

**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**

**Monday, 5 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:

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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

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MR BAIJU VASANI

Messrs CMS Cameron McKenna Nabarro Olswang LLP:

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MS DARIA KUZNETSOVA

Miranda & Associados:

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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:

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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)

I N D E X

GERALD LAPORTE .....1445  
    Examination by Claimant .....1446  
    Presentation .....1447  
    Cross-examination by Respondent .....1474  
    Questions by the Arbitral Tribunal .....1479  
MARK LANTERMAN .....1484  
    (via videolink) .....1484  
    Examination by Respondent .....1485  
    Presentation .....1486  
    Cross-examination by Claimant .....1493  
    Questions by the Tribunal. ....1525  
MARK SONGER .....1530  
    (via videolink) .....1530  
    Examination by Respondent .....1531  
    Presentation .....1532  
    Cross-examination by Claimant .....1537

I N D E X, cont'd

PROFESSOR RUI MEDEIROS .....	1571
Examination by Claimant .....	1572
Cross-examination by Respondent .....	1587
Re-examination by Claimant .....	1646
Questions by the Arbitral Tribunal. ....	1651
DR TERESA MUENDA .....	1664
Examination by Respondent .....	1665
Presentation .....	1668
Cross-examination by Claimant .....	1683

1 (9.32 am, Monday, 5 December, 2022)

2 **PRESIDENT:** Good morning. This is the 7th  
3 day in the merits hearing between Patel Engineering  
4 and the Republic of Mozambique. After this day of  
5 rest on Sunday, if there's any point of order,  
6 I listen, and look first to Claimant. Ms Vasani?

7 **MS VASANI:** Thank you, Mr President. We  
8 are ready to proceed with Mr LaPorte.

9 **PRESIDENT:** Mr Basombrio?

10 **MR BASOMBRIO:** Yes. Good morning,  
11 Mr President. We do have two points of order, but  
12 they are related to matters in the testimony of the  
13 legal experts, so what I would propose, if it's OK  
14 with the Chair, would be just to wait and address  
15 those before the experts testify.

16 **PRESIDENT:** That sounds good.

17 So then we start with Mr Gerald LaPorte.

18 GERALD LAPORTE

19 **PRESIDENT:** Mr LaPorte, good morning to  
20 you.

21 Mr LaPorte, you are here as an expert, and  
22 the first thing we have is we have to take your  
23 declaration as an expert witness. So can I kindly  
24 ask you that you stand up?

25 Do you solemnly declare upon your honour

1 and conscience that you will speak the truth, the  
2 whole truth and nothing but the truth, and that your  
3 statement will be in accordance with your sincere  
4 belief?

5 **MR LAPORTE:** I do.

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

7 **MR LAPORTE:** Thank you, Mr President. And  
8 good morning to the Tribunal.

9 **PRESIDENT:** I will give now the floor to  
10 Ms Vasani to introduce you.

11 Examination by Claimant

12 **MS VASANI:** Thank you, Mr LaPorte.

13 Mr LaPorte, the Tribunal has called you here today  
14 to give testimony in relation to the MOIs that you  
15 have examined in this arbitration.

16 Do you have your expert reports before  
17 you, clean copies?

18 **MR LAPORTE:** I believe I do, yes.

19 **MS VASANI:** And are you able to confirm  
20 that those are your signatures on the last pages of  
21 those reports?

22 **MR LAPORTE:** Yes, these are my reports.

23 **MS VASANI:** Thank you, Mr LaPorte. And is  
24 there any modification or amendment you would make,  
25 or corrections to any of the reports?



1           **MR LAPORTE:** No, not at this time.

2           **MS VASANI:** Thank you. No further  
3 questions.

4           **PRESIDENT:** I think you have a  
5 presentation, Mr LaPorte?

6           **MR LAPORTE:** I do.

7           **PRESIDENT:** We must give it a number, it's  
8 H-13, and you have the floor, Mr LaPorte.  
9 Presentation

10           **MR LAPORTE:** Thank you. I'd like to begin  
11 with a very brief introduction of myself and my  
12 background. So I've been involved in the forensic  
13 sciences for about 30 years. I've been employed in  
14 some capacity. It will be 30 years coming up here  
15 in September, next September, so about 29 and a  
16 little bit of years.

17           I received my education, my Bachelor of  
18 Science degree and my Bachelor of Commerce Degree at  
19 the University of Windsor in Ontario, Canada. I'm  
20 originally from Canada.

21           I then went to the US to obtain my Master  
22 of Science in Forensic Science at the University of  
23 Alabama at Birmingham.

24           I've worked in multiple capacities but  
25 mostly as a chemist, so I'm going to kind of skip a

1 little bit of my background in terms of my time as a  
2 chemist, and then jump right up to 2001, when  
3 I began my training with the United States secret  
4 service. I had already had about seven years of  
5 chemistry experience, so when I was brought to the  
6 secret service my position entailed performing  
7 chemical examinations on documents to help determine  
8 their authenticity.

9           So with respect to chemical analysis of  
10 documents, I'll say there's only probably around  
11 maybe 10 to 15 experts in the entire world that do  
12 what I do. There's only four or five of us in the  
13 United States. A couple from Germany, some in  
14 Australia, but it's a very niche area.

15           But the one thing that chemical analysis  
16 allows me to do as a forensic document examiner is  
17 to get a lot more information about the document  
18 than a typical forensic document examiner. So the  
19 chemical analysis allows me to perform quite a bit  
20 of testing to determine like the materials that were  
21 used and more information about those particular  
22 materials.

23           In terms of my employment, so I worked  
24 with the United States secret service up until 2009.  
25 I started off as a document analyst with a sub

1 specialty in chemistry. I was promoted to a senior  
2 document analyst, and then I was promoted to the  
3 chief research forensic chemist for the United  
4 States secret service.

5 In 2009 I began a new position at the  
6 United States Department of Justice. I became the  
7 director of the office investigative and forensic  
8 sciences within the Department of Justice, and then  
9 in 2019 I retired from the government, and I took a  
10 position with Florida International University,  
11 which is in Miami, Florida. I work there remotely  
12 but I'm the director of research innovation for the  
13 global forensic and justice centre.

14 So to sort of intersect with all of that,  
15 since 2008 I have a private company that I work  
16 with. I'm a co-owner of the company, and it's  
17 Riley, Welch LaPorte & Associates Forensic  
18 Laboratories.

19 Today I'm here on behalf of my work with  
20 Riley Welch LaPorte & Associates, so this has  
21 nothing to do with my work or my position at Florida  
22 International University. So anything I say here  
23 today doesn't represent the views of Florida  
24 International University or the state of Florida or  
25 anything like that, so I just want to be clear on

1 that.

2           So I'm going to get into the presentation  
3 now. I'm going to start moving towards this.

4           There's a lot of background that I believe  
5 I don't need to provide, but essentially what we  
6 have here is we have a very sort of -- I'll say a  
7 very narrow objective of trying to determine whether  
8 one -- there's two MOIs, two English MOIs, PEL's  
9 version and Mozambique's, so which one of those  
10 versions is authentic? And so the way that we  
11 address this type of question is we develop what's  
12 called competing propositions. So the idea is one  
13 or the other is authentic.

14           Now, I will talk about sort of in my next  
15 slide, so even though we have competing  
16 propositions, as a scientist I still need to be open  
17 to alternative explanations or sort of alternative  
18 things that may have happened outside of the  
19 competing proposition approach, and I'll discuss  
20 that a little bit more.

21           So that's essentially the idea. But  
22 really what I have, the evidence that I've been  
23 provided lends itself to a competing proposition.  
24 And that is, which one of these is authentic?  
25 They're different, obviously, in a minor but

1 important way, but the question is which one of  
2 these is authentic.

3           So in this case we have clause 2, and  
4 basically in PEL's version clause 2 is different  
5 than the clause 2 in Mozambique's English MOI, so  
6 really the focus is narrowed down into sort of the  
7 idea of clause 2.

8           But the questions that I have to  
9 consider -- and I do want to -- I want you to keep  
10 this in mind, and that is when I started the  
11 examination, there was a lot of information that  
12 I may not have had that I have today, so I'm going  
13 back to sort of where my mind was and my objective  
14 to my testing before these proceedings started,  
15 before any other information was provided.

16           So, first of all, the question that I have  
17 to ask myself is was clause 2 altered in any of  
18 those -- in one or the other versions. If it was  
19 altered, was one or more of the pages altered,  
20 including clause 2, and then reinserted back into  
21 the document? So sometimes what we'll see is that  
22 somebody will make a change to something, and then  
23 they'll print it on a whole new page and then  
24 they'll substitute that page into the multipage  
25 document, so we call that a page substitution.

1           The other way that this could have been  
2 done is that the entire document was fabricated to  
3 alter clause 2, so -- and like I'd previously  
4 mentioned, I have to think about whether there's an  
5 alternative method that could have been used to  
6 alter clause 2, maybe something that would be  
7 completely surprising, maybe remote, and then also  
8 I do have to think about whether there's an  
9 alternative explanation for the possibility of why  
10 there are two different versions. So I am going to  
11 address a whole lot of these questions as I go  
12 through my presentation.

13           So the first thing is I'll say we have  
14 some undisputed assumptions and facts here. So we  
15 know that PEL's English and Portuguese MOIs are  
16 original, following my examination. That hasn't  
17 been disputed by any of the other experts. I think  
18 we all understand that both of PEL's MOIs are  
19 original. Mozambique's English and Portuguese MOIs  
20 are not original; we've never been provided with any  
21 originals from Mozambique.

22           Mr Zucula's signature on page 6 of PEL's  
23 English MOI is a genuine signature. Now, at the  
24 time -- I understand that Mr Zucula has testified  
25 that that was his signature. At the time of my

1 examination, it was my understanding that this was  
2 never disputed, so it was an assumption on my part  
3 that Mr Zucula's signature was genuine. I did not  
4 do an examination of the signature but since it was  
5 never -- it was never asserted by the defendants --  
6 I'm sorry, by the Respondents that it was not a  
7 genuine signature, I made that assumption.

8           Mr Zucula's initials on page 1 through 5  
9 of PEL's English MOI are genuine. Once again, that  
10 has not been disputed. And then the Mozambique  
11 embossing seal used on PEL's English and Portuguese  
12 MOIs are authentic.

13           Once again, when I was engaged in this  
14 there was no allegation that Mozambique's embossing  
15 seal was stolen or anything like that, so once  
16 again, it's an authentic Mozambique seal.

17           The one thing that I really do need to  
18 urge to the Tribunal is that there are many, many  
19 limitations when we have copies of documents versus  
20 the original documents, so this quote is from Ordway  
21 Hilton. He's authored multiple textbooks; he's  
22 considered a grandfather in the field of forensic  
23 document examination and he states in his book "No  
24 reproduction, regardless of how skillfully it is  
25 made, is as satisfactory for a technical examination

1 as the original. Each kind of reproduction imposes  
2 definite limitations on both the examination and the  
3 findings".

4 So that's really important to keep in  
5 mind, is that we have copies of Mozambique's  
6 documents, and so there's going to be a lot of  
7 limitations with respect to the types of exams that  
8 can be performed, the testing, and then the  
9 conclusions that we can reach.

10 So there are dangers, if you will, you  
11 know, cautions that we need to think about when we  
12 have non-original documents, and that doesn't just  
13 happen in this case -- that's not just for this  
14 case. This is every case that I have where we don't  
15 have an original document.

16 First of all, a document can be easily  
17 manipulated, fabricated, copied and scanned without  
18 detection, and then somebody can create a pdf of  
19 that document, so the pdf is something that happens  
20 later on down the line. All kinds of things can  
21 happen to the document before the pdf is created.

22 Non originals preclude the examiner from  
23 doing a comprehensive forensic examination using a  
24 multitude of tests -- physical, optical, chemical  
25 tests. You can't do those on copies. There are



1 certain things that one might be able to do with  
2 copies, but for the most part chemical testing and  
3 any kind of optical testing, using ultraviolet,  
4 infrared, those kind of things cannot be done on a  
5 copy.

6           It's far more difficult to manipulate and  
7 fabricate on an original document without detection,  
8 especially when chemical analysis can be conducted,  
9 as it was here, so this is an important point  
10 because if somebody makes a change to an original  
11 document, even a layperson can typically see that  
12 change, but there are still things that still I need  
13 to be cognisant of, even with original documents,  
14 whether they were completely fabricate or whether  
15 signatures were forged -- those kind of things -- so  
16 all of that I have to keep in mind when I'm doing  
17 that examination.

18           So I'm going to go through the results  
19 from my examination of PEL's English and Portuguese  
20 MOIs. First of all, all the physical and optical  
21 characteristics of the paper used for both of the  
22 MOIs, both of PEL's MOIs, are all consistent with  
23 each other, so there's no evidence that there was  
24 some sort of page substitution. The paper -- the  
25 paper that I analysed -- I discuss this in my

1 report -- I do physical, optical examinations and  
2 even chemical tests of those papers, so I didn't  
3 find any differences to indicate there was a page  
4 substitution.

5           If we look now at Mozambique's English and  
6 Portuguese MOIs, you can't do any paper examination.  
7 We can't tell if there was a page substitution or  
8 not based on the paper.

9           The other thing I thought was very  
10 compelling is that the same printing device -- and  
11 when I say the same printing device I'm saying the  
12 exact same printer -- was used to print colour pages  
13 in PEL's English and Portuguese MOIs. The way I can  
14 do that is that back in the late 1990s and the early  
15 2000s, many of the governments around the world  
16 started to understand that these copying  
17 technologies were excellent for quality, and it  
18 would be very easy to counterfeit money and  
19 currency. You could just photocopy a \$100 US dollar  
20 bill, a euro, and you can go spend it.

21           So what ended up happening there was a  
22 conglomeration, everybody got together with the  
23 business, with all of the machine manufacturers, and  
24 they decided that they would put in these called  
25 counterfeit protection security codes, so what these

1 are, they're yellow dots that get encoded onto the  
2 paper that you can only see with certain wavelengths  
3 of light or by blowing it up or having a high  
4 resolution document. You can't see these yellow  
5 dots with the naked eye. So these yellow dots have  
6 a unique pattern that they lay out on the paper, so  
7 I had noticed that the Portuguese and the English  
8 MOIs, the title pages, had CPS codes in them. They  
9 were identical CPS codes. And then also, too, that  
10 one of the pages in PEL's English MOI printed in  
11 colour because it had a period at the end of a  
12 sentence that somehow got turned into colour.

13           The reason that can happen sometimes is if  
14 you have a bold function and then it bolds a certain  
15 character, the printer will read that and say, oh,  
16 I need to print colour so I'll print colour for the  
17 whole page, so it may look black and white to a  
18 layperson, but it's actually a colour printed page,  
19 so that page also had a CPS code.

20           I also did a chemical analysis and a  
21 microscopic analysis of all the black toner that was  
22 used for the printing. All of that was chemically  
23 consistent in both MOIs, so therefore there was no  
24 evidence of a page substitution or anything like  
25 that based on the toner differences in the paper.

1           With respect to the printing, since  
2 Mozambique -- we don't have originals of the  
3 Mozambique's English and Portuguese MOIs, there was  
4 nothing we could do to determine how it was printed.

5           What might have been helpful is it's my  
6 understanding -- and I'll talk about this a little  
7 later -- it's my understanding that somebody has  
8 said that they found a copy and that a pdf was made  
9 of the copy, but we don't have -- we've never been  
10 provided with the -- I'll call it the original copy.  
11 I know that's a term that can get confusing, so what  
12 I'll call it is I'm going to call it a first  
13 generation copy. I can't call it a first generation  
14 because I don't know if there were multiple  
15 generations before that, but for the purpose of not  
16 being confusing I'm going to call it a first  
17 generation copy, so it's my understanding there was  
18 a first generation copy that's never been provided.

19           That might have been helpful. It may have  
20 had a CPS code in it that could have been analysed a  
21 little further.

22           In terms of the writing inks, so I did a  
23 chemical analysis on each of the writing inks that  
24 were used for the three different initials and then  
25 the three different signatures of the signatories of

1 the documents. One of the signatures used a blue  
2 ballpoint ink, the other used black ballpoint ink,  
3 and then Mr Zucula used a brown fountain pen ink, so  
4 we've got three different inks now. All of those  
5 inks match from the signatures from both MOIs, and  
6 then the initials for each of those individuals on  
7 every page. So there was certainly no evidence of  
8 page substitution in terms of the writing inks.

9           And then the one thing I do want to  
10 emphasise at this point in time, too, is that if  
11 PEL's documents were somehow forged or created  
12 improperly, I'll say, they would have had to have  
13 matched Mr Zucula's brown fountain pen ink that was  
14 used on all of the documents, and then this would  
15 have meant that they would have had to recreate both  
16 the Portuguese and the English document, the MOIs,  
17 so that starts to become a little more of a remote  
18 scenario as you start to think about this. So, you  
19 know, if someone were to create a document  
20 fraudulently, they would probably just focus on the  
21 English MOI. However, once again, as a scientist,  
22 I can't sort of throw out all of those  
23 possibilities. I've worked many intelligence cases  
24 for the United States. I've seen government -- I'll  
25 say government funded -- government fabricated

1 documents from around the world, and I worked a lot  
2 of Nazi war crime cases and those sorts of things,  
3 so I can tell you that I've seen the best of the  
4 best in terms of forgery and fraudulence, and this  
5 would require somebody with a pretty extensive  
6 background in forgery to think about doing all of  
7 this at this point in time. And, of course, we  
8 still have some other findings that I'm going to  
9 discuss.

10           This is just an example. So based on my  
11 understanding, too, Mr Zucula has admitted that this  
12 was his signature, and of course that was an  
13 assumption that I had, but his signature was  
14 executed in brown fountain pen ink. This is an  
15 example that the same brown fountain pen ink was  
16 used for the initials on the MOIs. This just  
17 happens to be the page in question, so all of that  
18 ink matches.

19           In terms of the analysis of the writing  
20 inks, it's impossible to do an analysis on  
21 Mozambique's English and Portuguese MOIs.  
22 (Portuguese channel interruption) ...

23           Once again, in terms of the analysis of  
24 the writing inks, we can't do that in this  
25 particular case with Mozambique's documents. And

1 then also I do want to add at this point in time  
2 initials and signatures could easily be digitally  
3 cut and copied from another source and pasted into  
4 Mozambique's English MOI.

5           There are going to be some other -- the  
6 other factors that I'm going to talk about with  
7 respect to cut and pasting, but what I do want to  
8 make very clear to this Tribunal is I know that this  
9 duty is here to come and provide you with as much  
10 information as possible. I'm not making any  
11 allegations that Mozambique did these sorts of  
12 things. This is just information -- I'm providing  
13 you with information of what could be done,  
14 potentially, so I'm not here to make any allegations  
15 about somebody forging documents or anything like  
16 that.

17           I have not found the evidence to say that  
18 Mozambique forged documents, so I don't want it to  
19 be interpreted as me making that kind of allegation.  
20 All I'm saying is that at this point in time now  
21 with signatures, very, very easy to cut and paste  
22 them from various sources and put them into -- and  
23 put them into a document.

24           So the stamps -- in terms of the stamps  
25 and the stampings, the stamps on the signature pages

1 in PEL's English and Portuguese MOIs, they're wet  
2 ink. I did a chemical analysis of the black ink  
3 that was used for those stamps. I compared them.  
4 The stamp ink, the formulations are the same, so no  
5 difference in the stamps.

6           With respect to the Mozambique's English  
7 and Portuguese MOIs, determining the authenticity of  
8 Mozambique's MOI based on the original stamps, we  
9 can't do that. But once again now it's very easy,  
10 someone could take the Patel stamp and digitally cut  
11 and copy that from one source and then paste it back  
12 into Mozambique's English MOI. So that's another  
13 example of something that could be easily cut and  
14 paste.

15           In terms of the embossing seal,  
16 Mozambique's seals were used on the signature pages  
17 of PEL's English and Portuguese MOIs. They're  
18 physically embossed into the paper so the  
19 authenticity of the seal has not been disputed.

20           So, once again, for me to think about  
21 whether PEL's documents were forged in some way,  
22 they would have had to have obtained Mozambique's  
23 seal and then put that seal into their documents.  
24 So I've worked in a lot of government documents; an  
25 embossing seal is actually used as what we call an



1 overlayer of security for fraud prevention because  
2 it does something physical to the paper, and so it  
3 is a fraud prevention type of thing, so typically  
4 governments will keep these seals very -- they'll  
5 keep them locked up, they'll put them in safes,  
6 whatever that is, but there will obviously be very  
7 limited use on who could use the seal as well, too,  
8 so I just want to make that point, too. So it's  
9 really important that we have an embossing seal.

10           To me, that's actually one of the more  
11 important features in this document is because it's  
12 a physically embossed -- it's physically embossed  
13 into the paper, and it's a government seal on top of  
14 it.

15           So with respect to Mozambique's English  
16 MOI we can't determine whether a franking seal was  
17 embossed into the signature page, and it's  
18 impossible to compare the seals that were used in  
19 the signature pages of Mozambique's English and  
20 Portuguese MOIs.

21           What I did do was I looked -- I'm sorry.  
22 I have copies -- obviously the image on your left is  
23 a copy -- is from the -- I'm sorry, is from page 8  
24 of Mozambique's English MOI, and the image on the  
25 right is from page 6 of PEL's English MOI, so

1 I scanned -- obviously I scanned PEL's English MOI,  
2 and you can see some evidence of embossing in PEL's  
3 English MOI, and the reason for that is because when  
4 someone embosses paper, it creates a different  
5 density in the paper, and then when you do a scan of  
6 the document, the way scans or photocopies work is  
7 that it's all based on how the light is reflected  
8 and then interpreted back by the machine, so that's  
9 what allows you to create a copy of something.

10           So typically if you have some density  
11 difference in the paper, the machine will pick that  
12 up to a certain extent. It might not be as good as  
13 my scan, because I scanned that at a high  
14 resolution, but typically you might see the  
15 embossing, you'd see -- whether there's crookedness  
16 in the printing.

17           So I didn't see any evidence of a seal  
18 that was embossed into Mozambique's English MOI  
19 based on the copies that I received. And just to be  
20 clear, I'm not saying definitively that no seal was  
21 there. I'm just saying there was no evidence of a  
22 seal that I could find.

23           So really, when I'm finished with all of  
24 those tasks, I also do -- I will take a document or  
25 I can take a document and put it in photo shop and

1 then I create a grid, and then I look at whether  
2 there's any skewing of the text to indicate that the  
3 text may have been altered or somehow added, so if  
4 someone has a piece of paper with printing on it and  
5 then they add something, they would have to put it  
6 back in the printer, so we look for any kind of bias  
7 or skewness to that. So I didn't find any evidence  
8 of any kind of text alteration or text addition or  
9 any irregularities in PEL's English MOI to indicate  
10 that it was fraudulently prepared.

11           With respect to Mozambique's English MOI,  
12 it could have been easily altered without detection,  
13 could have been completely recreated, could have  
14 been copied, and then it could have been saved as a  
15 pdf at a later date.

16           Some of the other undisputed findings, so  
17 this was information that was provided to me that  
18 exact copies of PEL's English and Portuguese MOIs  
19 were sent as pdf attachments in e-mails dated May 9,  
20 2011, so this was three days after the official  
21 signing of the MOIs on 6 May, so typically if  
22 someone were to alter these documents, you would  
23 think that they would have done that when this  
24 litigation began but not, you know, three days after  
25 the official signing.

1           There has been no evidence that I've been  
2 provided so far that Mozambique copied and created  
3 their pdfs of the English and Portuguese MOIs on or  
4 around the official date of the signing. I haven't  
5 seen any of that. I haven't seen any evidence to  
6 suggest that.

