the

16 drawings saying this is AutoCAD version for

17 education, not for professional use. This is

18 illegal. We cannot use illegal software. It's not

19 important but it's -- well, it's what it is.

20 **MS BEVILACQUA:** Thank you, Mr Mendonça.

21 **MR MENDONÇA:** Only one thing again. I'll

22 talk no more. Sorry, Mr President. Can I? Please?

23 **PRESIDENT:** Please. Just bear in mind the

24 time. So if you wrap up then I think --

25 **MR MENDONÇA:** Only one thing. There was a

1 public tender, Mr President, and the public tender,  
2 according to the law, in my opinion, there's no  
3 chance of doing that, and Patel lost the tender.  
4 And Patel -- in the Mozambican law you have three  
5 phases that you can compliant. One, two and three.  
6 In phases one and two you have to make a warranty  
7 from the bank. Patel used the first phase for  
8 compliant. Never used two other phases. So we have  
9 to do everything according to the law. They didn't  
10 use it. They could have used it. I don't know if  
11 they were going to win, I have no idea. But if they  
12 want it they could have used. And now, if they want  
13 to claim, why didn't they claim at the time in a  
14 formal tender?

15           So I would say Patel is a victim of its  
16 own acts. As an engineer, I am ashamed of what I've  
17 seen in the prefeasibility study. And as a licensed  
18 engineer, I think the Government of Mozambique has  
19 to comply with Mozambican laws and that what they  
20 have done in this process.

21           Sorry to take this time. Thank you.

22           **PRESIDENT:** Thank you. Thank you,  
23 Mr Mendonça.

24           So thank you. Let me get a time check  
25 now, a final time check from the secretary so that

1 you know where you stand.

18:24

2           **MS JALLES:** So the direct was 33 minutes,  
3 and Respondent has used a total of eight hours and  
4 ten minutes.

5           **PRESIDENT:** Very good. So we will now go  
6 off the record. Thank you.

7           (The hearing was adjourned at 6.25 pm)

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