7           And then also, too -- and I just added  
8 this -- is that Mr Zucula has confirmed that his  
9 signature was executed on PEL's English MOI.

10           Before I go on, so what makes Mr Zucula's  
11 signature -- so if we think about the signature page  
12 on PEL's English MOI, we have Mr Zucula's signature,  
13 we have an embossment on page 6, but I've been  
14 able -- and then I've been able to show that the  
15 inks used for all the signatories on page 6 match  
16 the ink on all of the other pages in the MOI. The  
17 paper, the printing -- all of that is the same.

18           So based on that -- so using Mr Zucula's  
19 genuine signature as an anchor point, if you will,  
20 we can kind of work backwards and say, OK, well, we  
21 know that by all means it looks like page 6 is an  
22 authentic page, that there's really no dispute about  
23 anything on page 6 with respect to the embossing or  
24 Mr Zucula's signature, but page 6 then ties back  
25 into pages 1 through 5 and of course the important

1 page with clause 2 on it, so there's no differences  
2 based on all of that.

3           So I concluded in my report that it's  
4 highly probable that PEL's English MOI is authentic,  
5 and I just have a summary of the points which  
6 I don't need to go over. They're there for your  
7 review and, if you're using this presentation later  
8 on, to go back and look at all of this.

9           One thing that I do want to describe or  
10 explain is this idea of what "highly probable"  
11 means.

12           So "highly probable" is a definition that  
13 we use in a standard, and by definition this is a  
14 term that's used to describe very persuasive  
15 evidence, and the examiner, who would be me in this  
16 case, is virtually certain, but there's some factor  
17 that precludes the examiner from reaching an  
18 unequivocal opinion with absolute certainty.

19           So you might be asking why aren't you  
20 reaching an unequivocal opinion. So as a scientist  
21 it's very, very difficult to reach an unequivocal  
22 opinion in this field.

23           I like to use this example. If we were to  
24 ask lay people whether the sun is going to rise in  
25 the east tomorrow, everybody would say of course

1 it's going to rise in the east. As a scientist I  
2 would say I'm not exactly sure. Tomorrow hasn't  
3 happened yet, so if -- I don't know, if some  
4 phenomenon happens and the earth rotates a little  
5 bit and the sun doesn't rise exactly in the east,  
6 right, I would say by all circumstances we should  
7 expect the sun to rise in the east tomorrow, that's  
8 what we should totally expect, and that's based on  
9 years of experience, but something totally  
10 unexpected happens, so as a scientist this idea of  
11 100 percent certainty is becoming -- it's very  
12 difficult. There are times I would say out of --  
13 maybe out of every 20 cases that I do, maybe I reach  
14 on absolute certainty opinion one time out of 20,  
15 and it depends what the case is.

16           The one thing, though, that I do need to  
17 urge is that very rarely do I make opinions with a  
18 high degree of probability when I'm asked to  
19 determine the authenticity of, say, a business  
20 contract or something like that. It's very  
21 difficult.

22           So if I'm doing a passport examination or  
23 a driver's license examination, I have an exemplar  
24 or a comparator specimen to compare to, so I can  
25 look at a genuine passport, and then I can look at a

1 suspected fraudulent passport, and I can say oh,  
2 there's differences between these two so therefore  
3 this one is genuine or it's not genuine.

4           So, in terms of business type documents,  
5 we don't really have exemplars to compare with, so  
6 it's very difficult to sort of reach any kind of  
7 opinion other than saying there's just no evidence.

8           What I'm saying in this particular case is  
9 it's highly probable. This is all based on  
10 Mr Zucula's signature not being in dispute, the  
11 embossing seal, and then the connection to all of  
12 the other pages. But I will say that, you know,  
13 it's unethical for me to provide you with a  
14 statistical percentage, so I can't tell you, you  
15 know, it's 99 per cent or 98 per cent or anything  
16 like that because I don't have the statistical  
17 backing to provide that.

18           But what I can tell you is that -- and I'm  
19 not a betting man, but I would bet my house on  
20 something like this, that's what a Highly Probable  
21 is to me, so this is a very, very high degree of  
22 certainty. It takes a lot of evidence in my mind to  
23 get me to this point. I've examined thousands of  
24 documents over the years, so I've seen lots of  
25 variation and different types of scenarios that can

1 occur, so I would say as I've gotten older in this  
2 profession, I'm actually much more -- it's very  
3 difficult for me to get to this level of certainty.

4 **PRESIDENT:** Mr LaPorte, the secretary  
5 tells me you have been now speaking for half an  
6 hour, so if you can --

7 **MR LAPORTE:** I'll start winding down.

8 **PRESIDENT:** If you can finish in -- take  
9 your time but so that you are aware of the time.

10 **MR LAPORTE:** Thank you.

11 So with respect to Mozambique's English  
12 MOI, so we do have a large spacing gap after  
13 paragraph 2. I believe that one of the other  
14 experts is going to say that there's a spacing gap  
15 that's consistent with this spacing gap in the  
16 Portuguese MOI. I don't know what the term  
17 "consistent" means. I measured this difference, and  
18 it's a far larger gap than any gap in the Portuguese  
19 MOI. So it's an observation on my part. It doesn't  
20 necessarily -- it's not a strong enough observation  
21 to say that somebody fraudulently created, but it's  
22 an important observation.

23 The fonts were different that were used in  
24 Mozambique's English MOI versus Mozambique's  
25 Portuguese MOI -- I'm sorry, Mozambique's English



1 MOI, the cover page was a different font than the  
2 other pages.

3 Also the font that was used in  
4 Mozambique's Portuguese MOI is different than  
5 Mozambique's English MOI. These are typically  
6 characteristics you would find when two documents  
7 purportedly created contemporaneously with each  
8 other are created in different timeframes.

9 Also, these are considerations for the  
10 Tribunal. I'm not privy to a lot of information;  
11 I can't ask questions of the opposition; but what  
12 I would want you to sort of be aware and be  
13 cognisant of is why is Mozambique's Portuguese MOI,  
14 why is the quality of it so different than  
15 Mozambique's English MOI?

16 This makes it a situation where it's  
17 possible that information, signatures, initials,  
18 could have been copied and pasted from the  
19 Portuguese MOI and then put back into the English  
20 MOI. We can't make that determination. The quality  
21 is too poor in Mozambique's Portuguese MOI.

22 Also, too, it's my understanding that now  
23 somebody has said that a copy of Mozambique's  
24 English MOI was found and then scanned, so that's  
25 new information. Although limited, if we had that

1 physical copy, that was never provided for  
2 inspection or examination.

3 I know I've been involved in this case for  
4 nearly two years, so this is the first time I've  
5 heard this information as well, too, and then  
6 Mozambique has provided no explanation or provenance  
7 from the originals to these copies. So, once again,  
8 I'm not in the position and I'm not privy to other  
9 information, so I think those are just things for  
10 the Tribunal to keep in mind.

11 And then my conclusion with respect to  
12 Mozambique's English MOI, it seems I just saw copies  
13 of the other experts' presentations, they seem to  
14 think that I've said that Mozambique's English MOI  
15 is inauthentic. I've never said Mozambique's  
16 English MOI is inauthentic. That's not in my  
17 report. I've been clear and I've stated that it is  
18 not possible to accurately and reliably conduct a  
19 scientific examination and analysis of Mozambique's  
20 English MOI to determine its authenticity.

21 There are certainly some features in there  
22 that should be paid attention to, such as the  
23 spacing gap, the difference in the fonts and those  
24 sorts of things, but what I'm saying is we can't do  
25 a proper examination to determine the authenticity.

1           So I want to be sure that that's  
2 understood by the Tribunal, that I've never made any  
3 allegation that it's inauthentic. So I don't know  
4 where the other experts came up with that word,  
5 I checked my report to make sure I didn't say that  
6 accidentally, but I never said it in my report.

7           So if we evaluate the competing  
8 propositions, we look and we say that PEL's English  
9 MOI is authentic, there's no evidence of  
10 authenticity of Mozambique's English MOI, and if we  
11 think about this, you know, on a scale, the  
12 competing proposition by far favours the idea that  
13 PEL's English MOI is authentic.

14           And once again, we must keep in mind that  
15 there's some inconsistency in Mozambique's English  
16 MOI in that the evidence supporting the authenticity  
17 of PEL's English MOI far outweighs the evidence  
18 supporting the authenticity of Mozambique's English  
19 MOI, so this is put into a competing proposition  
20 approach.

21           And, with that, I'm open for any questions  
22 that you may have.

23           **PRESIDENT:** Thank you, Mr LaPorte.

24           Ms Vasani, do you have any further  
25 questions?

1           **MS VASANI:** No, thank you.

**10:14**

2           **PRESIDENT:** Ms Bevilacqua, do you have any  
3 questions for the expert?

4           **MS BEVILACQUA:** Just a few, Mr President.

5           **PRESIDENT:** Please.

6 Cross-examination by Respondent

7           **MS BEVILACQUA:** I just want to be clear on  
8 your final conclusion slide there, Mr LaPorte, and  
9 where you started your presentation was with the  
10 idea that there's a competing proposition that one  
11 English version is authentic and the other is not,  
12 correct?

13           **MR LAPORTE:** Correct.

14           **MS BEVILACQUA:** But isn't it also possible  
15 that both are authentic?

16           **MR LAPORTE:** I have not been -- so what we  
17 need to be clear about is it's impossible to -- it's  
18 scientifically impossible to render any opinion  
19 about the authenticity of Mozambique's MOI, the  
20 English MOI. We just -- we can't say anything about  
21 it because the quality of the copies were inferior,  
22 they were just copies, so there's nothing that can  
23 be confirmed.

24                   If I had an original Mozambique MOI, then  
25 I would say that that's a -- that would be a

1 potential possibility that, I don't know, by some  
2 accidental circumstance there's another version out  
3 there or there was some confusion or whatever, but  
4 we don't have any of that evidence to be able to  
5 state that.

6 **MS BEVILACQUA:** And you have evidence that  
7 all signatories signed two copies in English and two  
8 copies in Portuguese?

9 **MR LAPORTE:** Yes.

10 **MS BEVILACQUA:** And then you also reviewed  
11 PEL's Portuguese version?

12 **MR LAPORTE:** Correct.

13 **MS BEVILACQUA:** And that, for the record,  
14 is Claimant's Exhibit 5B.

15 And you reviewed both the original, and  
16 did you also review any copies of PEL's 5B?

17 **MR LAPORTE:** Yes, I did, so I reviewed  
18 copies, and also I've reviewed the e-mails -- the  
19 e-mailed copies as well, too.

20 **MS BEVILACQUA:** And the spacing gap that  
21 you point out as following clause 2, which you call  
22 the disputed clause in this matter, that exists in  
23 Mozambique's English version, that same spacing gap  
24 also exists in the original of PEL's Portuguese  
25 version, does it not?

1           **MR LAPORTE:** I believe that spacing gap  
2 wasn't the same. It wasn't as much of a gap.

10:17

3           **MS BEVILACQUA:** And the same spacing gap  
4 appears on PEL's 5B, the Portuguese version, and  
5 Mozambique's R-1, Mozambique's Portuguese version.

6           **MR LAPORTE:** Once again, not -- it wasn't  
7 a spacing gap as significant in size as the one in  
8 Mozambique's English MOI.

9           **MS BEVILACQUA:** Correct, but I'm talking  
10 about the difference between the spacing gap which  
11 you noted following clause 2 in the Mozambique  
12 English version.

13           **MR LAPORTE:** Yes.

14           **MS BEVILACQUA:** Also appears in both the  
15 Mozambique and PEL Portuguese versions?

16           **MR LAPORTE:** It's not a significant gap,  
17 though. I mean, can you put a picture of it up?

18           **MS BEVILACQUA:** Sure. Could you pull up,  
19 please, Exhibit 5B?

20           **MR LAPORTE:** Oh, OK. So it's not -- if  
21 you look at the spacing, somebody might be looking  
22 down to the bottom of the page. You have to look at  
23 the number, the page number, page number 3. You see  
24 the 3 on the bottom right? There's not a very large  
25 gap between the page number and the number 2, and if

1 you'd like, I would go back to the spacing gap that  
2 I found in that there's a much more large spacing  
3 gap.

4           You couldn't -- there's not really much  
5 that you could fit in -- and I did a measurement of  
6 it, so there's not much additional verbiage that you  
7 could fit in to go with clause 3 and then the next  
8 set.

9           So when we're talking about gaps, let's  
10 pay attention to where the page number is, not the  
11 bottom of the paper.

12           **MS BEVILACQUA:** Then are the page breaks  
13 the same between PEL's Portuguese version and  
14 Mozambique's Portuguese version between paragraphs 2  
15 and 3?

16           **MR LAPORTE:** Can you put those up?

17           **MS BEVILACQUA:** Sure.

18           **MR LAPORTE:** So, just to clarify, you're  
19 asking if that spacing gap is the same or different?

20           **MS BEVILACQUA:** If the page breaks are the  
21 same between clause 2 and then clause 3?

22           **MR LAPORTE:** Well, OK, so first of all,  
23 Mozambique's Portuguese MOI that we're looking at on  
24 the right-hand side --

25           **MS BEVILACQUA:** Correct.

1           **MR LAPORTE:** Don't forget, we've got to  
2 use the page number. OK. This looks like a shrunk  
3 pdf, so if you look at the space between the page  
4 number and the bottom of the line, to me that looks  
5 about the same.

6           **MS BEVILACQUA:** Thank you.

7           Just two more questions, Mr LaPorte. On  
8 page 14 of your presentation, you had the second  
9 bullet point that the initials and signatures could  
10 have been digitally cut and copied from another  
11 source and pasted into Mozambique's English MOI, but  
12 you are not making a finding or accusation that that  
13 was actually done in this case?

14           **MR LAPORTE:** Correct. These are -- I'll  
15 say this is information that I'd like to provide for  
16 the Tribunal to think about, but I don't have the  
17 evidence to state that.

18           **MS BEVILACQUA:** And you didn't do any  
19 analysis of the signatures and initials and whether  
20 they had actually been digitally cut and copied?

21           **MR LAPORTE:** So I -- well, first of all  
22 I couldn't do that. Number 1 is because  
23 Mozambique's Portuguese MOI was such poor quality.  
24 There were initials and signatures in there you  
25 couldn't even tell if you compared them.



1           Secondly, they may have come from another  
2 source.

10:22

3           But, third, somebody could have easily did  
4 a cut and paste, put it into a copy, and then  
5 scanned that as a pdf.

6           **MS BEVILACQUA:** And I understand what is  
7 possible, but you are again not making the  
8 accusation that it was done?

9           **MR LAPORTE:** Correct. All of these --  
10 well, once again, these are the dangers of having  
11 copies to do examinations with.

12           **MS BEVILACQUA:** And then again, on page  
13 20, you indicated in the second bullet point of your  
14 presentation that Mozambique's English MOI could  
15 have been altered without detection, completely  
16 recreated, copied and saved as a pdf but, again, you  
17 are not making the accusation that any of those  
18 things were actually done.

19           **MR LAPORTE:** Correct.

20           **MS BEVILACQUA:** Thank you. Nothing  
21 further, Mr President.

22           **PRESIDENT:** Thank you. Ms Vasani, any  
23 follow-up?

24           **MS VASANI:** No questions for Claimant.

25           **Questions by the Arbitral Tribunal**

1           **PRESIDENT:** Just on a follow-up question  
2 to Ms Bevilacqua, it's page 20 of your presentation,  
3 when you say "without detection", it is without  
4 detection because in the Portuguese version of  
5 Mozambique, you cannot see all the initials, because  
6 otherwise you could compare the initials and see if  
7 two initials really match and then you would say,  
8 yes, it has been pasted and copied from page 6 of  
9 the Portuguese version, but you cannot do that  
10 because of the poor quality of the document?

**10:23**

11           **MR LAPORTE:** Yes, that's an excellent  
12 question, Mr President, but, yeah, the poor quality  
13 doesn't allow you to do that. Then there's also the  
14 possibility -- so let's say we had a really good  
15 quality. We might be able to look at that scenario  
16 and then rule it out. We can't really rule it out.  
17 There could have been another source of those  
18 initials that could have been copied and pasted as  
19 well too, but we can't rule it out from Mozambique's  
20 Portuguese MOI because of the quality. But yes,  
21 that's a great question and it's something I've been  
22 thinking about since I did the examination of this,  
23 is that I wish I could do a comparison with the  
24 initials from Mozambique's Portuguese MOI to at  
25 least rule that out.

1           **PRESIDENT:** And what can you tell us about  
2 the Mozambique copy which you have seen? What is  
3 the information which can be obtained regarding how  
4 and when that copy was --

**10:24**

5           **MR LAPORTE:** The first thing I would want  
6 to see is whether -- we talked about those  
7 counterfeit protection security codes. So if it was  
8 a colour copy, we might be able to see when those  
9 CPS codes, sometimes you can determine the date in  
10 which that copy was made, so that would be one --  
11 certainly one aspect of the examination that would  
12 be helpful looking at just that copy.

13           **PRESIDENT:** My question was slightly  
14 different.

15           What is it that you actually have been  
16 given? What have you seen? What is there -- how  
17 does -- how is the Mozambican copy which you have  
18 examined, what exactly is it?

19           **MR LAPORTE:** The only thing I've been  
20 provided is just the pdf that Mozambique filed with  
21 this proceeding, so that's the only thing that I've  
22 seen.

23           **PRESIDENT:** And what can you glean from  
24 that pdf?

25           **MR LAPORTE:** Nothing really. I mean

1 there's nothing that can be done from a physical,  
2 from the physical evidence standpoint. There's just  
3 nothing there. Other than what seems to be clearly  
4 obvious is a spacing gap, the differences in the  
5 fonts, those sorts of things, but other than that,  
6 nothing.

7 **PRESIDENT:** Sorry for a very silly  
8 question. Because the pdf was made out of -- what  
9 was the predecessor of the pdf?

10 **MR LAPORTE:** That's a great question.  
11 I don't -- we don't know what the predecessor of the  
12 pdf really was, so -- if I had that predecessor,  
13 I would have to see it and then might be able to  
14 determine some additional information.

15 **PRESIDENT:** And the last question is just  
16 for my own curiosity, and is you say somewhere in  
17 page 12, "there is no evidence of page substitution  
18 and no evidence that PEL's English and Portuguese  
19 MOIs were created in different time periods".

20 Can you tell from the ink the time when  
21 the ink was used to make the signature?

22 **MR LAPORTE:** So yes, that's a complicated  
23 question, but yes, that's actually one of my main  
24 expertises, we can do a chemical analysis of inks  
25 sometimes to determine how old they are, so that's

1 limited, though, if the ink is -- if the ink is  
2 truly less than two years old.

3           So, for example, if a document was  
4 purportedly dated in 2010 and I received it in 20 --  
5 like I'll say within the last year or last  
6 two years, then I might be able to determine that  
7 it's, in quotes, a fresh ink in that it's not  
8 consistent with being created in 2010, but it can't  
9 be done in this particular case. And that's based  
10 on looking at the solvent levels and so forth that  
11 are expected to evaporate from the ink as it ages.

12           **PRESIDENT:** Yes. This is off the record.

13 (Discussion off the record)

14           **PRESIDENT:** Very good. Mr LaPorte, you  
15 have come -- Mr LaPorte, thank you very much. You  
16 have come all the way from Colorado?

17           **MR LAPORTE:** From Virginia. Close to  
18 Washington DC.

19           **PRESIDENT:** Thank you very much for making  
20 the effort. It has been very helpful.

21           **MR LAPORTE:** Thank you very much.

22           **PRESIDENT:** So let us break. It's now  
23 10.30. Let's come back at 10.45.

24 (Short break from 10.30 am to 10.50 am)

25           **PRESIDENT:** Very good. We resume in order

1 to examine Mr Mark Lanterman. And I understand he  
2 is through video conference.

10:50

3 **MS BEVILACQUA:** That is correct,  
4 Mr President.

5 MARK LANTERMAN  
6 (via videolink)

7 **PRESIDENT:** Good morning, Mr Lanterman.

8 **MR LANTERMAN:** Good morning, Mr President.

9 **PRESIDENT:** Where are you?

10 **MR LANTERMAN:** I am in Minnesota in the  
11 United States.

12 **PRESIDENT:** So, it must be very early for  
13 you, sir.

14 **MR LANTERMAN:** Yes, sir, it is. It is  
15 4.50 am.

16 **PRESIDENT:** I apologise for forcing you to  
17 be up so early. How does it feel at this very early  
18 hour of the -- I don't know if late hour of the  
19 night or early hour of the morning?

20 **MR LANTERMAN:** Yeah, it actually feels  
21 pretty good, and it's something that I'm pretty used  
22 to in my line of work, but thank you.

23 **PRESIDENT:** OK. I'm happy that you take  
24 it with grace.

25 You are here as an expert, Mr Lanterman,

1 and the first thing we have to do is we have to take  
2 your declaration as an expert.

10:51

3 So, Mr Lanterman, do you solemnly declare  
4 upon your honour and conscience that you will speak  
5 the truth, the whole truth and nothing but the  
6 truth, and that your statement will be in accordance  
7 with your sincere belief?

8 **MR LANTERMAN:** Yes, I do.

9 **PRESIDENT:** Thank you. Thank you very  
10 much, Mr Lanterman.

11 So I will now give you over to counsel to  
12 the Republic of Mozambique. Ms Bevilacqua, will  
13 introduce you?

14 **MR LANTERMAN:** Thank you.

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

16 Examination by Respondent

17 **MS BEVILACQUA:** Good morning,  
18 Mr Lanterman.

19 **MR LANTERMAN:** Good morning.

20 **MS BEVILACQUA:** You have authored two  
21 reports in this matter, and you have clean copies,  
22 either digital or printed, of your reports available  
23 to you?

24 **MR LANTERMAN:** Yes, I do.

25 **MS BEVILACQUA:** And your first report,

1 dated 19 March 2021, is that your signature on page  
2 10?

10:52

3 **MR LANTERMAN:** Yes.

4 **MS BEVILACQUA:** Do you have any additions  
5 or corrections that you wish to make to your first  
6 report?

7 **MR LANTERMAN:** No.

8 **MS BEVILACQUA:** And your second report is  
9 dated November 26, 2021. Is that your signature  
10 also on page 10 of the second report?

11 **MR LANTERMAN:** Yes.

12 **MS BEVILACQUA:** And do you have any  
13 additions or corrections you wish to make to that  
14 report?

15 **MR LANTERMAN:** No.

16 **MS BEVILACQUA:** And you have prepared a  
17 summary of your testimony which you would like to  
18 provide to the Tribunal today?

19 **MR LANTERMAN:** I have.

20 **MS BEVILACQUA:** And with that,  
21 Mr President, we turn it to you.

22 **PRESIDENT:** Thank you. We have the  
23 presentation in front of us. It's H-14.

24 And you have the floor, Mr Lanterman.  
25 Presentation



1           **MR LANTERMAN:** Thank you, Mr President.

2           So, first, I just want to thank you,  
3 Mr President, and the Tribunal for the opportunity  
4 to appear before you today. My name is Mark  
5 Lanterman, and I'm the chief technology officer of  
6 computer forensic services and I am based in  
7 Minneapolis, Minnesota in the United States.

8           For background, my undergraduate and  
9 graduate degrees are in Computer Science.

10 I completed my postgraduate studies in Cybersecurity  
11 and Digital Forensics at Harvard University.

12           I served for eight years as a member of  
13 the United States Secret Service Electronic Crimes  
14 Task Force. I am a professor in Cybersecurity and  
15 Digital Forensics at the University of St Thomas  
16 School of Law here in Minneapolis, Minnesota. I am  
17 also faculty at the Federal Judicial Centre in  
18 Washington DC, which means that I assist in training  
19 our Federal district court judges in cybersecurity  
20 and digital evidence.

21           And I am also certified by the Department  
22 of Homeland Security as a seized computer evidence  
23 recovery specialist.

24           If I can go to the next slide, please.

25           My assignment in this case was to review

1 electronic copies of PEL's and Mozambique's English  
2 language and Portuguese language MOI documents.  
3 I believe that these are Exhibit R-1, which is  
4 Mozambique's Portuguese MOI, r-2, Mozambique's  
5 English MOI, exhibit C-5A, which is the PEL English  
6 MOI, and Exhibit C-5B, which is PEL's Portuguese  
7 MOI. I was asked to evaluate these MOI documents  
8 and take into account Mr LaPorte's contentions about  
9 the same.

10 If I can go to the next slide, please.

11 Generally speaking, in the grand scheme  
12 I tend to agree with Mr LaPorte on a number of  
13 important topics.

14 First, I will say that there is nothing to  
15 indicate that PEL's versions of the documents have  
16 been tampered with or fabricated. I saw no evidence  
17 of fabrication with these documents. Now, based on  
18 an e-mail communication that was produced by PEL,  
19 these documents existed no later than May 9, 2011.

20 I did not analyse or review the physical  
21 copies of PEL's MOI documents, so I relied solely on  
22 the electronic versions, and I do agree with  
23 Mr LaPorte when he says that the authenticity of the  
24 Mozambique English MOI cannot be verified one way or  
25 the other.

1           If I could go to the next slide, please.

2           With respect to Mozambique's English MOI,  
3 the electronic version is consistent. I saw no  
4 signs of electronic tampering. Everything appeared  
5 as though I would have expected.

6           Mr LaPorte's observations, however, are  
7 not sufficient evidence to conclude that the  
8 document is inauthentic, and in fact, earlier today  
9 we heard testimony from Mr LaPorte stating that he  
10 never said that Mozambique's MOI was not authentic,  
11 and I do agree with that.

12           Now, there are three quick points, but  
13 I do think that they are important. He mentioned  
14 that there is a gap following clause 2. Well, this  
15 is consistent with the Portuguese language version  
16 of the MOI. There are scanning remnants -- and by  
17 scanning remnants I'm referring to unusual things in  
18 the scan. Well, this is often and can be attributed  
19 to things such as dust or imperfections with either  
20 the scanning machine or the original document  
21 itself.

22           And there are -- Mr LaPorte also discussed  
23 different fonts in the Mozambique English MOI both  
24 internally and compared with the other versions.  
25 Now, this is not evidence that the document is

1 inauthentic. As you can see on this slide, the very  
2 first line, Mozambique's English MOI, that's one  
3 font, and then the next line internally consistent,  
4 that's a different font. I chose those fonts, and  
5 that doesn't mean that my slide deck is inauthentic,  
6 so I would disagree with him that the differing  
7 fonts mean anything.

8           If we could go to the next slide, please.

9           I really think that this is important,  
10 that the Mozambique English MOI follows the language  
11 of both of the Portuguese versions, including the  
12 Portuguese version offered by PEL, and I think that  
13 this helps lay to rest the importance of the gap.

14           If we could go to the next slide, please.

15           So here I wanted to compare these three  
16 versions, and I know that you are familiar with  
17 these so I will be brief. I am not a fluent speaker  
18 or writer of Portuguese, but what I did was I took  
19 this language and I simply copied and pasted it into  
20 Google translate and it appears to say the same  
21 thing to me. And when compared to the PEL English  
22 MOI, that's where the differences occur.

23           If we could go to the next slide, please,  
24 and with respect to the gap, I noticed in a  
25 photograph that was taken at the time of the

1 signing, it does appear that the gap was present at  
2 the time of signing, so I don't see anything  
3 suspicious or unusual with respect to the gap.

4           If we could go to the next slide, please.

5           So I think that these facts that I have  
6 discussed briefly indicate that the gap that follows  
7 clause 2 is not evidence of anything other than it  
8 exists.

9           If we could go to the next slide, please.

10           Now, I do think that this is important,  
11 and I think that this will help support my final  
12 conclusions here. There are features of the  
13 Portuguese versions of the MOI that indicate to me  
14 that what we have is documents that were not  
15 carefully drafted. There was a lack of quality  
16 control in my opinion.

17           If we could go to the next slide, if we  
18 compare the clause 5 of the Mozambique Portuguese  
19 MOI, we can see that that appears as a full  
20 sentence, but when compared to the bottom clause 5,  
21 which is the PEL Portuguese MOI, we see what  
22 I believe to be an inadvertent carriage return mid  
23 word, mid sentence, so I think that these are --  
24 that these different documents were compiled without  
25 peer review or without carefully reviewing them.

1 This is just simply, respectfully, sloppiness.

2 If we can go to the next slide, please.

3 And, in fact, in this photograph we can  
4 see what appears to be clause 5 of the PEL  
5 Portuguese MOI showing that inadvertent carriage  
6 return at the beginning of that sentence.

7 So if we could go to the next slide,  
8 please, just to wrap up, some of the other facts  
9 that I would like you to be aware of is, again,  
10 scanning remnants. These are simply visible  
11 features that appear in an electronic scan. I often  
12 see this if someone is using an older scanner or if  
13 a document or the glass tray on the scanner has  
14 imperfections, that will often carry through to the  
15 digital copy.

16 The next point, the font of Mozambique's  
17 English MOI differs from the font of the other MOI  
18 documents, including the cover page. As I already  
19 explained, fonts are the choice of the drafter and  
20 do not mean that documents are inauthentic because  
21 they have different fonts, kind of like on this  
22 slide. I have different fonts on this slide. It  
23 does not mean that my slides are inauthentic.

24 And, finally, you know, Mr LaPorte's  
25 comments about the differences in fonts does ignore

1 substantive features such as the language of clause  
2 2 in Mozambique's English language MOI and its  
3 consistency with both PEL's and Mozambique's  
4 Portuguese language versions.

5 So based on -- and if I could go to the  
6 next slide, please -- so based on all of the  
7 materials provided to me, my opinion is that there's  
8 no evidence to establish that Mozambique's English  
9 language MOI is inauthentic, and it is further my  
10 opinion that all four versions of the MOI were  
11 signed and are, in fact, authentic.

12 Thank you, Mr President.

13 **PRESIDENT:** Thank you. Thank you,  
14 Mr Lanterman. Is there any follow up questions,  
15 Ms Bevilacqua?

16 **MS BEVILACQUA:** No, thank you,  
17 Mr President.

18 **PRESIDENT:** Ms Vasani, will you be taking  
19 the cross-examination?

20 **MS VASANI:** Yes, Mr President. Thank you.  
21 Cross-examination by Claimant

22 **MS VASANI:** Good morning, Mr Lanterman.

23 **MR LANTERMAN:** Good morning.

24 **MS VASANI:** Good morning. My name is  
25 Sarah Vasani and I am counsel for Claimant in this

1 arbitration. Thank you for being here and giving us  
2 your time this morning, especially considering the  
3 uncivilised hour which we made you wake up, so I do  
4 apologise for that.

5 **MR LANTERMAN:** Oh, that's OK. Thank you.  
6 It's good to meet you.

7 **MS VASANI:** And Mr Lanterman, just so  
8 you're aware, you're being projected on about four  
9 screens, so I'm trying to look you in the eye but  
10 I'm not sure if I'm connecting with you given that  
11 there's lots of different camera angles, but  
12 hopefully you can see me and hear me well, and we do  
13 appreciate we are in a grand building here and we  
14 appreciate you also have a beautiful library behind  
15 you, so as someone who's going through renovations,  
16 it looks like you've done a good job yourself.

17 **MR LANTERMAN:** Well, thank you.  
18 I appreciate that, as does my wife, who did it for  
19 me, so ...

20 **MS VASANI:** Mr Lanterman, can we move  
21 first to your experience. Now, you had just  
22 mentioned to us that you're the chief technology  
23 officer of Computer Forensic Services, correct?

24 **MR LANTERMAN:** Yes.

25 **MS VASANI:** And is it fair to say that



1 your area of expertise lies in digital forensics,  
2 e-discovery and the analysis of digital evidence?

3 **MR LANTERMAN:** Yes.

4 **MS VASANI:** So you are essentially an  
5 electronic data expert, correct?

6 **MR LANTERMAN:** Yes.

7 **MS VASANI:** But you are not a forensic  
8 document examiner, are you, Mr Lanterman?

9 **MR LANTERMAN:** Are you referring to paper  
10 documents?

11 **MS VASANI:** Yes, that's correct. I'm  
12 referring to paper as opposed to digital copies.

13 **MR LANTERMAN:** That is correct.

14 **MS VASANI:** And do you have any experience  
15 in the authentication of hard copy original  
16 documents?

17 **MR LANTERMAN:** No, and I did not review  
18 any hard copy documents in this matter.

19 **MS VASANI:** OK, that's fine. Thank you  
20 very much.

21 Mr Lanterman, did counsel for Mozambique  
22 make you aware that the Tribunal's Procedural Order,  
23 which requires expert reports to contain certain  
24 information including any past or present  
25 relationship to any of the parties or their

1    respective counsel?

2                   **MR LANTERMAN:** I believe they did.

3                   **MS VASANI:** OK. But your report doesn't  
4    contain those instructions, does it?

5                   **MR LANTERMAN:** I would have to go back and  
6    read, but I don't believe so, but I can represent  
7    that I have no relationship with any party or law  
8    firm involved in this matter. This is the first  
9    matter that I've worked with them on.

10                  **MS VASANI:** OK. So you've never worked  
11   with Dorsey & Whitney on any other matter?

12                  **MR LANTERMAN:** No. Typically I'm adverse  
13   to Dorsey & Whitney.

14                  **MS VASANI:** OK. I understand. OK,  
15   because we had done a search, Mr Lanterman, and it  
16   seems that you appeared on the same side as Dorsey &  
17   Whitney in Department of Enforcement v Ameriprise  
18   Financial Services, et al FINRA disciplinary  
19   proceedings.

20                  **MR LANTERMAN:** I don't recall that.

21                  **MS VASANI:** OK. Well, let's move on to  
22   information that you were provided with by opposing  
23   counsel.

24                         Now, if we go to your second report, do  
25   you have that in front of you?

1           **MR LANTERMAN:** Yes. Is that what's up on  
2 the screen, or do I need to open an independent  
3 copy?

4           **MS VASANI:** Yes, if you can see it on the  
5 screen and you're happy with viewing it visually,  
6 which you probably are given your area of expertise,  
7 then you can just look on the screen, but if you do  
8 prefer a hard copy, there should be one before you.

9           **MR LANTERMAN:** Yes, I can see this and,  
10 yes, this is my report.

11           **MS VASANI:** OK. So, according to pages 2  
12 and 3, you were provided with four scanned  
13 electronic pdf copies, correct?

14           **MR LANTERMAN:** Yes.

15           **MS VASANI:** And you were also provided  
16 with four e-mails dated 9 May 2011 in a native  
17 format attaching PEL's Portuguese and English  
18 versions of the MOI submitted in this arbitration,  
19 is that correct?

20           **MR LANTERMAN:** Yes.

21           **MS VASANI:** And I understand you were also  
22 provided with PEL's April 30, 2021 production of  
23 documents including photos from the signing  
24 ceremony, correct?

25           **MR LANTERMAN:** Yes.

1           **MS VASANI:** To save time, I will just  
2 represent to you that none of these photos clearly  
3 display the English version of the MOI. Are you  
4 able to confirm that?

5           **MR LANTERMAN:** I'm sorry, what was the  
6 question?

7           **MS VASANI:** So none of the photos of the  
8 signing ceremony from the MOI from the 6th of May  
9 clearly have a visual of the English version of the  
10 MOI?

11           **MR LANTERMAN:** I agree with that, yes.

12           **MS VASANI:** So those photos can't help us  
13 identify which English MOI was signed on that date,  
14 correct?

15           **MR LANTERMAN:** I believe that that would  
16 be correct.

17           **MS VASANI:** OK. Now, according to your  
18 second report, Mozambique also provided you with  
19 PEL's October 11, 2021 production of high resolution  
20 images of PEL's physical hard copy documents,  
21 correct?

22           **MR LANTERMAN:** Correct.

23           **MS VASANI:** And you did not analyse these  
24 photos in your report, did you?

25           **MR LANTERMAN:** I did not.

1           **MS VASANI:** And why is that, Mr Lanterman?

**11:12**

2           **MR LANTERMAN:** I didn't believe that they  
3 were in dispute, and the photographs were not  
4 considered part of my analysis other than that they  
5 documented the ceremony.

6           **MS VASANI:** Did you request Mozambique to  
7 provide you with any of the native files  
8 accompanying Mozambique's English and Portuguese  
9 versions of the MOI?

10          **MR LANTERMAN:** I did.

11          **MS VASANI:** And what was the response from  
12 Respondent?

13          **MR LANTERMAN:** I was told that the  
14 originals were not available.

15          **MS VASANI:** I'm not speaking about the  
16 originals at this point. I'm asking for the native  
17 files, like the native scans, like you were provided  
18 with PEL's native scans on May 9th. Did you ask to  
19 see native files associated with the MOIs that  
20 Mozambique presented in this case?

21          **MR LANTERMAN:** Well, I considered the pdfs  
22 to be the files that I was to analyse and opine on.

23          **MS VASANI:** That's not my question,  
24 Mr Lanterman. My question was whether or not you  
25 were given the native files that show the time at

1 which those pdfs were sent and scanned into  
2 Mozambique's governmental systems.

3 **MR LANTERMAN:** I would have been given  
4 those because those are the pdfs referenced in the  
5 report that are -- that's what's on the screen right  
6 now. They were attachments to e-mails.

7 **MS VASANI:** OK. Perhaps I'm not asking  
8 you the right way, so let's try this again.

9 Patel -- you reviewed native files sent by  
10 Patel, correct? That show --

11 **MR LANTERMAN:** Correct.

12 **MS VASANI:** And they show that the MOI was  
13 scanned into the system of Patel on May 9, 2011,  
14 correct?

15 **MR LANTERMAN:** Correct.

16 **MS VASANI:** What I am asking you about is  
17 the similar data for Mozambique, so when were  
18 Mozambique's pdfs filed into their computer systems?

19 **MR LANTERMAN:** I don't know.

20 **MS VASANI:** Did you ask for that  
21 information?

22 **MR LANTERMAN:** I did receive pdfs of  
23 Mozambique's documents.

24 **MS VASANI:** I'm not asking for pdfs.

25 I understand that you've received pdfs. What I am

1 asking is whether you have information of when those  
2 pdfs were scanned into Mozambique's system.

11:14

3 **MR LANTERMAN:** I do not know when they  
4 were scanned into any system. I was not -- I was  
5 not given access to any servers maintained by  
6 Mozambique.

7 **MS VASANI:** And did you ask to have access  
8 to those servers by Mozambique, or ask for those  
9 dated files of transmission?

10 **MR LANTERMAN:** I asked for access to  
11 computers of both Mozambique and PEL, and I was told  
12 that they were not available.

13 **MS VASANI:** Do you know whether  
14 Mozambique's versions of the MOI at exhibits R-1 and  
15 R-2 are scans of the original MOIs or scans of a  
16 copy?

17 **MR LANTERMAN:** I do not know.

18 **MS VASANI:** Did you ask how those scans  
19 came to be? So, in other words, did you ask the  
20 provenance of how you got from the original document  
21 to the scan that you examined?

22 **MR LANTERMAN:** Yes.

23 **MS VASANI:** And what was the answer?

24 **MR LANTERMAN:** The answer that I received  
25 was that someone had found an original copy and had

1 subsequently scanned it and that that was the pdf  
2 that I received.

3 **MS VASANI:** And perhaps you're speaking  
4 about Mr Chaúque and his testimony last week, and  
5 I can put that up for you on the screen.

6 He mentioned that the scanned document was  
7 based on a copy of the MOI and not a scan of the  
8 original MOI.

9 Were you aware of that testimony,  
10 Mr Lanterman?

11 **MR LANTERMAN:** I was not, but it's  
12 consistent with what I was told.

13 **MS VASANI:** I believe, if I go back to  
14 your transcript, you said it was an original and not  
15 a copy.

16 **MS BEVILACQUA:** Objection.

17 **MS VASANI:** Let's look at the transcript,  
18 if we can pull up the transcript.

19 The answer that I received was that  
20 someone had found an original copy and had  
21 subsequently scanned it and that -- that was the pdf  
22 that I received.

23 **MR LANTERMAN:** Correct.

24 **MS VASANI:** So your testimony is someone  
25 had found an original, the original MOI, and then



1 scanned that original and that's what you received,  
2 correct?

3 **MR LANTERMAN:** An original copy, I think  
4 is what I said.

5 **MS VASANI:** Would that be a first original  
6 copy or a 50th generation of copy of the original?

7 **MR LANTERMAN:** I don't know.

8 **MS VASANI:** You don't know.

9 **PROFESSOR TAWIL:** Excuse me. Can I have a  
10 follow-up question?

11 **MS VASANI:** Sure.

12 **PROFESSOR TAWIL:** What is the original  
13 element of the copy, to understand?

14 **MR LANTERMAN:** I'm sorry, is that question  
15 for me?

16 **PROFESSOR TAWIL:** Yes.

17 **MR LANTERMAN:** I'm sorry, sir, could you  
18 repeat it?

19 **PROFESSOR TAWIL:** Yes. You say it is an  
20 original copy. Why do you call the copy "original"?

21 **MR LANTERMAN:** Because it was a copy that  
22 was scanned, and I am unaware of any other version.  
23 I was told that it was a copy of the original, and  
24 I just have to believe what I was told.

25 **MS VASANI:** Mr Lanterman, are you able to

1 see the testimony on the screen of Mr Chaúque?

11:18

2 **MR LANTERMAN:** Yes.

3 **MS VASANI:** So Mr Chaúque is the legal  
4 representative in the MTC, and he testified in this  
5 arbitration. He said: "Time went by, and when we  
6 reached the minister's office, we couldn't find the  
7 originals. We found copies. So we looked at these  
8 paper copies, we scanned them, and we filed the  
9 scanned document. The scanned document was based on  
10 a copy of the MOI and the originals. We couldn't  
11 find originals".

12 Do you see that?

13 **MR LANTERMAN:** I do see that.

14 **MS VASANI:** So you don't know,  
15 Mr Lanterman, if there was any difference between  
16 that document that Mr Chaúque referenced last week  
17 in his testimony, which was in Mozambique's  
18 possession, and the one you received in pdf format,  
19 correct?

20 **MR LANTERMAN:** I'm sorry, could you repeat  
21 that for me?

22 **MS VASANI:** Sure. And you don't know if  
23 there was a difference between that document, which  
24 Mr Chaúque referenced in his testimony, which was in  
25 Mozambique's possession, and the one that you

1 received in pdf, correct?

2 **MR LANTERMAN:** I don't know that there is  
3 a difference, correct.

4 **MS VASANI:** And so you can't assist the  
5 Tribunal in determining whether that document  
6 referenced by Mr Chaúque matches the one that you  
7 reviewed, correct?

8 **MR LANTERMAN:** I was given a document that  
9 matches the description of the testimony that's in  
10 front of me. I was told that the documents that  
11 I received were pdf scans of original copies of the  
12 document. That's what my testimony is. I don't  
13 know -- unless this gentleman comes and personally  
14 confirms that the document in my possession is the  
15 document that he's referencing, I would have no way  
16 of knowing.

17 **MS VASANI:** OK. Let's move on,  
18 Mr Lanterman. If you could please turn to the  
19 bottom of page 9 of your first report, now you say  
20 there -- and this is the bottom of page 9 -- that  
21 forensic digital analysis, and I quote, "at a  
22 minimum, the original word processor files, (eg the  
23 electronic files, such as Microsoft Word documents,  
24 representative of what was printed before the  
25 documents were executed), [should] be provided".

1 Do you see that?

2 **MR LANTERMAN:** Yes.

3 **MS VASANI:** In this case that would be in  
4 Mozambique's possession, wouldn't it, because that's  
5 where the contracts were printed on the day of the  
6 signing.

7 **MR LANTERMAN:** I don't know who would have  
8 printed the documents.

9 **MS VASANI:** But you said there that what  
10 you need and what should be provided are the  
11 original word processor files, such as Microsoft  
12 Word documents representative of what was printed  
13 before the documents were executed, and I can  
14 represent to you, Mr Lanterman, that the testimony  
15 has shown that those documents were printed at the  
16 MTC on the day of signing, which also occurred at  
17 the MTC.

18 So in that case, it would be in  
19 Mozambique's possession, would it not?

20 **MR LANTERMAN:** If that is a correct  
21 statement, then yes.

22 **MS VASANI:** And if that's what you needed,  
23 Mr Lanterman, did you ask Mozambique to provide the  
24 original word processing files?

25 **MR LANTERMAN:** I did.

1           **MS VASANI:** And what was their response,  
2 Mr Lanterman?

3           **MR LANTERMAN:** I was told that it was not  
4 available.

5           **MS VASANI:** Thank you.

6           Now, Mr Lanterman, you further state on  
7 page 10 of your first report, you say, "Ideally, the  
8 computer system upon which the MOI documents were  
9 created/drafted and scanned should be provided for  
10 forensic analysis".

11           Do you see that?

12           **MR LANTERMAN:** Yes.

13           **MS VASANI:** Now, again, those computer  
14 systems would be in Mozambique's possession,  
15 wouldn't they? Because I represent to you that  
16 that's where they were printed.

17           **MR LANTERMAN:** Yes.

18           **MS VASANI:** Did Mozambique ask -- did you  
19 ask Mozambique to inspect those computer systems?

20           **MR LANTERMAN:** I asked that the computer  
21 or computers be provided to me.

22           **MS VASANI:** And what was the response from  
23 Mozambique?

24           **MR LANTERMAN:** I was told that the  
25 computer was not available.

1           **MS VASANI:** Thank you, Mr Lanterman.  
2           Now, Mr Lanterman, let's turn to your  
3 analysis. Just as a hypothetical -- and I and my  
4 team will vouch for you that I am the most digitally  
5 incompetent person when it comes to documents, I am  
6 always having computer trouble, so if you can help  
7 me understand, if I now were to scan a copy of your  
8 first report and save it to my computer, the date  
9 that would appear would be the 5th of December 2022,  
10 correct? Today's date?

11           **MR LANTERMAN:** That's correct. That would  
12 be the date of creation.

13           **MS VASANI:** Date of creation. And that's  
14 even though your report is actually dated the 19th  
15 of March 2021, correct?

16           **MR LANTERMAN:** Correct.

17           **MS VASANI:** So it's impossible to  
18 determine when the document was created based on the  
19 pdf file that you received, correct?

20           **MR LANTERMAN:** That is correct.

21           **MS VASANI:** Now, if there are native files  
22 associated with documents, it is possible to  
23 determine at least when a document was created,  
24 correct?

25           **MR LANTERMAN:** That is correct except this

1 is a scanned -- or what appears to me to be a scan,  
2 a pdf of a paper document, so the paper document  
3 would not necessarily have a date and time stamp  
4 metadata embedded within it. It's paper.

5 **MS VASANI:** I understand, thank you.

6 So I understand that you analysed scans of  
7 PEL's MOIs that were sent by e-mail on the 8th or  
8 9th of March 2011, depending on the time zone that  
9 we look at, and that's C-217 and C-218 for the  
10 record.

11 And you confirm that PEL's English and  
12 Portuguese versions of the MOI were in existence as  
13 of May 9, 2011, correct?

14 **MR LANTERMAN:** Correct.

15 **MS VASANI:** And you mentioned that earlier  
16 in your presentation this morning, correct?

17 **MR LANTERMAN:** Correct.

18 **MS VASANI:** So you can confirm that PEL's  
19 English version of the MOI was scanned into PEL's  
20 computer system 72 hours -- within 72 hours after  
21 the date of the signing ceremony, correct?

22 **MR LANTERMAN:** That's correct.

23 **MS VASANI:** And did you analyse  
24 Mozambique's copies of the MOI and whether they were  
25 scanned into the government's computer systems?

1           **MR LANTERMAN:** Well, that would be two  
2 different things. I'm not sure what you mean when  
3 you say "scanned into their computer systems".

4           **MS VASANI:** Sure. Mr Chaúque mentioned  
5 that he had found a copy and scanned it into  
6 Mozambique's system. That was his testimony of last  
7 week. Were you able to analyse the native files of  
8 those scans?

9           **MR LANTERMAN:** The original pdfs or the  
10 Word documents that led to the printed documents?

11           **MS VASANI:** Original pdfs.

12           **MR LANTERMAN:** I believe I did, yes.  
13 I don't recall as I sit here what the internal  
14 metadata creation date for the pdf was. It may be  
15 in my report but, as I sit here, I don't remember  
16 what that date is.

17           **MS VASANI:** OK. And I just want to be  
18 clear that I understood you because -- on the native  
19 files aspect.

20           So you received -- because you had told me  
21 previously that you did not receive the files that  
22 were electronically scanned into the government's  
23 computer system, is that correct?

24           **MR LANTERMAN:** Well, what I said was I did  
25 not receive that original Word document that led to



1 the paper document. I believe that I received the  
2 pdfs of the Mozambique -- or the scans of the  
3 Mozambique copies of the documents.

4 So I think what the confusion is, we have  
5 an original Word document that's printed, that is  
6 then scanned, so we have two native files here.

7 **MS VASANI:** OK. Thank you, Mr Lanterman.

8 Now, Mr Lanterman, you say on page 4 of  
9 your first expert report regarding PEL's electronic  
10 versions of the MOI, you say, given that Claimant's  
11 "electronic documents were not generated or saved  
12 contemporaneously or in close temporal proximity to  
13 the execution of the MOI ... they have a limited  
14 value in determining whether one or more of the  
15 documents are more likely to be representative of  
16 the original, executed documents".

17 Correct?

18 **MR LANTERMAN:** I'm looking at the screen,  
19 and I'm trying to find where that is.

20 **MS VASANI:** Sorry. I'll wait for you to  
21 get there. This is at page 4 of your first report.

22 **MR LANTERMAN:** OK. Thank you, that's  
23 helpful.

24 Correct.

25 **MS VASANI:** But you subsequently -- in

1 that opinion, your first opinion, you had asked for  
2 native files from Patel and, indeed, Patel produced  
3 native files demonstrating that within 72 hours  
4 documents that are exact matches were scanned into  
5 their system, correct?

6 **MR LANTERMAN:** Correct.

7 **MS VASANI:** Mr Lanterman, what is the  
8 earliest evidence that you have as to when  
9 Mozambique scanned any version of their MOIs into  
10 their computer systems?

11 **MR LANTERMAN:** I would need to refer to my  
12 report for the date. I know that it was after the  
13 fact. I know that that scan by Mozambique of their  
14 copy of the documents occurred further into the  
15 future than PEL's.

16 **MS VASANI:** Thank you. Exactly.

17 So what you've said, Mr Lanterman, if  
18 I can just quote: "I know that it was after the  
19 fact. I know that the scan by Mozambique of their  
20 copy of the documents occurred further into the  
21 future than PEL's".

22 Correct?

23 **MR LANTERMAN:** That's correct.

24 **MS VASANI:** Thank you.

25 Mr Lanterman, having seen, from the time

1 of your first report to the time of your second  
2 report, you were able to review those native files,  
3 would you agree with me that PEL's electronic  
4 versions of the MOI that were created 72 hours after  
5 the execution of the MOI are more likely to be  
6 representative of the original executed documents as  
7 opposed to those of Mozambique, which were not dated  
8 until, I quote, "after the fact"?

9 **MR LANTERMAN:** Yes, I would, which is why  
10 it's my opinion that all of these copies are  
11 authentic.

12 **MS VASANI:** Mr Lanterman, can I ask you to  
13 go to page 10 of your second report? We're just  
14 pulling that up on the screen for you, Mr Lanterman.

15 **MR LANTERMAN:** Thank you.

16 **MS VASANI:** And with the magic I think  
17 Daria can highlight it for you as well.

18 You say there that "both parties'  
19 Portuguese MOIs, and Mozambique's English MOI, have  
20 substantively similar clause 2 language and the fact  
21 that they do is evidence that supports the  
22 authenticity of Mozambique's versions", correct?

23 **MR LANTERMAN:** That's correct.

24 **MS VASANI:** And you emphasised that in  
25 your presentation this morning. You had said -- and

1 I think what your quote was, "important that the  
2 Mozambique English MOI follows the language of both  
3 the Portuguese versions of the MOI", correct?

4 **MR LANTERMAN:** Yes, that's correct.

5 **MS VASANI:** So that's a little bit of  
6 saying because things say the same things they're  
7 authentic, but that's not a scientific conclusion,  
8 is it, Mr Lanterman?

9 **MR LANTERMAN:** Well, if Mozambique's  
10 document in content matches the document produced by  
11 PEL, I don't need that -- or I don't know that it  
12 needs to be a scientific conclusion. It's simply a  
13 statement of fact that the Mozambique version, the  
14 content, matches the content of the document  
15 provided by PEL.

16 **MS VASANI:** Correct. It's a simple  
17 statement of fact, and even us mere lawyers in this  
18 room would be able to, for ourselves, look at the  
19 texts of the different versions and find out which  
20 is similar and which is not similar.

21 But I think, more importantly, your  
22 conclusion presupposes that Mozambique's English MOI  
23 was also signed on May 6, 2011 and was not a later  
24 created document designed specifically for the  
25 purposes of mirroring the language of the Portuguese

1 MOI, correct?

2 **MR LANTERMAN:** I think I testified that  
3 I don't know when the pdf of the Mozambique copy was  
4 created, but my comments were based upon the content  
5 and how the content of the Mozambique document  
6 matches the conditions outlined in the PEL's copy.

7 **MS VASANI:** Yes, I understand that,  
8 Mr Lanterman, but what I'm saying is that your  
9 conclusion presupposes that that language was in  
10 existence at the time of the signing and not  
11 subsequently created in order to mirror the language  
12 of the Portuguese version, correct?

13 **MR LANTERMAN:** Well, the language would  
14 have been in place at the time of the signing  
15 because that's what the PEL versions represent, or  
16 the one PEL document represents.

17 **MS VASANI:** Yes, but I'm talking about  
18 Mozambique's English version. The similarities  
19 between Mozambique's English version and the two  
20 Portuguese versions, that is only a measure of  
21 authenticity if that English version was created at  
22 the time of the signing. It would not be an  
23 indication of authenticity if it was created after  
24 the signing in order to mirror the Portuguese  
25 language version, correct?

1           **MR LANTERMAN:** I don't know if I agree  
2 with you on this point because the language is the  
3 same as the language portrayed in the PEL document  
4 that there's no dispute about the signing. I don't  
5 understand what the purpose would be of creating a  
6 fabricated document that mirrors the original  
7 language supplied by PEL, so it's my opinion that  
8 all of these documents were signed on that day.

9           **MS VASANI:** I put to you, Mr Lanterman,  
10 the purpose of doing that would be because there is  
11 a dispute with relation to what the various versions  
12 of the MOI say, and the purpose would be to create a  
13 document that is consistent with the Portuguese  
14 version and not PEL's original English version of  
15 the MOI.

16           **MR LANTERMAN:** But the document mirrors  
17 PEL's Portuguese version.

18           **MS VASANI:** Exactly, but that is only  
19 probative of authenticity if it was created at the  
20 same time.

21           **MS BEVILACQUA:** I'm going to object,  
22 Mr President, at this point as argumentative.

23           **PRESIDENT:** Do you have any comment,  
24 Mr Lanterman?

25           **MR LANTERMAN:** I don't have any comment

1 other than the Portuguese version, the language  
2 matches the -- or excuse me, Mozambique's document  
3 language matches PEL's language, and my statement  
4 was what's the point of a fabrication if you simply  
5 copied the language of your opponent? To me, that  
6 wouldn't make any sense. I would expect to see  
7 differences.

8 **MS VASANI:** Mr Lanterman, I would  
9 represent to you that that represents a translation  
10 and not a corroboration.

11 Let's move on to page 7 of your second  
12 report, Mr Lanterman.

13 Now, you agree with Mr LaPorte's  
14 conclusions --

15 **MR LANTERMAN:** I'm --

16 **MS VASANI:** Oh, sorry.

17 **MR LANTERMAN:** I'm sorry, I didn't mean to  
18 interrupt you, but could you pull that up on the  
19 screen for me so I can see it?

20 **MS VASANI:** It doesn't seem to be  
21 projecting.

22 **MR LANTERMAN:** There it is. I'm sorry.  
23 Thank you.

24 **MS VASANI:** Thank you, Mr Lanterman, and  
25 thank you for drawing that to my attention.

1           So, Mr Lanterman, you agree with  
2 Mr LaPorte's conclusion that the typeface font used  
3 for the cover page of Mozambique's English MOI is  
4 different than the fonts for pages 1 through 6,  
5 correct?

6           **MR LANTERMAN:** Yes.

7           **MS VASANI:** And you also agree with  
8 Mr LaPorte that all of the documents -- so that's  
9 Mozambique's Portuguese MOI, PEL's English MOI and  
10 PEL's Portuguese MOI were created using a sans serif  
11 font that appears to be Arial, or a close variation,  
12 except for Mozambique's English MOI which was  
13 created with what appears to be a Cambria font,  
14 correct?

15           **MR LANTERMAN:** Can you show me where I say  
16 that in my report?

17           **MS VASANI:** It appears you do not dispute  
18 Mr LaPorte's conclusion in relation to the different  
19 fonts that are used for the Mozambique MOI, on the  
20 one hand, and the other three MOIs, on the other,  
21 correct?

22           **MR LANTERMAN:** I do -- I do not dispute  
23 that, that's correct.

24           **MS VASANI:** And you do not dispute that  
25 the size of the font used in Mozambique's English



1 MOI at Exhibit R-2 is larger than the fonts used for  
2 the other three documents, correct?

11:39

3 **MR LANTERMAN:** I do not dispute that,  
4 that's correct.

5 **MS VASANI:** And, as a result, the  
6 Mozambique English version has additional pages,  
7 correct? Is that correct, Mr Lanterman? The  
8 English version of the MOI that Mozambique has  
9 produced has additional pages.

10 **MR LANTERMAN:** Can you show me where  
11 I state that in my report, please?

12 **MS VASANI:** I'm just asking you, you've  
13 looked at the documents and the English MOI that  
14 Mozambique produced is eight pages as opposed to six  
15 pages, do you recall that?

16 **MR LANTERMAN:** That does sound correct.  
17 Do I need to go and count the pages? I'm sure that  
18 what you're saying is accurate.

19 **MS VASANI:** That's fine. You don't need  
20 to count the pages. I can represent to you that  
21 that's correct, and I'm sure your counsel will  
22 interrupt me if I'm incorrect on that.

23 Let's move on to my last topic,  
24 Mr Lanterman, and then I'll let you get back to bed.  
25 Let's go to your first report, page 3, section II,

1 and we can pull that up on the screen for you?

11:41

2 **MR LANTERMAN:** Thank you.

3 **MS VASANI:** Now, Mr Lanterman, you say  
4 that "The PEL-submitted English language version of  
5 the MOI documents exhibit suspect features", and  
6 there's two main reasons that you give for that  
7 conclusion. First you say in a), if you can -- we  
8 can highlight that for you -- you say the internal  
9 metadata you were originally provided with showed  
10 that the pdf file of PEL's English MOI was created  
11 about three years after the pdf file of PEL's  
12 Portuguese MOI, correct?

13 **MR LANTERMAN:** Well, I say that the  
14 PEL-submitted English version of the MOI was created  
15 approximately three years after the PEL-submitted  
16 Portuguese language version.

17 **MS VASANI:** Right. But that suspicion was  
18 then dispelled in your second report, and you now  
19 confirm that PEL's English and Portuguese MOIs were  
20 in existence as of May 9, 2011, just 72 hours after  
21 their execution?

22 **MR LANTERMAN:** Correct.

23 **MS VASANI:** And the second reason for your  
24 preliminary conclusion that PEL's English MOI  
25 exhibits suspect features was because clause 2 of

1 the PEL-submitted English language version of the  
2 MOI is not consistent with or a translation of  
3 PEL-submitted Portuguese versions of the MOI and  
4 both the Portuguese and English versions submitted  
5 by Mozambique, correct?

6 **MR LANTERMAN:** Correct.

7 **MS VASANI:** Now, Mr Lanterman, in the  
8 record there are several draft MOIs. Were you  
9 provided with any of the draft MOIs, the draft  
10 versions pre execution?

11 **MR LANTERMAN:** I don't recall. It would  
12 be in -- as I sit here I don't recall reviewing  
13 drafts.

14 **MS VASANI:** Mr Lanterman, are you aware  
15 that the language that Mozambique claims is suspect  
16 in these proceedings was included by Mozambique in  
17 the last Portuguese draft of the MOI that it shared  
18 with PEL on the morning of the day that the MOI was  
19 signed? And that's Exhibit C-204, for the record.

20 **MS BEVILACQUA:** Objection. Mis-states the  
21 record, and it was the formulation of her question,  
22 Mr President.

23 **PRESIDENT:** Yes. Maybe you can state the  
24 question in somewhat more objective fashion because  
25 I'm not quite sure that everything that you say is

1 really proven or undisputed.

2 **MS VASANI:** Sure.

3 I've pulled up on the screen an e-mail,  
4 and you'll see this is an e-mail from Mozambique to  
5 PEL. It says, "Dear all, thank you [so] much for  
6 all of your effort and dedication. Please find  
7 hereby attached the final revised version with my  
8 [comments] and editing of the Portuguese version.  
9 We have to finalise the English version  
10 accordingly".

11 Now, that draft I can represent to you  
12 contains substantially the same language as 2.1 in  
13 Claimant's English version which Mozambique has  
14 claimed as suspect.

15 **PRESIDENT:** Yes. I wonder whether  
16 Mr Lanterman can really help us. He says he has not  
17 seen these versions. I think you'll have to plead  
18 that.

19 **MS VASANI:** Mr Lanterman, would that have  
20 been important for you to view the previous drafts  
21 on the day of the execution?

22 **MR LANTERMAN:** Well, I would have liked to  
23 have seen the drafts. However, that doesn't impact  
24 my opinion that all of these documents are authentic  
25 and signed.

1           **MS VASANI:** But that's not what we're  
2 saying. You said that it has suspect features  
3 because of the language in 2.1, and what I'm showing  
4 you here is an e-mail from the government with a  
5 Portuguese version of their MOI that contains  
6 virtually identical language to PEL's English MOI,  
7 so it's not suspect, is it?

8           **MR LANTERMAN:** No, because I think it's  
9 authentic.

10           **MS VASANI:** So that was before the  
11 signing, Mr Lanterman. Let's look at events  
12 post-dating it.

13           Mr Lanterman, are you aware that PEL cited  
14 to the language of clause 2.1 of its English MOI in  
15 contemporaneous correspondence between the party  
16 numerous times dating back to 2013, before any  
17 dispute arose?

18           **MR LANTERMAN:** I don't have any knowledge  
19 of that.

20           **MS VASANI:** Are you aware that Mozambique  
21 never once contested the language of clause 2.1 of  
22 the MOI until this arbitration?

23           **MS BEVILACQUA:** Objection, Mr President.  
24 It's beyond the scope of the expert's testimony and  
25 his reports. And argumentative.

1           **PRESIDENT:** I wonder if Mr Lanterman --  
2 I don't think he has seen anything of that.

**11:47**

3           **MS VASANI:** This is actually my last  
4 question, you'll be pleased to know, Mr President,  
5 and the reason it's relevant is because he says in  
6 his report that that language is suspect, but that  
7 language was always cited by PEL and it was never  
8 contested by PEL, and I think that goes to the  
9 authenticity of that language. It was never  
10 contested by the government, for the record.

11           **PRESIDENT:** But I think that is something  
12 which the Tribunal will have to establish.

13           **MS VASANI:** Sure.

14           **PRESIDENT:** He's a computer specialist.  
15 I don't think he can actually help us too much with  
16 that.

17           **MS VASANI:** Mr Lanterman, with that, thank  
18 you very much for your time and for your patience  
19 with us this morning on a very early, and I think  
20 cold, Minneapolis, Minnesota morning.

21           Thank you very much, Mr Lanterman.

22           **MR LANTERMAN:** Thank you.

23           **PRESIDENT:** Is there any follow-up  
24 question, Ms Bevilacqua?

25           **MS BEVILACQUA:** No, thank you,

1 Mr President.

2 **PRESIDENT:** Any questions?

3 I do have some questions for you,

4 Mr Lanterman, and that's the following.

5 Questions by the Tribunal.

6 **PRESIDENT:** When you -- I think it is  
7 undisputed that these documents were printed at the  
8 offices of the government in Mozambique on the  
9 relevant date, and let me ask you this question --  
10 and I think we all --

11 Do you agree that these documents  
12 originally were Word documents?

13 **MR LANTERMAN:** Yes.

14 **PRESIDENT:** So when you have a Word  
15 document and you have a signing, what you normally  
16 do -- and you have two signatories -- you say -- and  
17 you want to sign physically, you say print two  
18 copies and then you print two copies.

19 Would that be a normal procedure when you  
20 are organising a signing?

21 **MR LANTERMAN:** Well, that's hard for me to  
22 answer because every situation is different.  
23 I would think that that would be a common thing to  
24 do.

25 **PRESIDENT:** Yes. I think we all agree

1 it's a common -- not always the case, and now I am  
2 focusing only on the Portuguese version. Now, I  
3 think you have shown to us that the two available  
4 Portuguese versions, the one of PEL and the one of  
5 Mozambique, are not identical. They were not  
6 printed from the same Word file.

7 **MR LANTERMAN:** Well, they are different,  
8 that is correct, yes.

9 **PRESIDENT:** Because I have now -- I had  
10 not noticed that, but I have now noticed I think the  
11 only difference is this 2.3 -- you -- it's -- where  
12 is it? It's clause -- where do I have it? PEL's  
13 version has in clause 5 like a jump. A jump --  
14 maybe we can see it. It's document C-5, and page --  
15 and you have shown it in your presentation.

16 **MR LANTERMAN:** Correct.

17 **PRESIDENT:** But it has the paragraph 2,  
18 somehow it says -- it's clear that then it's -- can  
19 we --

20 **MS BEVILACQUA:** Respondent's.

21 **PRESIDENT:** And I think it's clause 5.  
22 There it is. So that -- and that does not exist --  
23 this jump does not exist in the file which is in  
24 possession of the Mozambican government. You agree  
25 on that?



1           **MR LANTERMAN:** I do agree with that.

**11:51**

2           **PRESIDENT:** I have quickly looked through  
3 both documents. This -- at least on a first  
4 review -- there it is, that is correct, this is the  
5 only difference between both versions. Do you agree  
6 with that, Mr Lanterman?

7           **MR LANTERMAN:** I do believe that that's  
8 correct, yes, sir.

9           **PRESIDENT:** So that implies that when the  
10 relevant officer, who was in charge of printing the  
11 signature copies, when he printed one signature copy  
12 and the other, they came from different files.  
13 Something was done to the file -- to the Word file  
14 in between.

15           **MR LANTERMAN:** That would be correct. It  
16 doesn't necessarily mean that it's two files. It  
17 means perhaps that the first document printed and  
18 then the carriage return occurred, making the  
19 change.

20           But it would have changed from one to the  
21 other, yes, sir.

22           **PRESIDENT:** Yes, but what is important to  
23 me is the following. You normally give the print --  
24 or normally that's what I do. When you give a print  
25 order you say two copies, and then you are sure that

1 it is two identical copies because they come out of  
2 the printer in exactly the same format.

3 Here the order given by the officer to the  
4 printer was print first one version, then there was  
5 a change and then the next one was printed. There  
6 were two printing orders. Would that be a correct  
7 interpretation?

8 **MR LANTERMAN:** Yes, Mr President.

9 **PRESIDENT:** And now, then, once I am the  
10 officer -- now assume I am the officer, I have  
11 printed separately the Portuguese versions and then  
12 I go on and try to print the English versions and  
13 I also print them separately, because you basically  
14 say that in your professional opinion, probably all  
15 versions are authentic. Then my question to you is  
16 could this same procedure have been repeated when  
17 printing the English versions, that first one  
18 version is printed and then, by mistake or whatever,  
19 a different English version is printed?

20 **MR LANTERMAN:** Yes, sir.

21 **PRESIDENT:** Thank you. Can I, by the  
22 way -- and thank you very much for being up early --  
23 can I really comment you on the quality of your  
24 equipment, it's evident that you are a computer  
25 specialist, because you are by far -- you are now

1 gone. Oh, there you're back. But the quality of  
2 the transmission is absolutely excellent. I mean,  
3 we almost see you here and we hear you very well, so  
4 you evidently have the best equipment from all the  
5 experts we have.

6 **MR LANTERMAN:** Well, thank you,  
7 Mr President. If the IT guy can't get it right,  
8 then there's a whole question about credibility, so  
9 I'm glad that you can see me and hear me.

10 **PRESIDENT:** It's very good. So I now  
11 leave you with the option of either going to bed and  
12 having the rest of the night's sleep, or going to  
13 work, but we thank you very much for being up so  
14 early and having helped us with this interesting  
15 case.

16 **MR LANTERMAN:** Well, it was my pleasure,  
17 and thank you for the opportunity to appear  
18 remotely. Thank you.

19 **PRESIDENT:** Thank you, sir. Goodbye.

20 **MR LANTERMAN:** Am I free to go?

21 **PRESIDENT:** Yes, please. Thank you very  
22 much.

23 **MR LANTERMAN:** Thank you. Bye now.

24 **PRESIDENT:** Very good. So shall we make a  
25 quarter of an hour break? Shall we come back at

1 12.15, and then we start with the next expert.

2 (Short break from 11.56 am to 12.19 am)

3 MARK SONGER

4 (via videolink)

5 **PRESIDENT:** Very good. We resume the  
6 hearing, and we do so in order to examine  
7 Mr Mark Songer.

8 Mr Songer, good morning to you. Where are  
9 you, sir?

10 **MR SONGER:** Good morning, Mr President.  
11 I am in Denver, Colorado, actually in my office  
12 today.

13 **PRESIDENT:** Thank you. You have a  
14 beautiful library.

15 **MR SONGER:** Thank you, Mr President.  
16 That's actually a backdrop to my Zoom, Zoom  
17 meetings.

18 **PRESIDENT:** Yes. Do you know which  
19 library it is? It looks very beautiful.

20 **MR SONGER:** I am not sure where that  
21 picture came from.

22 **PRESIDENT:** Very good.  
23 So it's very early for you, sir?

24 **MR SONGER:** Yes, Mr President.

25 **PRESIDENT:** But thank you.

1           **MR SONGER:** It is 5.20 am as of now.

2           **PRESIDENT:** Thank you very much for making  
3 the effort of being up so early in the morning.

4           **MR SONGER:** It's my pleasure to be here in  
5 front of you, Mr President, and distinguished  
6 members of the Tribunal.

7           **PRESIDENT:** You are here, Mr Songer, as an  
8 expert and, as an expert, the first thing you have  
9 to do is you have to take your declaration as an  
10 expert witness.

11                   So, Mr Songer, do you solemnly declare  
12 upon your honour and conscience that you will speak  
13 the truth, the whole truth and nothing but the  
14 truth, and that your statement will be in accordance  
15 with your sincere belief?

16           **MR SONGER:** Yes, I do.

17           **PRESIDENT:** Thank you very much. Thank  
18 you very much, Mr Songer.

19                   With that, I will give you over to counsel  
20 to the Republic of Mozambique. Ms Bevilacqua will  
21 introduce you.

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

23 Examination by Respondent

24           **MS BEVILACQUA:** Good morning, Mr Songer.

25           **MR SONGER:** Good morning.

1           **MS BEVILACQUA:** Do you have available to  
2 you a clean copy of your expert report submitted in  
3 this matter?

4           **MR SONGER:** Yes, I do.

5           **MS BEVILACQUA:** And that report was  
6 dated November 26, 2021?

7           **MR SONGER:** That is correct.

8           **MS BEVILACQUA:** And is that your signature  
9 on the last page of the report?

10          **MR SONGER:** Yes, it is.

11          **MS BEVILACQUA:** Do you have any additions  
12 or corrections you wish to make to your report at  
13 this time?

14          **MR SONGER:** No, I do not.

15          **MS BEVILACQUA:** I understand you have  
16 prepared a summary and, with that, I will turn it  
17 back over to the president.

18          **PRESIDENT:** Thank you. Thank you.

19                 You have a summary, a presentation, which  
20 we'll number H-15.

21                 With that, I will give you the floor,  
22 Mr Songer.

23 Presentation

24          **MR SONGER:** Great.

25                 So my name is Mark Songer. I am currently

1 with the national forensics firm employed with  
2 Robson Forensic where I have been employed as a  
3 forensic document examiner for a little over nine  
4 years. I'm also on the executive leadership team of  
5 the firm in which I also serve as western regional  
6 director of operations for the west.

7           Prior to becoming a handwriting expert,  
8 after my military service I received my Master's in  
9 Forensic Science degree in 1993 from National  
10 University in San Diego. That curriculum did  
11 include a course in forensic document examinations,  
12 which piqued my interest, and today is why I'm here.  
13 I enjoy the field and picked that area of expertise  
14 out of all the other disciplines.

15           I've been doing this work for about 26  
16 years now as a court-recognised expert in forensic  
17 document examinations.

18           Previously I'm a former FBI special agent  
19 and also an FBI forensic document analyst, where  
20 I received some of my additional training when  
21 assigned to the FBI laboratory.

22           I've been qualified and designated as an  
23 expert in both federal and state courts here in the  
24 US, and have never been excluded as an expert.

25           My teaching experience, I have teaching

1 experience as an adjunct professor of forensic  
2 science, having taught at several different  
3 universities, and those courses include forensic  
4 document examinations.

5 Next slide.

6 So the scope of work. I was retained to  
7 provide the following. On May 31, 2022 I was  
8 provided copies of documents labelled in my report  
9 as Q1-Q4 and K1-K4c.

10 Now, Q1 and Q2 are both Mozambique English  
11 and Portuguese versions -- excuse me, PEL's English  
12 and Portuguese versions of the MOIs, and Q3 and Q4  
13 are Mozambique's Portuguese and English versions of  
14 the MOIs.

15 The purpose of reviewing these documents  
16 was to review Mr LaPorte's analysis and determine if  
17 his findings and opinions, as expressed in his  
18 report, clearly demonstrate that Patel Engineering  
19 (PEL) purported MOI versions are genuine and  
20 authentic and, additionally, if Mozambique's version  
21 of the purported MOIs is not genuine nor authentic.

22 I was not provided PEL's original wet ink  
23 MOIs and instead relied upon Mr LaPorte's high  
24 resolution photographs of various examinations which  
25 were conducted by himself.



1           These are the significant findings as  
2 outlined in my report.

3           I do agree with Mr LaPorte's findings that  
4 PEL's English and Portuguese wet ink versions appear  
5 to be original. I do disagree with Mr LaPorte's  
6 finding that Mozambique's Portuguese and English  
7 MOIs are not authentic.

8           I also disagree with Mr LaPorte's repeated  
9 use of the word "authentic" or "not authentic" when  
10 analysing documents because that conclusion cannot  
11 be drawn from a forensic document examination  
12 perspective. The methods and standards we rely upon  
13 as professionals do not support Mr LaPorte's  
14 conclusions.

15           "Original" and "authentic" are not  
16 synonymous in our field of expertise, and  
17 Mr LaPorte's use of "authentic" is not appropriate.

18           Mr LaPorte's use of "authentic" in  
19 describing both MOIs is misleading and implies that  
20 only PEL's versions are real and genuine, as opposed  
21 to Mozambique's English and Portuguese versions,  
22 which Mr LaPorte claims are not authentic.

23           Next slide.

24           A photograph of an MOI's line count  
25 labelled as Bates No 0000057 was compared with the

1 line counts on both Mozambique's Portuguese version  
2 and PEL's Portuguese version, which was found to be  
3 consistent with one another in terms of line count.

4 Due to insufficient copy quality and not  
5 having examined the original wet ink versions of  
6 both Mozambique's MOIs, no conclusion could be  
7 reached to negate Mozambique's MOIs' authenticity.

8 No conclusion could be reached as to the  
9 authenticity of PEL's MOIs, due to the lack of  
10 access to the original wet ink documents, the unique  
11 signatures and writings contained in all four MOIs,  
12 no signature analysis was conducted, and  
13 inconsistent wording differences appearing in PEL's  
14 English version, clause 2, in comparison with PEL's  
15 Portuguese version, clause 2, and Mozambique's  
16 English and Portuguese versions in clause 2.

17 I find no scientific basis that supports  
18 Mr LaPorte's observations and conclusions that  
19 Mozambique's photocopied MOIs are likely not  
20 authentic.

21 And with that, any questions.

22 **PRESIDENT:** Thank you very much,  
23 Mr Songer. Let me see if Ms Bevilacqua has any  
24 follow-up questions.

25 **MS BEVILACQUA:** No questions. Thank you,

1 Mr President.

2 **PRESIDENT:** Mr Songer, Ms Vasani on behalf  
3 of Claimant may have some questions for you.

4 **MS VASANI:** Thank you, Mr President.

5 Cross-examination by Claimant

6 **MS VASANI:** Good morning, Mr Songer. My  
7 name is Sarah Vasani.

8 **MR SONGER:** Good morning to you.

9 **MS VASANI:** My name is Sarah Vasani and  
10 I'm counsel for Claimant in this arbitration. Thank  
11 you for your time this morning, and in particular  
12 for getting up so early. We appreciate it.

13 **MR SONGER:** No problem.

14 **MS VASANI:** Mr Songer, did counsel for  
15 Mozambique make you aware of the Tribunal's  
16 Procedural Order where it sets out the information  
17 that's required to be in your report?

18 **MR SONGER:** I don't -- I don't recall if I  
19 had that.

20 **MS VASANI:** OK. I can represent to you  
21 that your report doesn't follow those instructions,  
22 so I'd just like to quickly go through that with you  
23 now, if that's OK.

24 **MR SONGER:** Sure.

25 **MS VASANI:** Mr Songer, do you have any

1 previous relationship with Respondent Mozambique or  
2 any of Mozambique's State-owned entities?

3 **MR SONGER:** No.

4 **MS VASANI:** And have you ever done any  
5 work for Mozambique's counsel, Dorsey & Whitney?

6 **MR SONGER:** No.

7 **MS VASANI:** Mr Songer you say on page 4  
8 that your CV was attached to your report. Are you  
9 aware that it was never submitted?

10 **MR SONGER:** I know I submitted it. I'm  
11 not sure why it's not attached to this report.  
12 I generally send in my CV in every instance when  
13 I send out a report.

14 **MS VASANI:** OK. So that must have been a  
15 mistake.

16 Mr Songer, when you are asked to determine  
17 the authenticity of a document, do you consider a  
18 photocopy to be the best form of evidence when an  
19 original is available?

20 **MR SONGER:** No.

21 **MS VASANI:** And why not?

22 **MR SONGER:** Because the standard is that  
23 the original is always the document you want to  
24 examine before photocopies.

25 **MS VASANI:** So you would agree that

1 photocopies are inferior vis-à-vis originals when  
2 you're asked to determine if a document is  
3 authentic, correct?

4 **MR SONGER:** Correct.

5 **MS VASANI:** Now, in your experience as a  
6 forensic document examiner, can you explain why a  
7 government or a company would have a policy  
8 requiring the retention of original documents?

9 **MR SONGER:** Could you elaborate that --  
10 can you be more specific in your question, please?

11 **MS VASANI:** Absolutely. So many  
12 governments and companies alike have policies to  
13 ensure that original copies of important documents  
14 are maintained. They're filed for safe keeping,  
15 they're archived, so that the original is  
16 maintained.

17 What are the reasons that companies or  
18 governments might do that?

19 **MR SONGER:** Well, some of the reasons may  
20 be because, number one, you know, the best evidence  
21 rule is that the originals are always the best to  
22 examine in case it becomes litigious in the future,  
23 and also photocopies are subject to distortion based  
24 on the generation of the copy which is produced.

25 **MS VASANI:** Thank you.

1           So you mentioned that if there's a dispute  
2 in the future, it's helpful to have the original so  
3 that there's no question about which is the original  
4 version and who signed it, correct?

5           **MR SONGER:** Correct.

6           **MS VASANI:** Now, according to section 2,  
7 which is on page 2 of your report, I just want to go  
8 through some of the information that was made  
9 available to you.

10           You were provided with four photocopies of  
11 the MOIs corresponding to PEL's English and  
12 Portuguese MOIs and Mozambique's English and  
13 Portuguese MOIs, yes?

14           **MR SONGER:** Correct.

15           **MS VASANI:** And these are all photocopies,  
16 correct?

17           **MR SONGER:** Correct. I was not provided  
18 originals. I was provided Mr LaPorte's examination  
19 file which illustrated his various examinations he  
20 conducted on the originals.

21           **MS VASANI:** Thank you. Just for my  
22 understanding and the Tribunal's understanding, is a  
23 photocopy the same as a pdf?

24           **MR SONGER:** Well, I mean, when you're sent  
25 a pdf -- it depends, I mean, on the version. If

1 it's a copy of the original and then turned into a  
2 pdf as opposed to a multi-generational photocopy,  
3 then yes, the quality will be different.

4 **MS VASANI:** OK. But the photocopies that  
5 you reviewed, were they sent to you by pdf via  
6 e-mail and then you printed them out?

7 **MR SONGER:** That is correct.

8 **MS VASANI:** OK. Thank you.

9 And the documents that you analysed, did  
10 you ask how they came into being? So, in other  
11 words, how they got from the original to the  
12 documents that you were instructed to examine?

13 **MR SONGER:** No.

14 **MS VASANI:** Sorry, I didn't hear that  
15 response.

16 **MR SONGER:** I said no.

17 **MS VASANI:** Did you ask about the origin  
18 of the documents?

19 **MR SONGER:** Yes.

20 **MS VASANI:** And what were you told,  
21 Mr Songer?

22 **MR SONGER:** Well, I believe the originals  
23 at the time were not available to me, and I believe  
24 we were in a COVID environment at the time, but for  
25 whatever reason they weren't available to me for my

1 examination.

2 And then Mozambique didn't have the  
3 originals. We just had copies.

4 **MS VASANI:** Is it true, Mr Songer, that  
5 every time a document is photocopied, there's a risk  
6 of degradation?

7 **MR SONGER:** Yes.

8 **MS VASANI:** And every time you get further  
9 away from the original, you have a further risk of  
10 loss of information for authentication, correct?

11 **MR SONGER:** That is correct.

12 **MS VASANI:** So let's go back to how the  
13 documents you examined came into being. Luckily for  
14 us the Tribunal, who's very interested in this  
15 topic, had asked a witness in this arbitration, last  
16 week, Mr Chaúque, who is a legal representative to  
17 the MTC, they asked him about that document and we  
18 can put it up on the screen for you so you can see  
19 that testimony.

20 Mr Chaúque noted that "we couldn't find  
21 originals, we found copies, so we looked at these  
22 paper copies and we scanned them and we filed the  
23 scanned document. The scanned document was based on  
24 a copy of the MOI and the originals. We couldn't  
25 find the originals". And then the president says:



1 "So the Cabinet do Ministros, what is now here is a  
2 copy of the original, and what you then did is you  
3 scanned that copy into the computer?"

4 Do you see that on the screen, Mr Songer?  
5 It might be difficult to read.

6 **MR SONGER:** Yes, I do.

7 **MS VASANI:** So you'll agree with me, based  
8 on that testimony, that the photocopy was not a scan  
9 of the original.

10 **MR SONGER:** That's what it appears  
11 according to this statement, yes.

12 **MS VASANI:** Had you assumed, when you  
13 analysed the document, that it was a scan of the  
14 original?

15 **MR SONGER:** Because of the current  
16 degradation of what I looked at, it certainly was  
17 far removed from a first or either a second  
18 generation copy, in my opinion.

19 **MS VASANI:** But did you ask for  
20 confirmation of that point?

21 **MR SONGER:** I don't believe I did.

22 **MS VASANI:** Mr Songer, based on the  
23 testimony that's on the screen in front of you, we  
24 don't know that the copy that Mr Chauque is  
25 referring to is a first generation copy or a 50th

1 generation copy, do we?

2 **MR SONGER:** That is correct.

3 **MS VASANI:** But the copy that was found in  
4 the minister's office is presumably still in  
5 Mozambique's possession, and that is a copy that is  
6 closer to the original than the version that you  
7 looked at, isn't it?

8 **MR SONGER:** I would -- I would assume so,  
9 yes.

10 **MS VASANI:** But you were never provided  
11 with that physical copy?

12 **MR SONGER:** I was only provided what I was  
13 provided, so whatever -- whatever document  
14 I received, that's what I got.

15 **MS VASANI:** And did you know that that  
16 document existed?

17 **MR SONGER:** No.

18 **MS VASANI:** Did Mozambique provide you  
19 with any of the native files accompanying any of the  
20 four MOIs?

21 **MR SONGER:** I do not believe so. I'm not  
22 a computer expert. By "native files" meaning the  
23 original scanned versions?

24 **MS VASANI:** The versions that Mr Chaúque  
25 scanned into the MTC's computer system.

1           **MR SONGER:** I am not sure if I did or not.

**12:38**

2           **MS VASANI:** OK. Well, now that we've  
3 established what Mozambique provided to you to  
4 examine, let's look at a few other pieces of  
5 evidence.

6           Mr Songer, you note that you didn't -- did  
7 you ask -- excuse me.

8           Did you ask to examine the original  
9 versions of the MOIs submitted by the parties?

10          **MR SONGER:** I believe I did.

11          **MS VASANI:** And how did counsel for  
12 Mozambique respond to your request?

13          **MR SONGER:** I believe they were just --  
14 they weren't made available. Again, we were in a  
15 COVID situation, so travel was out of the -- was  
16 out. So based on that, I believe they just weren't  
17 made available to me.

18          **MS VASANI:** But was it your understanding  
19 that the originals existed?

20          **MR SONGER:** Yes.

21          **MS VASANI:** It was your understanding that  
22 Mozambique's originals existed?

23          **MR SONGER:** No, just -- just PEL's.

24          **MS VASANI:** Now, are you aware that  
25 Claimant offered several times to tender its

1 original versions of the MOI for inspection by  
2 Mozambique's experts subject to an appropriate  
3 protocol that would preserve the integrity of the  
4 parties' originals, and that can be found in the  
5 record at C-267, 268, 269 and C-270?

6 **MR SONGER:** No, I'm not aware of that.

7 **MS VASANI:** It would have been important  
8 to have the best evidence, right?

9 **MR SONGER:** Yes. However, what Mr LaPorte  
10 provided to me in the file were colour photographs  
11 of various examinations and, after having looked at  
12 that, I felt that that was sufficient enough.

13 **MS VASANI:** Could you turn to page 9,  
14 paragraph 6.2 in your conclusions? It's the last  
15 page of your report.

16 You mention that in part, due to the lack  
17 of access to the original wet ink documents, no  
18 conclusion could be reached about the authenticity  
19 of Q1c and Q2c, which I understand are equivalent to  
20 Patel's English and Portuguese versions.

21 So when you say you lacked access, you  
22 didn't know that that was Mozambique's choice not to  
23 give you access, correct?

24 **MR SONGER:** I did not know.

25 **MS VASANI:** Are you aware that Mozambique

1 has a legal obligation to preserve and permanently  
2 archive its originals of the MOI under Mozambican  
3 law?

4 **MR SONGER:** No.

5 **MS VASANI:** I'll represent to you that  
6 this is correct for the purposes of my question.

7 Does the failure by Mozambique to preserve  
8 its originals have any impact on your assessment of  
9 authenticity of the photocopies that it submitted in  
10 this arbitration?

11 **MR SONGER:** I can't opine to the way they  
12 handle their documents but, as a general rule, you  
13 know, originals are always the best evidence to  
14 have.

15 **MS VASANI:** I understand originals are the  
16 best evidence to have. So would the fact that they  
17 haven't kept those documents in compliance with  
18 their own laws have any impact on your analysis?

19 **MR SONGER:** Yes. The impact would be  
20 that -- that my finding would be inconclusive -- my  
21 finding is inconclusive without the originals,  
22 correct.

23 **MS VASANI:** OK. But are you suggesting  
24 that it has no impact on you as a forensic document  
25 examiner whether the party that is required by law

1 to have originals has failed to produce them?

12:42

2 **MR SONGER:** Not having the originals does  
3 have an impact, correct.

4 **MS VASANI:** And what is that impact,  
5 Mr Songer?

6 **MR SONGER:** Not reviewing the original  
7 documents as opposed to the copies.

8 **MS VASANI:** But are you able to draw any  
9 conclusions based on the fact that the party that is  
10 required to keep the originals by law has not kept  
11 them?

12 **MR SONGER:** I'm not -- I'm not sure about  
13 the legalities or what the requirements are. I just  
14 know that I didn't -- they did not have the  
15 originals. I didn't look at the originals. I was  
16 only provided photocopies at the time of my  
17 analysis.

18 **MS VASANI:** I understand. Mr Songer, did  
19 Mozambique provide you with either of the two expert  
20 opinions of its other forensic expert, Mr Lanterman?

21 **MR SONGER:** I believe I only had Mr--  
22 actually, I didn't even have Mr Lanterman's  
23 conclusions. I did not find out about his findings  
24 until this arbitration, so the answer to your  
25 question is no.

1           **MS VASANI:** Wouldn't that have been  
2 important to see what another expert on the  
3 authenticity of the same document in the same  
4 arbitration had to say?

5           **MR SONGER:** Perhaps. I like to approach  
6 it from a different perspective. I don't like to  
7 read anybody else's reports. I like to conduct my  
8 analysis independent of anyone else's prior to  
9 reading it.

10           **MS VASANI:** So we've established that  
11 Mozambique didn't provide you with its originals of  
12 the MOI; it didn't seek to have you inspect  
13 Claimant's originals; it didn't provide you with any  
14 native files associated with the documents in  
15 question; it didn't provide you with a copy that  
16 Mr Chaúque found in the minister's office; and it  
17 also didn't provide you with the reports from its  
18 other forensic expert, Mr Lanterman.

19           Now, considering this, is it fair to say  
20 that your examination and conclusions might have  
21 been different had you been provided with all of  
22 that information?

23           **MR SONGER:** If I were provided  
24 Mozambique's original, perhaps, yes.

25           **MS VASANI:** And what about all of the

1 other information that I just mentioned, Mr Songer?  
2 Would that information have been important?  
3 Might -- sorry. Might that information have changed  
4 your opinion if you had access to all of those  
5 additional sources that I just mentioned?

**12:44**

6 **MR SONGER:** More likely not. The  
7 game-changer here would have been definitely having  
8 the original documents from Mozambique.

9 **MS VASANI:** Mr Songer, most experts that  
10 I know say that their opinions are always subject to  
11 additional material becoming available, and I see in  
12 page 9, section 6 of your report, you also say that  
13 your opinion is "subject to change if additional  
14 information becomes available".

15 Is it your opinion that none of that  
16 information, you wouldn't have wanted to review that  
17 information and potentially change your opinion on  
18 that basis?

19 **MR SONGER:** The only thing that would more  
20 likely change my opinion is if the original  
21 Mozambique documents surfaced. The other  
22 information, I'm not sure if that would have changed  
23 my -- would have any relevance to my opinion.

24 **MS VASANI:** But you can't say because you  
25 haven't seen it, correct?



1           **MR SONGER:** Correct.

2           **MS VASANI:** Mr Songer, let's move on.

3           Did you print the copies -- so you already  
4 told me, I believe, that you printed the copies of  
5 the MOIs you inspected from pdfs, correct?

6           **MR SONGER:** Correct.

7           **MS VASANI:** Now, you reference the  
8 standards published by the Scientific Working Group  
9 for Forensic Document Examiners, correct?

10          **MR SONGER:** Yes.

11          **MS VASANI:** For the record, I think that's  
12 C-392, and I understand Mr Songer, and you can  
13 correct me if I'm wrong, experts in your field refer  
14 to this as the SWIG Doc.

15          **MR SONGER:** That is correct.

16          **MS VASANI:** OK. So let's discuss the SWIG  
17 Doc.

18                 Did you conduct your own indentation  
19 analysis on any of the four photocopies provided to  
20 you?

21          **MR SONGER:** No. So the reason I mention  
22 those standards is, again, I didn't have the  
23 originals, I relied upon Mr LaPorte's photographs,  
24 and they were -- they were exceptional. I mean, I  
25 could clearly see the embossing, the wet ink

1 signatures, the security fibres -- all those things  
2 were visible, and all those things checked -- you  
3 know, for each standard that I list, was checked  
4 off.

5 **MS VASANI:** But you didn't conduct your  
6 own indentation analysis, correct?

7 **MR SONGER:** Not physically, correct. Only  
8 looking at the photographs he provided.

9 **MS VASANI:** And you didn't conduct your  
10 own analysis of stamping devices or stamping  
11 impressions?

12 **MR SONGER:** Correct. I don't dispute any  
13 of that in Mr LaPorte's report.

14 **MS VASANI:** So I think we can just go  
15 through, but the point I wanted to make to you,  
16 Mr Songer, is that all of the standards there that  
17 you list in your report, you weren't actually able  
18 to apply those standards in your analysis because  
19 you didn't have the originals, correct?

20 **MR SONGER:** Correct. Those are standards  
21 that Mr LaPorte used and I basically, like I said,  
22 just went through a check mark of yes, these are  
23 things that he did and this is the applicable  
24 standard that applies.

25 **MS VASANI:** Mr Songer, your area of

1 expertise is analysing handwriting and signatures,  
2 correct?

3 **MR SONGER:** Yes.

4 **MS VASANI:** And it says on your CV, which  
5 I Googled because it wasn't provided, that you have  
6 analysed hundreds of cases ranging from violent  
7 crimes to the financial violations of elderly.

8 **MR SONGER:** Yes.

9 **MS VASANI:** But you're not an expert in  
10 analysing chemical analysis of inks, correct?

11 **MR SONGER:** Only -- Mr LaPorte's training  
12 in chemistry is way beyond mine. I do  
13 non-destructive analysis using different wavelengths  
14 and light.

15 **MS VASANI:** Thank you, Mr Songer.

16 Let's then look at the signatures in the  
17 MOI.

18 Now, Mr Songer, were you able to  
19 authenticate Mr Zucula's signature on all of the  
20 MOIs?

21 **MR SONGER:** So I was -- based on testimony  
22 it appears that these signatures have been  
23 acknowledged as being genuine, so I didn't do any  
24 analysis on those signatures.

25 **MS VASANI:** But that testimony just arose

1 last week, not at the time of your report, correct?

2 **MR SONGER:** Correct.

3 **MS VASANI:** So, at the time that you  
4 conducted your analysis, didn't you think it was  
5 important to authenticate Mr Zucula's signature?

6 **MR SONGER:** Well, it wasn't the scope  
7 I was given for my assignment, but I was told that  
8 the signatures weren't being contested.

9 **MS VASANI:** OK. So, just to confirm, you  
10 were told by counsel for Respondent that  
11 Mr Zucula -- the signatures were not contested?

12 **MR SONGER:** I believe so.

13 **MS VASANI:** Did you ask for any exemplar  
14 signatures and initials so that you could  
15 authenticate any of those signatures?

16 **MR SONGER:** No.

17 **MS VASANI:** Had you done that, Mr Songer,  
18 could you have confirmed whether the signatures that  
19 you looked at were within the range of variation of  
20 the writer's known signatures?

21 **MR SONGER:** Perhaps.

22 **MS VASANI:** So, Mr Songer, you just  
23 mentioned that you were aware that last week in this  
24 arbitration Mr Zucula confirmed that it was his  
25 signature on PEL's original wet ink English MOI?

1           **MR SONGER:** Yes.

2           **MS VASANI:** Thank you.

3           Mr Songer, if I could, I'd like to move on  
4 to talk a little bit about embossing. Now,  
5 embossing is an imprint of the government's seal  
6 into the paper of the last page which leaves an  
7 indentation on the document itself, and I'm not sure  
8 if you were able to view Mr LaPorte's presentation  
9 but he had a photo in his presentation that showed  
10 the embossing of the government's seal in the MOI.

11           As a forensic document examiner, can you  
12 please tell us why a government has an official seal  
13 that it keeps under lock and key and only brings out  
14 for signing of important documents? In other words,  
15 why would a government emboss the physical paper  
16 with its own seal?

17           **MR SONGER:** It's because it's a security  
18 feature.

19           **MS VASANI:** And by "security feature",  
20 what do you mean, Mr Songer?

21           **MR SONGER:** Well, the embossing is  
22 impressed into the paper, and it becomes a permanent  
23 record with that document.

24           **MS VASANI:** So it's an anti-fraud  
25 mechanism, is that fair to say?

1           **MR SONGER:** Yes.

2           **MS VASANI:** And you can copy and paste  
3 signatures and initials onto photocopies, correct?

4           **MR SONGER:** Yes.

5           **MS VASANI:** But you can't copy and paste  
6 an indentation from an embossed document, can you?

7           **MR SONGER:** You could -- it -- you  
8 possibly could scan it, but it's not going to have  
9 the three dimensional appearance like an original  
10 would have. It would just be two-dimensional.

11           **MS VASANI:** And in none of the photocopies  
12 that you reviewed from Mozambique were you able to  
13 confirm that there was an embossed seal of  
14 Mozambique, is that correct?

15           **MR SONGER:** Correct. The copies were just  
16 too degraded, in my opinion.

17           **MS VASANI:** Mr Songer, you've already  
18 explained to us that authenticity can be  
19 demonstrated through the examination of signatures  
20 to determine who signed the document in question.

21                   Does authenticity also relate to the date  
22 the document was signed?

23           **MR SONGER:** Yes.

24           **MS VASANI:** And does authenticity also  
25 relate to the identification of the materials that

1 are used to prepare the document?

2 **MR SONGER:** Are you -- like are you  
3 talking about like a ballpoint pen or something like  
4 that?

5 **MS VASANI:** Yes, Mr Songer. So, for  
6 example, the type of paper, the type of pens, the  
7 type of material construction that is in that  
8 original document.

9 **MR SONGER:** Yes.

10 **MS VASANI:** Mr Songer, you conclude on  
11 page 9, paragraph 6.2, that "No conclusion could be  
12 reached as to the authenticity of [Claimant's  
13 English and Portuguese MOIs] due to the lack of  
14 access to original wet-ink documents, the unique  
15 signatures and writings contained in all four MOIs,  
16 and the inconsistent wording differences appearing  
17 in Q1C (Clause 2) in comparison with [the other  
18 MOIs]".

19 **MR SONGER:** Yes, I see that. Yes.

20 **MS VASANI:** Now, we've already established  
21 that PEL had the original wet ink documents, but you  
22 weren't given access to those.

23 So the only person who conducted testing  
24 on the originals is Mr LaPorte, correct?

25 **MR SONGER:** Correct.

1                   **MS VASANI:** And you know Mr LaPorte, don't     **12:55**  
2 you?

3                   **MR SONGER:** Yes. Yes, he's a very good  
4 guy. I like him.

5                   **MS VASANI:** Thank you. And you respect  
6 him as a forensic document examiner?

7                   **MR SONGER:** Yes, very much.

8                   **MS VASANI:** And you have no reason to  
9 believe that the analysis that he has done on the  
10 printing toner, the paper, the stamps, the writing  
11 ink, the embossing, the indentation, is incorrect,  
12 do you?

13                   **MR SONGER:** No.

14                   **MS VASANI:** Thank you, Mr Songer.

15                   Now, Mr Songer, as I read your report, the  
16 main reason for not being able to establish the  
17 authenticity of PEL's English and Portuguese  
18 documents, apart from not having access to the  
19 originals, which we already discussed, is the  
20 language of clause 2 in PEL's English MOI, which is  
21 different from the other versions of the MOI.

22                   Mr Songer, are you aware that the language  
23 that Mozambique claims is suspect in these  
24 proceedings was included by Mozambique in the last  
25 Portuguese draft of the MOI that it shared with



1 Patel on the day that the MOI was signed?

2 **MR SONGER:** I don't think I've had access  
3 to that, no.

4 **MS VASANI:** That's C-204 just for the  
5 record.

6 And were you also aware, or not aware,  
7 that, when sending that draft, Mozambique indicated  
8 that it would finalise the version, the English  
9 version, accordingly?

10 **MR SONGER:** I was not aware of that.

11 **MS VASANI:** Are you aware that copies of  
12 Claimant's original English and Portuguese versions  
13 of the MOI, with their different clause 2s, were  
14 scanned into PEL's systems as soon as Claimant's  
15 representatives returned to India on May 9, 2011, so  
16 just within 72 hours of their execution?

17 **MR SONGER:** I was not aware of that.

18 **MS VASANI:** That's a conclusion that is  
19 made by Mr Lanterman. You weren't aware of that?

20 **MR SONGER:** I wasn't aware of it until  
21 this morning when I was listening in to his  
22 testimony.

23 **MS VASANI:** Are you aware, Mr Songer, that  
24 PEL cited the language of clause 2.1 of its English  
25 MOI in contemporaneous correspondence between the

1 parties?

2 **MS BEVILACQUA:** I'm going to object to  
3 this line of questioning, as I did with  
4 Mr Lanterman, as irrelevant and beyond the scope of  
5 the expert's report.

6 **MS VASANI:** Were you aware of that,  
7 Mr Songer?

8 **MR SONGER:** No.

9 **MS VASANI:** No? OK.

10 Thank you, Mr Songer. We appreciate your  
11 time today.

12 **MR SONGER:** Thank you.

13 **PRESIDENT:** Ms Bevilacqua, any further  
14 questions for our expert?

15 **MS BEVILACQUA:** No. Thank you,  
16 Mr President.

17 **PRESIDENT:** Mr Songer, thank you very much  
18 for having made the effort of rising so early in the  
19 morning to help us in better understanding.

20 **MR SONGER:** It was my pleasure.

21 **PRESIDENT:** Thank you. We let you off.  
22 I don't know if you are going back to sleep or if  
23 you are going back to work.

24 **MR SONGER:** I think I'm going to just go  
25 back to work!

1           **PRESIDENT:** Then we wish you a day full of     **12:58**  
2 fruitful work.

3           **MR SONGER:** I want to wish you guys all a  
4 happy holidays.

5           **PRESIDENT:** The same to you.

6           **MS VASANI:** Thank you, Mr Songer. If we  
7 could get your Zoom template that would be much  
8 appreciated, so we can all have such a wonderful  
9 library.

10          **MR SONGER:** You're welcome. You guys take  
11 care.

12          **PRESIDENT:** Very good. So I think that's  
13 the end of our presentations for the morning. I  
14 think we have finalised spot on as it's now 1.  
15 Shall we come back at 2?

16          **MR VASANI:** Yes, Mr President. I have,  
17 during the presentation, talked to Respondent's  
18 counsel about the two housekeeping matters in  
19 relation to the legal experts.

20                 One of them is uncontested. The other, I  
21 think it would be good to have a decision of the  
22 Tribunal on before the break, so I give the floor to  
23 Mr Basombrio as to his two matters.

24          **PRESIDENT:** OK.

25          **MR BASOMBRIO:** OK, thank you.

1           Yes, we agree it might be better to raise  
2 it with you now.

3           **PRESIDENT:** Very good.

4           **MR BASOMBRIO:** So actually there are  
5 three. The first two I believe will be uncontested.

6           The first one is just that for the  
7 examinations of Theresa Muenda and Rui Medeiros, the  
8 interpreters should continue to follow the  
9 instruction of not translating the following terms  
10 but using them in their original language, which  
11 would be *direito de preferência*, ajuste direto,  
12 right of preference, direct award and right of first  
13 refusal, and I believe Mr Vasani is agreeable to  
14 that.

15           **MR VASANI:** As the Tribunal directed with  
16 the fact witnesses, so we agree for the expert  
17 witnesses.

18           **PRESIDENT:** It seems logical that we  
19 continue with the same rule as regards the  
20 interpreters, and I understand the interpreters are  
21 hearing us and I see the thumbs up from them, so  
22 that's agreed. Excellent.

23           **MR BASOMBRIO:** The second point is not  
24 intended to be a surprise. I forgot to mention it  
25 to you. It is just a point of clarification. We

1 just want to clarify that Ms Muenda is going to be  
2 testifying in Portuguese, as we indicated.

3 **PRESIDENT:** Of course.

4 **MR BASOMBRIO:** And I wanted to ask the  
5 same question of Mr Vasani. Is Mr Medeiros going to  
6 be testifying in Portuguese?

7 **MR VASANI:** He is testifying in  
8 Portuguese.

9 **MR BASOMBRIO:** In Portuguese?

10 **MR VASANI:** Yes, sir.

11 **PRESIDENT:** Very good. That's also not  
12 disputed.

13 **MR BASOMBRIO:** No, just clarification.

14 So the point of dispute relates to the  
15 direct, and first let me put forward my comments.

16 What we understood from Patel's counsel  
17 this morning was that they intend to conduct, as was  
18 communicated to us, a full traditional direct  
19 examination of Rui Medeiros, and they may want to  
20 clarify for themselves what they mean by a full,  
21 direct traditional examination of Mr Medeiros.

22 If what we're talking about here is going  
23 through a whole direct examination of his testimony,  
24 we would object to that, because we do not believe  
25 that that's consistent with Procedural Order No 1,

1 paragraph 98, and if the Tribunal will allow me,  
2 I will read what that says.

3 **PRESIDENT:** Give me one second. I have it  
4 somewhere. I now have it in front of me. Thank  
5 you.

6 **MR BASOMBRIO:** So this is paragraph 98 of  
7 PO1.

8 It says, in relevant part, "Any person who  
9 has produced an expert opinion or report may be  
10 called to the hearing for cross-examination so that  
11 other party calls him for cross-examination".  
12 That's the main purpose. Then it says "The expert  
13 opinion and/or report produced by any witness  
14 shall" -- meaning it's forced -- "shall be  
15 considered that person's direct evidence and there  
16 shall" -- again -- "be no additional need for the  
17 party submitting said witness to engage in direct  
18 examination of the witness at the hearing, other  
19 than a brief introductory examination as provided  
20 herein in order to address any new points that have  
21 arisen".

22 So our position is that we would object to  
23 a traditional, full blown direct examination of the  
24 witness. That has not been done with any other  
25 witness, factual or expert here, and instead,

1 Patel's counsel should be instructed, pursuant to  
2 PO1, paragraph 98, to keep the direct to a, quote,  
3 "brief introductory examination" and to address any  
4 new points that may have arisen.

5 Thank you.

6 **PRESIDENT:** Thank you, Mr Basombrio.

7 Mr Vasani?

8 **MR VASANI:** Thank you, Mr President. May  
9 I just ask what is the intention of Ms Muenda on  
10 direct?

11 **MR BASOMBRIO:** Ms Muenda's -- our  
12 intention is to simply put her witness statements  
13 like we have all done in front of her -- I'm sorry,  
14 expert opinions, and have her summarily indicate  
15 that they are hers and she's not making changes, and  
16 then she's just going to make a brief presentation  
17 like all the other experts have done.

18 **MR VASANI:** So your objection is the  
19 difference between the witness giving a presentation  
20 of his or her own accord and questions put to the  
21 witness which essentially does the same thing? It's  
22 the interjection of three or four questions in  
23 between which is your objection, yes?

24 **MR BASOMBRIO:** No. My objection is what  
25 I stated. What was communicated to us was that your

1 side was going to do a traditional full blown direct  
2 examination of the witness, and we would object to  
3 that. If you have -- let me finish, please.

4 **MR VASANI:** Sorry, yes.

5 **MR BASOMBRIO:** If you have a few questions  
6 that are within a brief introduction, we would not  
7 object to that. We just don't want to go through a  
8 traditional American style direct examination.

9 **MR VASANI:** Well, Ms Martins, who will  
10 conduct the direct examination, is not an American  
11 lawyer, so I don't think she's going to do anything  
12 traditional to the United States.

13 **PROFESSOR TAWIL:** Can I ask a question to  
14 both counsel? How long are you planning to do the  
15 presentation of your legal expert, and how long are  
16 you planning to do the direct examination of your  
17 legal expert?

18 **MR VASANI:** Yes. May I go first? So,  
19 Dr Tawil, my understanding is that it is up to 30  
20 minutes, as has been the case for every witness. I  
21 think the only difference -- and perhaps I might add  
22 some things here -- I'm looking at paragraph 103,  
23 the second bullet, where it says "The party  
24 presenting the witness may conduct a brief direct  
25 examination lasting no more than 15 minutes; in the



1 case of expert witness, the witness may make a  
2 presentation in lieu of direct examination limited  
3 to 30 minutes".

4 I'm not sure that that "may" is meant to  
5 be a mandatory that either the expert witness has to  
6 give a direct presentation alone for 30 minutes and  
7 they cannot be led with a few pointed questions.

8 I really think this is a storm in a  
9 teacup, if I may use an English phrase, because  
10 ultimately you're going to get the same thing.  
11 You're going to get equal treatment of the parties  
12 at 30 minutes; you're going to get a direct  
13 presentation from each witness; the only difference  
14 is going to be you're going to have a few, maybe  
15 four or five questions, intermittent to the witness'  
16 answers.

17 So I'm not sure where this objection  
18 really comes from as a matter of prejudice.

19 **PRESIDENT:** Yes.

20 **MR BASOMBRIO:** Let me respond.

21 There is substantial prejudice because it  
22 completely --

23 **PROFESSOR TAWIL:** Could you first answer  
24 my question?

25 **MR BASOMBRIO:** I'm sorry.

1           **PRESIDENT:** My question was how long would  
2 be the presentation of your expert.

**13:07**

3           **MR BASOMBRIO:** 20 minutes on her own.

4           So we believe that this is changing the  
5 rules of the game. This is not what we have done.  
6 There are a lot of problems with direct  
7 examinations -- questions that lead the witness,  
8 et cetera, that would force us to object -- and the  
9 Tribunal has clearly indicated that that's not the  
10 process we were going to follow.

11           **MR VASANI:** I can represent there are no  
12 leading questions.

13           **PRESIDENT:** Yes. Let's look at what we  
14 said, and what we said in paragraph 103, the  
15 examination of witnesses shall proceed as follows.  
16 We said "The party presenting the witness may  
17 conduct a brief direct examination lasting no more  
18 than 15 minutes", and I suppose it relates to  
19 paragraph 98, especially in fact witnesses where  
20 there are new facts, new issues, some additional  
21 questions. That was I think the thought of the  
22 15 minutes.

23           And then we said, or we all agreed, "the  
24 witness may make a presentation in lieu of direct  
25 examination" -- sorry, "in the case of expert

1 witnesses the witness may make a presentation in  
2 lieu of direct examination limited to 30 minutes",  
3 and the norm -- the norm -- is that they make, as  
4 Mozambique's expert witness is going to do, is they  
5 make -- or, as all the experts we have seen today,  
6 they make a general presentation.

7 I wonder if this prohibits that, let's  
8 say, more historic version where counsel makes six  
9 questions.

10 "Professor, do tell me what is the concept  
11 of administrative contracts under Mozambican law?"  
12 And he answers. And then "Can you tell us what  
13 Mozambican law has to say about document retention",  
14 and then he tells us. To be very, very frank,  
15 Mr Basombrio, I do not see a huge difference because  
16 the expert could have a list with the six questions  
17 in front of him and then answer them in a row.  
18 I agree with you that the more normal solution  
19 nowadays is the one you advocate. I wonder if it  
20 really makes a huge difference.

21 **MR BASOMBRIO:** Mr President, and part of  
22 the purpose of raising this as a procedural point  
23 was to clarify, and so, to be clear, what we were  
24 objecting to was what was communicated to us, that  
25 there was going to be a traditional style direct

1 examination, which means going into all the issues  
2 that the witness has testified, it would take a long  
3 time, but now we're clear that that's not what we're  
4 doing --

5 **PRESIDENT:** No, no. You have 30 minutes.  
6 I mean, after 30 minutes I will start saying we have  
7 to finish.

8 **MR BASOMBRIO:** Well, the witness would  
9 have 30 minutes in lieu of the 15 minutes, so if  
10 we're just talking about a few questions in direct,  
11 introductory nature, 15 minutes, we're fine with  
12 that. We just wanted to make sure it wasn't some  
13 drawn-out direct examination.

14 **PRESIDENT:** You see, I often -- well,  
15 I always asked Ms Bevilacqua today if she had any  
16 further question. If she had had two or three  
17 questions more to the expert, I would not have  
18 objected. I think that -- it is just -- yeah. So  
19 if this is agreeable to you and if you want to put  
20 some questions to your expert at the end, that  
21 should be -- I see no problem in that.

22 Let's again -- are we now in a question of  
23 timing? Did you say, Mr Basombrio, that you are  
24 only in agreement with a 15-minute examination, not  
25 a 30-minute presentation by Medeiros?

1           **MR BASOMBRIO:** It seems to me that, based  
2 on the language that you have read, Mr President,  
3 there are two options. The witnesses -- and a  
4 witness includes an expert witness and a fact  
5 witness -- with respect to a witness a party may  
6 conduct a brief direct examination of no more than  
7 15 minutes, so there's a time limit if you're going  
8 to ask them the questions. In lieu of that, all the  
9 expert witnesses can make a presentation of no more  
10 than 30 minutes, so if Mr Medeiros is not going to  
11 make a presentation then they would be limited to  
12 15 minutes on direct, but you cannot do both. You  
13 have to do one or the other.

14           **MR VASANI:** Mr President, may I just ask  
15 that this witness be given the courtesy that has  
16 been extended to every other witness of up to 30  
17 minutes?

18           **PRESIDENT:** Let's get off the record.

19 (Short discussion off the record)

20 (Lunch break from 1.24 pm to 2.30 pm)

21           PROFESSOR RUI MEDEIROS

22           **PRESIDENT:** Very good. We resume the  
23 hearing, and we do so in order to examine the  
24 expert, Professor Rui Medeiros.

25           Good afternoon, Professor.

1           **PROF MEDEIROS:** A very good afternoon.

**14:32**

2           **PRESIDENT:** Professor Medeiros, you are  
3 here as an expert, and the first thing we have to do  
4 is we have to take your declaration as an expert.  
5 So would you kindly stand up? Can you raise your  
6 right hand?

7           Do you solemnly declare upon your honour  
8 and conscience that you will speak the truth, the  
9 whole truth and nothing but the truth, and that your  
10 statement will be in accordance with your sincere  
11 belief?

12           **PROF MEDEIROS:** Indeed, I do.

13           **PRESIDENT:** Very good. I understand that  
14 Ms Martins is going to introduce the expert.  
15 Examination by Claimant

16           **MS MARTINS:** I will indeed. Thank you  
17 very much. I was just wondering, both Mr Basombrio  
18 and I said we would like to get something on the  
19 record before we begin this afternoon, so, I don't  
20 know, Mr Basombrio, if you want to state your  
21 objection for the record first, and then I can state  
22 mine?

23           **MR BASOMBRIO:** No. I'm going to state it  
24 at the appropriate time.

25           **MS MARTINS:** Thank you. Then, just for

1 the record, the objection pertains to Ms Muenda's  
2 slide on matters that were not covered in her legal  
3 opinions, as we with discussed before, and that's  
4 it.

5 So, without further ado, I will turn then  
6 to Professor Medeiros.

7 **PRESIDENT:** Before you go on with that,  
8 your objection is one slide in Dr Muenda's'  
9 presentation --

10 **MS MARTINS:** Yes.

11 **PRESIDENT:** And can we have the position  
12 on which slide it is?

13 **MS MARTINS:** Yes, of course.

14 So it's slide -- so there's the cover --  
15 so it's the slide that has a number III at the top.  
16 It says "Investimento Estrangeiro à Luz do Dto  
17 Moçambicano" and refers in the first bullet point to  
18 Law 3/93 of 24 June.

19 **PRESIDENT:** So your --

20 **MS MARTINS:** This was never addressed by  
21 Ms Muenda in her legal opinions, nor was it  
22 addressed by Professor Medeiros in his legal  
23 opinions, and so that Ms Muenda will speak about  
24 this today comes as a surprise to Claimant and  
25 should not be included.

1           **PRESIDENT:** Very well. Thank you. So now  
2 let us go on with the presentation of Mr Medeiros.

**14:34**

3           **MS MARTINS:** Thank you, Mr Chairman.

4           So, Professor Medeiros, first of all,  
5 thank you so much for being here and making yourself  
6 available today. I understand that you have read  
7 the second legal opinion that was issued -- well,  
8 the first obviously because you responded to it in  
9 writing but also the second legal opinion that was  
10 issued by Ms Muenda.

11           I understand that there are some issues  
12 that you would like to clarify regarding that second  
13 legal opinion, and so I give you the floor to make  
14 those clarifications.

15           **PROF MEDEIROS:** Thank you very much. Yet  
16 again, allow me to greet the Tribunal and both  
17 parties. I have a document with notes of what  
18 I wanted to say. May I follow it? In that case  
19 allow me by way of a short introduction to refer to  
20 five main topics and just five, the first one as  
21 follows.

22           The MOI is not to be confused with a  
23 concession agreement, and in this regard allow me to  
24 make four remarks regarding this first main  
25 observation, namely that the MOI is not to be



1 confused with a concession agreement, as follows.

2           Number 1. We are facing a preliminary  
3 contract. It's not the definitive contract. The  
4 MOI has no other goal than being a preliminary  
5 contract.

6           My second note. Preliminary contracts are  
7 also binding. The law does not assign binding  
8 nature merely to definitive final contracts. A  
9 preliminary contract such as a preference pact or a  
10 promissory contract remains binding nevertheless.

11           My third note. The MOI contains several  
12 clauses, including a *direito de preferência*, but it  
13 is not a promissory contract. The MOI has nothing  
14 in common with such a promissory contract.

15           In order to explain briefly the  
16 difference, allow me to quote the example of a  
17 purchase and sales promissory contract, and compare  
18 it with a preference pact for the purchase and sale.

19           In a contrato promessa the debtor  
20 undertakes to sell, in the contrato promessa there's  
21 a binding -- the seller binds him or herself to  
22 selling something, whereas in the preference pact,  
23 no such thing. The preference pact is conditional.  
24 If the debtor decides to sell something, then he or  
25 she must accord this preference.

1           The MOI has several clauses, but none of  
2 it is a clause typical of a contrato promessa, a  
3 promissory contract, and because it is not such a  
4 contract, one cannot apply article 410 of the  
5 Mozambican Civil Code.

6           But even were such an article to apply,  
7 that's my fourth and last note, even were this  
8 article to apply, even were we to believe that we  
9 were facing a promissory contract, article 410 of  
10 the Civil Code does not just say that the rules of  
11 the promised contract apply to the promissory  
12 contract, and it does not merely allow for formal  
13 exception. Article 410 of the Civil Code stipulates  
14 that neither do any of the rules that apply to the  
15 definitive contract apply inasmuch as their very  
16 nature would make it nonsensical for them to be  
17 applied to the promissory contract. This is why the  
18 MOI isn't a promissory contract, but it would never  
19 be expected to abide by the rules presiding over the  
20 complex contract of a PPP concession.

21           So that's my first main remark.

22           My second one, the rules -- the 2010 rules  
23 on public procurement do not apply to the MOI. One  
24 must bear in mind that in Mozambique, as the case is  
25 in Portugal and across the European Union, the

1 so-called public procurement rules have been  
2 designed solely and exclusively for contracts for  
3 typical purchasing contracts of goods and services  
4 by a given state, to wit, public construction  
5 contract, supply of goods, provision of services and  
6 concessions. That is the case in Mozambique; that  
7 was the case in Portugal until 2008; and the same  
8 goes for EU directives dated from 2014.

9           We are not facing a concession agreement.  
10 We are merely facing a preliminary contract, which  
11 does not involve, in and of itself, any public  
12 expenditure.

13           Article 1st of the 2010 legislation does  
14 not include, rather excludes, this type of contract  
15 from its application.

16           My third fundamental idea or concept. The  
17 approval of the MOI and later the approval of the  
18 study undertaken by Patel is but a stage in a  
19 complex process with the approval whereof the  
20 concession agreement is not to be concomitantly  
21 executed. A PPP is a very complex creature.  
22 Therefore, and that's the very reason for the  
23 existence of a special system regulating successive  
24 stages all the way to the execution of the  
25 concession agreement.

1           After the approval of the study, after the  
2 decision to go for *ajuste directo*, a complex stage  
3 of negotiation, negotiation between the parties  
4 takes place and only at the end thereof will the  
5 State decide whether it approves a project, whether  
6 it approves the investment plan, and only thereafter  
7 will it enter into the concession agreement.  
8 Therefore, there's no grounds on which a bypass  
9 could be undertaken going from *ajuste directo* to the  
10 execution of a concession agreement.

11           Fourth and penultimate fundamental  
12 concept, the issue of language. There's no need to  
13 insist on the fact that article 5 of the 2010  
14 procurement system does not apply. I've said it.  
15 But even if it did apply, even were article 5, which  
16 stipulates that the Portuguese language prevails  
17 were to apply, it would remain crucial to find out  
18 the circumstances of a given agreement, the  
19 circumstances of a given transaction, and  
20 undoubtedly, irrespective of the value to be  
21 assigned to the English version or one of the  
22 English versions, most assuredly, when in the MOI  
23 reference is made to it is stated that the English  
24 version is of an equal import, even were it not to  
25 prevail, this implies that the parties acknowledge

1 that what was discussed in English is relevant with  
2 a view to understanding what the parties meant to  
3 say.

4 Moreover, the behaviour right after the  
5 approval of the MOI, the study --

6 **THE INTERPRETER:** The speaker corrects  
7 himself.

8 **PROF MEDEIROS:** -- reveals that at that  
9 point in time in the minds of the Mozambican  
10 government, there existed the concept, the notion of  
11 an *ajuste directo*.

12 My final remark -- this was but a mere  
13 introduction, a brief introduction to say, to refer  
14 to the relevance of the act by the Council of  
15 Ministers dated April 16th, and it is relevant  
16 because clearly, the government at council applied  
17 article 13(3) of the law on PPPs, the one that  
18 exceptionally allows recourse to *ajuste directo*, the  
19 Council of Ministers provided grounds for their  
20 decision to have recourse to the solution provided  
21 for by 13(3), and according to the stages leading to  
22 a PPP listed in the PPP regulation, listed the  
23 successive steps, namely instructed that  
24 negotiations should ensue with the proper parties.

25 And this is all I wanted to say by way of

1 an introduction.

2 **MS MARTINS:** Thank you, Professor  
3 Medeiros. I would just have few more follow-up  
4 questions for you on what you just said and on two  
5 other topics.

6 So basically when you said, and you  
7 explained very well, that there is a difference  
8 between preliminary and non binding contracts and in  
9 your opinion there is no doubt the MOI is a binding  
10 contract, you also referred to the fact that it's  
11 not a promissory agreement.

12 For the benefit of those in the room who  
13 are not civil lawyers, could you please confirm or  
14 explain in your words if the pact of preference, as  
15 it is known in civil law jurisdictions, and in  
16 Lusophone jurisdictions, is materialised into a  
17 promise in some way and at what moment?

18 **PROF MEDEIROS:** Like I said, in the  
19 preference contract -- like I said, the speaker  
20 repeats, in the promissory contract the debtor is  
21 bound to execute the definitive final contract.

22 In the preference pact this is not the  
23 case. In the preference pact the debtor does not --  
24 is not bound -- does not bind itself to sell. Only  
25 should he or she decide to sell, in that case he

1 binds him or herself to give preference.

2 In such a contract the creditor is not  
3 entitled to buy the piece of real estate, if we use  
4 the purchase and sale of a building by way of an  
5 example.

6 In this case the parties, or the  
7 Mozambican State, did not bind itself to execute the  
8 concession. The Mozambican State merely said that  
9 they would consider the study, and should they  
10 conclude that, on and all, it is important for the  
11 public interest to progress with this project, in  
12 that case they would approve the study and accord  
13 the preference.

14 **MS MARTINS:** At this moment when the right  
15 of preference is -- when the preference is -- when  
16 the State tells Patel to exercise its right of  
17 preference and PEL does indeed exercise that right,  
18 from this moment onward is the State bound, or not,  
19 to proceed with the concession contract? Or with  
20 the direct award procedure?

21 Is there a promise in that sense at this  
22 moment? So it's not at the inception but upon this  
23 second moment?

24 **PROF MEDEIROS:** At this second moment,  
25 from that point in time when the

1 *direito de preferência* is exerted, the State is  
2 bound to progress towards a concession agreement.

3 **MS MARTINS:** Turning to a slightly  
4 different topic, Professor Medeiros, as you know,  
5 Ms Muenda in her second legal opinion also states  
6 that the State of Mozambique would have subjected  
7 the negotiation of the concession agreement to a  
8 condition. That condition would be to set up a  
9 joint venture with Caminhos de Ferro de Moçambique,  
10 with the CFM, and I would just like to ask you two  
11 short questions on this.

12 The first one is if, in your opinion, the  
13 MTC had to indicate a public entity, and the second  
14 one is, having indicated the CFM to partner up with  
15 Patel, should it then have in any way directed the  
16 CFM to proceed with those negotiations?

17 **PROF MEDEIROS:** If I understand you  
18 correctly, you're formulating two different  
19 questions. Starting with the first one, a PPP, or  
20 PPPs in general, there is a seminal distinction  
21 across the Portuguese-speaking world between the  
22 so-called contractual PPPs and institutional PPPs.

23 In both, a private individual is  
24 associated with the State or a public entity in  
25 carrying out public tasks, but one thing is to say



1 I'm going to set up a company with a mixed capital  
2 with a share a private capital and a share a public  
3 capital, this is the model of institutional PPPs.

4 As a rule, when we refer to PPPs, when the  
5 law, namely in Mozambique, regulates PPPs, this is  
6 not what the law is referring to. Rather, to a  
7 contractual PPP. Where there's a contract between  
8 the State and a private individual or entity, in  
9 order to associate in a lasting manner, such private  
10 entity to carrying out a public endeavour or task.

11 This means, for instance, that a motorway  
12 concession during the concession period will be  
13 operated by a private company under a contract,  
14 under an agreement. Therefore, an institutional PPP  
15 is not to be mixed up with a contractual PPP, and  
16 the latter, responding to your question, does not  
17 necessarily have to involve an institution that  
18 I mentioned, ie the entrance of public equity in the  
19 private company that is going to carry out the  
20 public task.

21 As to your second question, I did read the  
22 opinion in question, and what I believe is that we  
23 all know that the State has a plethora of bodies,  
24 and oftentimes, in order for better organisation of  
25 its action, it unfolds into several different

1 entities, as it were.

2           This is what happens when they set up an  
3 SOE in order to manage, say, railways. Such SOE,  
4 State-owned enterprise, formally has a legal  
5 personality which is not to be confused for the  
6 State's, but it is but the hand of the State.

7           Therefore, the State, ie the government,  
8 appoints the board of directors, the Prime Minister  
9 appoints the chairman of the board of directors, the  
10 Minister of Transport the remaining members of the  
11 board, equity is 100 percent public, and the State  
12 guides the activity of said company.

13           And that's why, inasmuch as it is the arm  
14 or the hand of the State, of course the State cannot  
15 wash its hands thereof of anything the company does.  
16 Some go as far as referring to de-consideration of  
17 legal personality. Legal personality of an SOE  
18 should be de-considered because we are referring to  
19 a hand of the State or an arm.

20           Therefore, it is obvious that when the  
21 government determines that as of a given date,  
22 matters should go under an SOE, the government  
23 cannot wash its hands, Pilate like, thereof, and it  
24 is in accordance with the duty of good faith for the  
25 State to keep ensuring that the negotiation is at

1 least adequate to the principles of good faith.

14:59

2 **MS MARTINS:** Thank you,  
3 Professor Medeiros. There is just one last topic  
4 that I would like to address with you before we turn  
5 to cross-examination regarding your qualifications.

6 As you know, Ms Muenda in her second legal  
7 opinion calls into question the fact that -- well,  
8 states that you are not a qualified lawyer under  
9 Mozambican law and that, as such, you may be  
10 confused about some meanings of Mozambican law  
11 provisions.

12 Now, as you indicated in your first legal  
13 opinion, you are a full Professor at the Faculty of  
14 Law of the Portuguese Catholic University, also a  
15 registered lawyer in Portugal, but could you please  
16 explain to the Tribunal how close the two legal  
17 orders are both in terms of civil law and public  
18 law, and also provide your experience, personal  
19 experience, not only in Portugal which we have seen  
20 in your CV, but in Portuguese-speaking countries and  
21 in particular, naturally, regarding Mozambique?

22 **PROF MEDEIROS:** Allow me to state that I'm  
23 never that -- I'm never at ease to refer to my own  
24 CV, but inasmuch as I must, needs must.

25 Following the order, some say that the

1 number 1 influence that Portugal has had in  
2 Portuguese-speaking countries in Africa was indeed  
3 the law. It is the main bequest left by Portugal.  
4 Not only did most of the law live on, but a great  
5 deal of the new law draws inspiration in Portuguese  
6 law paradigm. It's not about copy/paste, but it is  
7 about using a legal framework which is the legal  
8 framework existing and in existence in Portugal.

9 I do not -- I am not a lawyer in  
10 Mozambique, I'm not an accredited lawyer in  
11 Mozambique, but I can tell you that at least in the  
12 Portuguese-speaking countries, normally those deemed  
13 to be best qualified for a foreigner to discuss  
14 Mozambican and Angolan or whatever law is a legal  
15 advisor, not lawyer.

16 From the days of Professor Marcelo  
17 Caetano, who was not a lawyer, Jorge Miranda, Gomes  
18 Canotilho are not lawyers, nor is Viera Andrade to  
19 more recent names such as Paulo Otero, Paula Costa e  
20 Silva, or Paulo Mota Pinto. None of them is a  
21 lawyer, but all of them normally are chosen because  
22 they're familiar with Mozambican, Angolan or any  
23 other law in those Portuguese-speaking countries.

24 In my own case, other than having been  
25 involved in several projects, namely natural gas in

1 the Rovuma basin or more recently with a Mozambican  
2 corporation with which Sérvulo, my firm, works,  
3 Tiago Mascarenhas, in foreign investment, for  
4 instance, in 2019, not as a lawyer but as a  
5 professor, I was invited to be a part of the  
6 doctoral thesis panel of the -- now of the present  
7 chairman of the constitutional court Lúcia Ribeiro.

8           The fact that I am not a lawyer did not  
9 preclude me two months ago from issuing an opinion  
10 to the president of Sao Tomé, or six months ago to  
11 the government of Cape Verde. I do not believe that  
12 I need -- I have to be a lawyer in order to discuss  
13 a legal system which is this close to the Portuguese  
14 one.

15           **MS MARTINS:** Thank you very much,  
16 Professor. Those are all my questions. Thank you.

17           **PRESIDENT:** Thank you very much,  
18 Ms Martins.

19           Mr Basombrio, I think you are going to  
20 lead the examination of Professor Medeiros.

21           **MR BASOMBRIO:** Yes, your Honour. Thank  
22 you.

23 Cross-examination by Respondent

24           **MR BASOMBRIO:** Professor Medeiros, I had  
25 an opportunity to shake your hand when we both

1 walked in, but first of all, I want to say it's a  
2 pleasure meeting you, and thank you for coming here  
3 to answer my questions.

4 **PROF MEDEIROS:** Thank you.

5 **MR BASOMBRIO:** There are a couple of  
6 preliminary matters that I wanted to mention. One  
7 is that, as you are seeing, your testimony is being  
8 interpreted back and forth between English and  
9 Portuguese, so I think it's very important that we  
10 let each other finish our sentences so we can give  
11 the interpreters the time to do that, and the court  
12 reporter also needs to take everything down so we  
13 have to be mindful of that, too.

14 So I think if both of us try to speak  
15 slowly, that would be very helpful. I also want to  
16 mention that if I ask you any questions that you  
17 think are unclear, please do not hesitate to  
18 indicate that to me, or if you don't understand  
19 something I'm asking, and I'll just try to clarify  
20 it to make sure that we are communicating properly.  
21 OK?

22 I first want to start with your  
23 background, which is the last issue that counsel for  
24 Patel mentioned, and I need to ask you some  
25 questions to make sure that we have a clear record.

1           It is correct that you're licensed to  
2 practise law in Portugal, correct?

3           **PROF MEDEIROS:** That is correct.

4           **MR BASOMBRIO:** Now, you're a partner,  
5 I believe you mention at a Portuguese law firm,  
6 Sérvulo & Associados. Are you a partner at that law  
7 firm?

8           **PROF MEDEIROS:** I am a partner.

9           **MR BASOMBRIO:** And since when have you  
10 been a partner at that law firm? What year?

11           **PROF MEDEIROS:** I was one of the founding  
12 partners in 1999. 23 years ago.

13           **MR BASOMBRIO:** And in that law firm, do  
14 you practise as a partner in the arbitration  
15 department?

16           **PROF MEDEIROS:** In Sérvulo we don't have a  
17 distinct arbitration department, but I am one of the  
18 partners that does arbitration.

19           **MR BASOMBRIO:** And in your arbitration  
20 practice, do you represent the parties in  
21 arbitrations?

22           **PROF MEDEIROS:** My experience in  
23 arbitration is mostly as an arbitrator nominated by  
24 the parties -- indicated by the parties or presiding  
25 over the actual arbitration. I would say in my

1 experience, 95 per cent -- more than 90 per cent of  
2 the time has been as an arbitrator and less than 10  
3 per cent as a lawyer.

4 **MR BASOMBRIO:** Thank you.

5 You also indicate that you're a Professor  
6 at Catholic University of Portugal, is that right?

7 **PROF MEDEIROS:** Exactly, sir.

8 **MR BASOMBRIO:** And since when have you  
9 been a Professor at Catholic university? Since what  
10 year?

11 **PROF MEDEIROS:** Since 1987, which is when  
12 I finished my degree, I became an assistant. In  
13 1991 I did my Master's degree. In 1999 I did my  
14 PhD. In 2005 I sought to become associate  
15 professor. In 2016 I became full professor.

16 **MR BASOMBRIO:** Let's take the last five  
17 years, for example. What percentage of your time do  
18 you spend practising as an attorney with Sérvulo  
19 & Associados, as opposed to teaching at the  
20 university. Could you please give us an estimate?

21 **PROF MEDEIROS:** I don't actually teach or  
22 practise as a lawyer. You can teach, you can be a  
23 lawyer, and you can do research. I would say that  
24 I spend about 40 per cent of my time as a lawyer, 40  
25 per cent as a researcher and 20 per cent as a



1 teacher.

2 **MR BASOMBRIO:** Do you know whether Sérvulo  
3 & Associados has ever performed any legal work for  
4 Patel prior to this arbitration?

5 **PROF MEDEIROS:** I have thought not. I've  
6 never heard of that. I think not.

7 **MR BASOMBRIO:** Who contacted you to be a  
8 legal expert in this case, in this arbitration?

9 **PROF MEDEIROS:** It was Sofia Martins.

10 **MR BASOMBRIO:** And have you worked with  
11 her before?

12 **PROF MEDEIROS:** In one arbitration -- in  
13 an arbitration, never. Not even as a lawyer. I met  
14 Sofia Martins a while ago in the arbitration field.

15 **MR BASOMBRIO:** In your two legal opinions  
16 on the upper left-hand side -- and I don't know that  
17 it's necessary to put this on the screen -- you have  
18 your name, Rui Medeiros, Professor Catedrático,  
19 right, Faculdade de Direito, at the Catholic  
20 University, and then it says "Doutor em Direito".

21 It would be correct to say that the  
22 university itself has not approved these legal  
23 opinions. The only reason why you list them there  
24 is to identify one of your positions, correct?

25 **PROF MEDEIROS:** Of course the university

1 has nothing to do with the contents of the opinion,  
2 which is why it is not printed on university paper.

3 **MR BASOMBRIO:** All right. Going back,  
4 then, to your qualifications, so to be clear on the  
5 record, you're not licensed to practise law in  
6 Mozambique, correct?

7 **PROF MEDEIROS:** I do not.

8 **MR BASOMBRIO:** Are you familiar with the  
9 Estatuto, the Ordem de Advogados of Mozambique?

10 **PROF MEDEIROS:** I'm familiar with that of  
11 Angola. I have not looked at the Mozambican one  
12 closely. I don't know it well. I only know two or  
13 three things therein. I have never read it  
14 carefully, so no.

15 **MR BASOMBRIO:** Do you know whether -- I'll  
16 refer to that as the Estatuto, OK?

17 Do you know whether the Estatuto contains  
18 a definition of what constitutes the practice of  
19 law?

20 **PROF MEDEIROS:** As I don't know it, I can  
21 only imagine so.

22 **MS MARTINS:** I must object to this line of  
23 questioning. One, this statute is not on the  
24 record, and I would state for the record that  
25 Mozambique's counsel, who was arguing Mozambican law

1 in these proceedings is from the US, so I really  
2 don't understand why we're having this discussion.

3 **MR BASOMBRIO:** May I respond?

4 I'm asking the witness for his  
5 interpretation and familiarity with Mozambican law,  
6 including licensure, which is relevant, and I am  
7 here as the counsel for the Republic of Mozambique,  
8 not as an expert on Mozambican law so I can ask  
9 questions about it.

10 **PRESIDENT:** I don't think that the -- that  
11 the by-laws of the Bar Association of Mozambique is  
12 in the record, to the best of my recollection. What  
13 do you want to ask Professor Medeiros about that?

14 **MR BASOMBRIO:** My question was whether he  
15 knows -- I'm asking just for his knowledge.

16 **PRESIDENT:** What do you want to ask him  
17 about the by-laws of the Bar Association of  
18 Mozambique? Maybe Professor Medeiros can help us?  
19 Maybe not.

20 **MR BASOMBRIO:** Correct. In his direct he  
21 made the representation that it is his understanding  
22 that in Mozambique, you can provide -- well, he  
23 didn't speak about Mozambique in general. In  
24 Portuguese-speaking countries, you do not have to be  
25 a licensed lawyer to provide legal opinions, and so

1 I want to ask him about Mozambique specifically,  
2 whether he has an understanding whether that's true  
3 or not.

4 Because he made that argument, he said you  
5 don't have to be a lawyer, you can be a professor,  
6 and that's enough, and so I want to -- and he gave I  
7 think Cape Verde and Angola as examples, so I want  
8 to ask him about Mozambique.

9 **PRESIDENT:** Let's read it to him or say it  
10 to him or ask him, but let's move on.

11 **MR BASOMBRIO:** Yes, I'm trying to.

12 **PRESIDENT:** Thank you.

13 **MR BASOMBRIO:** Lei 28, I'll read it to you  
14 as the chairman indicates.

15 Article 54.1 Lei 28 says: Legal  
16 consultation is considered to be the activity of  
17 interpreting and applying legal rules to a concrete  
18 or abstract case as well as legal advice in the  
19 interest and on behalf of a third party.

20 Are you familiar with that provision of  
21 the Estatuto de Ordem de Advogados de Mozambique?

22 **PROF MEDEIROS:** As I had indicated, I do  
23 not know this Mozambican statute but, based on what  
24 I just heard, this is not far from what is in the  
25 Portuguese Bar Association statute, which is

1     unsurprising.

2                     Practising law involves consultancy as  
3     well. Consultation. Mozambique, like in Portugal,  
4     we can see there is this common paradigm.

5                     **MR BASOMBRIO:** Do you understand that this  
6     proceeding is pursuant to a treaty between India and  
7     Mozambique?

8                     **PROF MEDEIROS:** Yes, I was told so.

9                     **MR BASOMBRIO:** This is not a contractual  
10    arbitration, correct?

11                    **PROF MEDEIROS:** Correct.

12                    **MR BASOMBRIO:** Do you have an  
13    understanding as to whether the prohibitions against  
14    the unauthorised practice of law under the  
15    Mozambican statute would apply in a treaty  
16    proceedings such as this one?

17                    **PROF MEDEIROS:** I have no idea, but I'd  
18    like to make one thing clear.

19                    That limitation probably has a note  
20    indicating that it does not apply to people with a  
21    PhD. However, that was never my point. My point  
22    was that a professor who's a legal expert, who's not  
23    Mozambican but is Portuguese, has the knowledge and  
24    ability to interpret Mozambican law. That is all  
25    I said.

1           **MR BASOMBRIO:** Such a professor could  
2     invoke a process that exists under Mozambican law in  
3     order to be admitted into the role of attorneys  
4     there, correct?

5           **PROF MEDEIROS:** I'm sorry, but I don't  
6     follow your question. Could you perhaps  
7     reformulate?

8           **MR BASOMBRIO:** Have you ever followed any  
9     process set forth by the Bar Association in  
10    Mozambique in order to qualify as an attorney in  
11    Mozambican law and be able to lawfully provide legal  
12    consultation?

13          **PROF MEDEIROS:** No.

14          **MR BASOMBRIO:** So, your Honour, this is --  
15    my following statement is going to be for purposes  
16    of the record only at this point, as I'm obligated  
17    to state my objection so that I don't waive it.

18                 So I say this with all due respect to you,  
19    Professor Medeiros, it's not directed at you. It's  
20    a legal statement that I have to state on behalf of  
21    my client before the Tribunal.

22                 So Mozambique objects to Professor  
23    Medeiros as an expert on Mozambican law,  
24    Mr President of the Tribunal, and moves to strike,  
25    that is exclude from the record, his two witness

1 statements and any of his testimony insofar only as  
2 they provide legal opinions strictly about  
3 Mozambican law.

4           Professor Medeiros does not qualify as an  
5 expert on Mozambican law because he's not licensed  
6 to practise law in Mozambique. Professor Medeiros  
7 is not a Mozambican attorney. Mozambican law  
8 prohibits non licensed attorneys from providing  
9 legal consultation including in the article that  
10 I have read to this Tribunal. In fact, in  
11 Mozambique it's a public offence to do so. I'm  
12 stating that for purposes of complete transparency  
13 and clarity, the Republic's view is that this is not  
14 a contractual arbitration, this is an official  
15 proceeding between the governments of India and  
16 Mozambique pursuant to a treaty and, therefore,  
17 Mozambique's view is that the prohibitions against  
18 the unauthorised practice of law apply in this type  
19 of proceeding.

20           Finally, we have heard Professor Medeiros'  
21 explanation that Portuguese-speaking countries may  
22 have law that derives from Portuguese law. It's the  
23 position of the Republic of Mozambique that that's  
24 not an exception to an authorised consultation of  
25 law in Mozambican law and it also doesn't make any

1 sense.

2           It would make no sense in any Tribunal for  
3 a UK lawyer to be admitted as an expert on  
4 California law. It would make no sense in any  
5 Tribunal for a Spanish lawyer to be admitted as an  
6 expert in Argentinian law or Mexican law, and it  
7 makes no sense in this Tribunal for a Portuguese  
8 lawyer to be admitted as an expert on Mozambican  
9 law, especially in light of the prohibitions against  
10 the unauthorised practice of law in Mozambique.

11           Having said that, again, that is just my  
12 objection for the record, and our request has been  
13 made. I will proceed respectfully to Professor  
14 Medeiros with my examination, but obviously I do  
15 that without waiving this objection and preserving  
16 of all of our rights, and this will be addressed in  
17 the proper course by the Tribunal, of course.

18           **PRESIDENT:** Thank you. That is noted.

19           **MR BASOMBRIO:** Thank you.

20           OK. Let me return to you, Professor  
21 Medeiros, if I may.

22           First, I want to ask you some questions  
23 that address conflicts of law issues. You're  
24 familiar with what I refer to by the subject of  
25 conflicts of laws. In other words, which is the



1 applicable law?

2           **PROF MEDEIROS:** Yes, I am familiar with  
3 that.

4           **MR BASOMBRIO:** I'm going to ask for your  
5 opinion on certain conflicts of law points that  
6 I believe may be relevant in this case.

7           So the first question would be from a  
8 conflicts of law -- and all these questions again  
9 are from a conflicts of law perspective. The first  
10 question is, is the MOI governed by Mozambican law?

11           **PROF MEDEIROS:** The MOI is governed by  
12 Mozambican law.

13           **MR BASOMBRIO:** And that would be on the  
14 basis of what the MOI says in addition to the  
15 requirements of Mozambican law?

16           **PROF MEDEIROS:** The MOI considers that  
17 Mozambican law applies to it. I'm referring only to  
18 the MOI.

19           **MR BASOMBRIO:** The issue of the validity  
20 of the MOI -- again, the validity of the MOI -- is  
21 that also an issue that's governed by Mozambican law  
22 in your opinion?

23           **PROF MEDEIROS:** In terms of the MOI  
24 per se, yes.

25           **MR BASOMBRIO:** If an attorney were to

1 interpret the rights and obligations of the parties  
2 under the MOI, would the rights and obligations also  
3 be governed by Mozambican law?

4 **PROF MEDEIROS:** I would say, yes.

5 **MR BASOMBRIO:** Now I'm going to ask you a  
6 question that's not necessarily tied to the MOI.  
7 Just more broadly speaking.

8 Are the negotiation, contracting and  
9 execution of PPP projects and concessions in  
10 Mozambique also governed by Mozambican law?

11 **PROF MEDEIROS:** Yes, there is a PPP Law  
12 and Regulations in Mozambique.

13 **MR BASOMBRIO:** And in your opinion, does  
14 that -- did that -- strike that, I'm having some  
15 trouble with my microphone turning on and off, but  
16 I'll try to speak more closely.

17 **PRESIDENT:** For once, I am not  
18 responsible!

19 **MR BASOMBRIO:** Thank you. Let's see if it  
20 works. OK.

21 My last question in this regard in terms  
22 of conflicts of law. Are unsolicited proposals for  
23 PPP projects and concessions in Mozambique also  
24 governed by Mozambican law in your opinion?

25 **PROF MEDEIROS:** Well, let me see.

1 Different legal orders have specific rules, and  
2 there is doctrine that's parastatal, but there are  
3 also rules in Mozambican law for unsolicited  
4 proposals, and there is the need to integrate the  
5 lack thereof.

6 **MR BASOMBRIO:** But to the extent that  
7 there is Mozambican law on the issue of unsolicited  
8 proposals, Patel's proposals, if it's interpreted as  
9 an unsolicited proposal, would be governed by  
10 Mozambican law, correct?

11 **PROF MEDEIROS:** It has to be framed by  
12 Mozambican law, yes.

13 **MR BASOMBRIO:** I'm going to ask you a  
14 question from your initial legal opinion, and  
15 I don't know that we need to put it on the screen.  
16 I'll just read you the sentence that you said.

17 You said at paragraph 40.1 of your legal  
18 opinion CER-3, you say "I understand form" -- and I  
19 think it's just a typo --

20 **PROF MEDEIROS:** Apologies. Perhaps you  
21 could put that up on the screen if possible? If you  
22 don't mind, please put that up on the screen.

23 **MR BASOMBRIO:** Sure.

24 **PROF MEDEIROS:** Sorry for the delay.

25 **MR BASOMBRIO:** I believe you also have a

1 copy. We'll put it on the screen, but you may also  
2 have a copy in front of you.

3 **PROF MEDEIROS:** If I have a hard copy,  
4 I don't need it on the screen.

5 **MR BASOMBRIO:** So we're looking at page  
6 36, paragraph 40.1. I'm looking at the last  
7 sentence of that paragraph.

8 You say, "I understand form" -- that's  
9 probably just a typo, it's supposed to be "from" --  
10 "Addleshaw Goddard that PEL's Mozambican law firm,  
11 Sal & Caldeira Advogados, participated in the  
12 drafting of the PPP Law".

13 Do you see that?

14 **PROF MEDEIROS:** See it very clearly.

15 **MR BASOMBRIO:** With whom at Addleshaw  
16 Goddard did you talk about this, about what you say  
17 in that sentence?

18 **PROF MEDEIROS:** Sarah and Sofia Martins.

19 **MR BASOMBRIO:** What did they tell you  
20 about the legal work that Sal & Caldeira performed  
21 for Patel in conjunction with the MOI?

22 **MS VASANI:** Excuse me, I'd like to object.  
23 That is attorney-client privilege.

24 **PRESIDENT:** It sounds dangerously close to  
25 that.

1           **MR BASOMBRIO:** He's a testifying expert,  
2 and he's disclosing the information that was  
3 provided to him, and there is no attorney-client  
4 privilege because, as we will see, Patel has waived  
5 it by submitting the legal opinion of Sal &  
6 Caldeira, C-51.

7           I'm not getting to all that yet. Here I'm  
8 just asking for what it is that you were told that  
9 resulted in this statement.

10           **MS VASANI:** Mr President, I would note  
11 that by submitting a letter that Sal & Caldeira  
12 wrote to the Respondent, that is not a waiver of  
13 Patel's attorney-client privilege. However, Patel's  
14 internal discussions with its attorneys in  
15 Mozambique are privileged.

16           **PRESIDENT:** Look, this is -- experts  
17 sometimes like to make references to facts, and  
18 that's something with which we have to live, that  
19 legal experts unavoidably sometimes refer to facts,  
20 but when they refer to facts, that is not part of  
21 their expert opinion. This is just surroundings.

22           I have some difficulties that we now put a  
23 lot of emphasis on this phrase, because if there's  
24 one thing I like to respect above everything else it  
25 is the privilege of all counsel, counsel to

1 Mozambique and counsel to Claimant. I think it is  
2 one of the cornerstones of our profession,  
3 privilege, and when I see that things get close to  
4 the confidentiality of relationships between lawyers  
5 and their customers, their clients, I feel awkward.

6           So if you could abstain from really --  
7 I would even say I give no value at all to this  
8 statement. It's an obiter. The same like judges  
9 make obiters from time to time, experts also make  
10 obiters. This is really an obiter, and I would not  
11 go on much further in that investigation. I feel  
12 uncomfortable.

13           **MR BASOMBRIO:** I will respect what you  
14 just said, and I won't ask more about this  
15 particular topic, but the witness did receive  
16 several instructions from counsel. For example, he  
17 was told which version of the MOI he should review,  
18 and so there are going to be areas where I'm going  
19 to have to ask, but as to this one in particular,  
20 I'll respect the Tribunal's concerns and move on  
21 from that.

22           Have you, Professor Medeiros, ever worked  
23 with Sal & Caldeira?

24           **PROF MEDEIROS:** No.

25           **MR BASOMBRIO:** Do you know whether your

1 law firm, Sérvulo & Associados, has ever worked with  
2 Sal & Caldeira?

3 **PROF MEDEIROS:** I have no idea.

4 **MR BASOMBRIO:** In preparing your legal  
5 opinion, did you review Patel's Statement of Claim  
6 submitted in this arbitration?

7 **PROF MEDEIROS:** I saw it at the time, yes.

8 **MR BASOMBRIO:** Patel's Statement of  
9 Claim -- I'll represent to you that Patel's  
10 Statement of Claim --

11 We're good? Ready? OK.

12 I'll represent that Patel's Statement of  
13 Claim at paragraph 375 on note 458 and again at  
14 paragraph 330 on note 410 refers and cites the  
15 document that opposing counsel and I were just  
16 talking about a minute ago, exhibit C-51, which is a  
17 legal opinion of Sal & Caldeira dated 9 March 2013.  
18 I want to ask you some questions about that  
19 document, so maybe we should put that on the screen.  
20 It is not part of the Core Bundle, and I believe we  
21 have copies we can hand out to those present, so  
22 I'll wait for my colleague to do that. I am  
23 referring to exhibit C-51 that you have in your  
24 hands, Professor Medeiros.

25 Was this one of the documents that was

1 provided to you for your review by counsel for  
2 Patel?

3           **PROF MEDEIROS:** No, I have no recollection  
4 of having seen this document. I just read the  
5 Statement of Claim. I didn't see the supporting  
6 documents together with the Statement of Claim.  
7 I just read the Statement of Claim, not the  
8 supporting documents. I've never seen this  
9 document, as far as I recall. This was two years  
10 ago, please bear with me.

11           **MR BASOMBRIO:** If you need time to review  
12 it, please do so. Do you need to review it?

13           **PROF MEDEIROS:** I don't remember seeing  
14 this document.

15           **PRESIDENT:** Maybe --

16           **MR BASOMBRIO:** Mr President, when you read  
17 in the Statement of Claim that a legal opinion had  
18 been provided by Sal & Caldeira, why did you not ask  
19 for a copy of that legal opinion from Patel's  
20 counsel?

21           **PROF MEDEIROS:** If this is the legal  
22 opinion, and this is a Portuguese characteristic,  
23 legal opinions in Portugal are very long opinions  
24 with a lot of doctrine, very complex, so we ask the  
25 professor, Professor, how did you interpret this?



1 So I didn't ask for it. I don't know if it's  
2 pertinent or relevant.

3 In my opinion, it's not very important for  
4 me in my study. Frequently -- not in this case --  
5 I'm not even given any documents just to make sure  
6 that the opinion is completely not influenced by  
7 these documents, so I didn't ask for this document,  
8 but I have known -- I didn't feel any need to ask  
9 for it to prepare my own legal opinion Portuguese  
10 way.

11 **MR BASOMBRIO:** Now, you understand Sal &  
12 Caldeira to be a law firm of licensed Mozambican  
13 lawyers, right?

14 **PROF MEDEIROS:** I assume so. They're a  
15 Mozambican law firm. It never crossed my mind that  
16 it wouldn't be like that. It would never cross my  
17 mind they didn't have authorisation to practise law  
18 in Mozambique.

19 **MR BASOMBRIO:** If that's the case, and  
20 according to the Statement of Claim Sal & Caldeira  
21 provided a legal opinion about this matter to Patel,  
22 why would that not be relevant to your analysis if  
23 they are Mozambican lawyers and you're not?

24 **PROF MEDEIROS:** I'm going back to the same  
25 answer, but we have different views, I see.

1 More important than being a Mozambican  
2 lawyer in my opinion is to be somebody who has a  
3 knowledge of Mozambican law, even if he is not an  
4 authorised lawyer to exercise or practise law in  
5 Mozambique.

6 So I confess that it's not important for  
7 me to know that a law firm in their English legal  
8 opinion which has nothing to do with Portuguese  
9 legal opinions, about this topic.

10 **MR BASOMBRIO:** OK. Let's turn to -- well,  
11 before we turn to the paragraph I want to ask you  
12 about in this letter, let me ask you something  
13 different.

14 Did you ever conduct any research  
15 regarding whether Sal & Caldeira publishes  
16 newsletters?

17 **PROF MEDEIROS:** I remember that in the  
18 past, when I was researching for legislation,  
19 I found on their site, of Sal & Caldeira, the  
20 website, information of legislative updates.

21 **MR BASOMBRIO:** And they do updates in the  
22 form of articles and newsletters that you can find  
23 on their website and also on the internet, correct?

24 **PROF MEDEIROS:** This happened to me once.  
25 I saw one update. I have no idea. I did not go

1 back to their website. I didn't have a need for  
2 that. I don't know what is their usual practice of  
3 Sal & Caldeira in this field.

4 **MR BASOMBRIO:** OK. This exhibit C-51 --  
5 and I'll represent to you that according at least to  
6 Sal & Caldeira it is a legal opinion because that's  
7 what they say in it, it's dated 9 March 2013.  
8 That's the legal opinion that's being relied upon by  
9 Patel in this case.

10 Did you conduct any research of the Sal &  
11 Caldeira website to determine whether Sal & Caldeira  
12 had issued a newsletter precisely in March of 2013  
13 that dealt with PPP Law and procedure in Mozambique?

14 **PROF MEDEIROS:** I didn't understand your  
15 question, sorry. Would you mind repeating your  
16 question? I didn't really follow what you said.

17 **MR BASOMBRIO:** That's fine. I'll repeat  
18 it. Exhibit C-51, the letter that you have in front  
19 of you, it's a legal opinion from Sal & Caldeira  
20 that has been submitted into the record and is being  
21 relied upon by Patel.

22 Now, that letter is dated 9 March 2013,  
23 and it discusses PPP Law and procedure in Mozambique  
24 according to Sal & Caldeira. OK? My question is,  
25 in conducting your review of the Sal & Caldeira

1 website and whatever else you were looking at there,  
2 were you able to determine whether Sal & Caldeira  
3 had issued a newsletter in this same time period,  
4 in March of 2013, that discussed Mozambican PPP Law  
5 and procedure?

6           **PROF MEDEIROS:** I saw the website of Sal &  
7 Caldeira as part of the support I was giving  
8 Anadarko many years ago in a natural gas project in  
9 the Rovuma basin in Mozambique. I didn't visit  
10 their site of Sal & Caldeira as part of this -- my  
11 legal opinion or my legal opinions. This was in  
12 2015 and 2016 with Anadarko. That's when I visited  
13 the website. It had nothing to do with this. We  
14 were looking at rights of land use, land rights, as  
15 part of resettlement of people in northern  
16 Mozambique, and it was only then that I accessed  
17 Sal & Caldeira website.

18           So I don't know if there were any updates,  
19 I have no idea.

20           **MR BASOMBRIO:** But you were aware that  
21 Sal & Caldeira issues articles and newsletters about  
22 Mozambican law, so let me ask you a different way,  
23 and I'm trying to understand what work you performed  
24 to reach your opinions.

25           In conjunction with the research that you

1 performed in reaching the opinions in this case, did  
2 you research whether Sal & Caldeira had issued any  
3 newsletters in March of 2013 at the same time that  
4 they issued this legal opinion that also relate to  
5 the issue of PPP Law and procedure in Mozambique?

6 **PROF MEDEIROS:** No. The research --  
7 basically the research which I did was first and  
8 foremost from the Legis PALOPS Portuguese speaking  
9 African countries, which is an instrument which  
10 makes life easier to understand what legislation  
11 exists in Mozambique, how it has changed -- that's  
12 the basis for my work.

13 After that, we tried to understand the  
14 doctrine, what is said of importance to understand  
15 that legislation. As Mozambican doctrine is still  
16 under development, unfortunately, a large part of  
17 that doctrine is not from Mozambique, so I wasn't  
18 concerned. I did no research as regards to what  
19 Sal & Caldeira mentions or writes about this topic.

20 **MR BASOMBRIO:** Do you know whether Sal &  
21 Caldeira, and specifically Jose Manuel Caldeira, who  
22 was the author of C-51 of the legal opinion, do you  
23 know whether he has stated that the direito e margem  
24 de preferência means under the PPP Law a 15 per cent  
25 scoring advantage in a public tender.

1           **PROF MEDEIROS:** I have no idea. The only  
2 thing I was told was what I said already in my first  
3 opinion on page 36, 40.1 which you've just read,  
4 that Sal & Caldeira have participated in the  
5 drafting of the PPP Law. I don't know specifically  
6 what kind of intervention, what kind of influence  
7 they had in that field.

8           **MR BASOMBRIO:** Mr President, we want to  
9 submit for consideration as an exhibit a newsletter  
10 from Sal & Caldeira that's dated March 2013 that  
11 contains a news article written by Mr Jose Caldeira,  
12 who's the drafter of the legal opinion to Patel,  
13 which we believe is relevant to these issues, and  
14 that it directly contradicts the positions that  
15 Patel has taken in this case, and it is also  
16 relevant to my point in my opening statement that  
17 the reason why Patel does not have Sal & Caldeira  
18 here and does not have any licensed Mozambican  
19 attorney here is because none would agree with their  
20 contention or with what Professor Medeiros  
21 respectfully is saying, and so we have a copy of it,  
22 we would like to submit it as an offer of proof and  
23 be allowed to question the witness given that's  
24 here.

25           I understand fully that the decision

1 whether to admit it or not if opposing counsel  
2 objects will be made at a later time, but I want to  
3 take advantage of the fact that Professor Medeiros  
4 is here, introduce the document as an impeachment  
5 document.

6 **PRESIDENT:** Yes? Ms Vasani?

7 **MS VASANI:** Yes, Mr President. I remember  
8 the president's clear directions at the pre hearing  
9 conference that there would be no surprises and, in  
10 fact, ten days prior to the hearing is when Claimant  
11 submitted proposed new authorities. We've heard  
12 nothing from Respondent about any potential new  
13 authorities, and I would -- I'm not sure how long  
14 this has been planned, but I think it's very unfair  
15 to have done this at this stage. This should have  
16 been brought up previously when the additional  
17 documents were being considered, and I would object  
18 to its entrance into the record and I would object  
19 to using it currently with Mr Rui Medeiros.

20 **MR BASOMBRIO:** I should say, Mr President,  
21 we found this document last Saturday. We did not  
22 find it before last Saturday. I can represent that  
23 to this Tribunal. It's incredibly relevant. We  
24 have heard opposing counsel's objections. I want to  
25 have the opportunity as an offer of proof to

1 question the witness and then of course the Tribunal  
2 will decide in due course whether to allow it or  
3 not.

4 **PRESIDENT:** Have you shown -- you have not  
5 shown the document to anyone?

6 **MR BASOMBRIO:** Not yet because we're using  
7 it as an impeachment document, and the  
8 Procedural Order does not have any prohibition  
9 against the use of impeachment documents.

10 **PRESIDENT:** What is an impeachment  
11 document?

12 **MR BASOMBRIO:** An impeachment document is  
13 a document that can be used in an international  
14 tribunal to challenge the testimony of the witness,  
15 and obviously you do not show it to the witness  
16 before because then they would be prepared to  
17 address it. You could not use it as impeachment.

18 But here again, we found this article this  
19 past Saturday, not before.

20 **MS MARTINS:** Mr President, if I may,  
21 Respondent objected to documents submitted ten days  
22 prior to the hearing basically saying well, they're  
23 not recent documents, they've been around for a long  
24 time. It's not our fault if they found it on  
25 Saturday. This is a surprise, and it completely



1 contravenes the directions of the Tribunal at the  
2 pre hearing conference.

3           Second, Professor Medeiros has already  
4 stated that he does not know the document that is on  
5 the screen, and he has not consulted the opinion of  
6 other lawyers.

7           Third, Mr Sal & Caldeira -- not Mr Sal &  
8 Caldeira, the firm Sal & Caldeira is comprised of  
9 Mozambican lawyers who under the statute of the Bar  
10 Association, which Mr Basombrio insists on quoting,  
11 are prevented from testifying as witnesses in any  
12 case, so all the insinuations that have been made as  
13 to the fact that Mr Caldeira would not be here on  
14 purpose is completely devoid of any legal grounds.  
15 If he were here, he would be breaching his duties  
16 under the Bar Association statute of Mozambique, and  
17 I would like this to be in the record, given the  
18 numerous allegations that have been made and  
19 insinuations that have been made by Mr Basombrio as  
20 to Patel's conduct.

21           **PRESIDENT:** Why would they be breaching,  
22 Ms Martins?

23           **MR BASOMBRIO:** The --

24           **PRESIDENT:** One second, Mr Basombrio,  
25 please.

1           What is the duty which they would be  
2   breaching?

15:52

3           **MS MARTINS:** The duty is of professional  
4   secrecy which is different from legal privilege  
5   under common law systems, and as is the norm both in  
6   Mozambique and all Portuguese speaking countries,  
7   once again a similarity, a lawyer is bound to  
8   professional secrecy as a public duty. This cannot  
9   be waived by clients. The only entity that can  
10   waive and only in very exceptional circumstance is  
11   the actual Bar Association, and the Bar can only  
12   waive professional secrecy if the lawyer is the only  
13   person who can testify to a given fact.

14           Now, lawyers do not testify on facts, they  
15   give legal opinions. There are no facts that  
16   Mr Caldeira could bring to the table, and any facts  
17   that his client told him, whatever they might have  
18   been back in the past, are subject to professional  
19   secrecy.

20           So he could not -- Mr Caldeira or any  
21   other Mozambican lawyer, for that matter, could ever  
22   testify in these proceedings.

23           **PRESIDENT:** Very good. So it's now 15.53.  
24   We will be coming back at 4.15. Thank you.

25           Professor Medeiros, can I kindly ask you

1 that you do not speak with counsel to Claimant  
2 during the break, and the secretary will take care  
3 of you and will offer some coffee and some  
4 refreshments.

5 (Short break from 3.54 pm to 4.16 pm)

6 **PRESIDENT:** We resume the hearing. We  
7 have been deliberating on this document from the web  
8 page of Sal & Caldeira to which counsel to the  
9 Republic has made reference. We think that it is  
10 not appropriate at this stage to incorporate that  
11 document. It's much too late. This is not the  
12 appropriate time, and it does in any case not affect  
13 the credibility of Professor Medeiros because it's  
14 not neither from him nor from any of his partners or  
15 anyone. It does not affect his credibility.

16 So that is our decision, and now we  
17 continue with the examination of Professor Medeiros,  
18 and I give the floor back to the Republic of  
19 Mozambique.

20 **MR BASOMBRIO:** Thank you, Mr President.  
21 I do have to state something on the record, and  
22 I have a request of clarification.

23 I'm sorry. I have to make a statement,  
24 and I have a request for clarification.

25 C-51 -- and I understand you've made your

1 ruling, I'm just making my statement for the  
2 record -- C-51 is a legal opinion from Sal &  
3 Caldeira that has been presented by Patel, and it's  
4 been relied upon by Patel for the proposition of  
5 what are PEL's rights under the PPP Law. There is  
6 no attorney-client privilege issue because they have  
7 produced it and submitted it to this Tribunal. This  
8 Tribunal is being asked to rely on it.

9           The Sal & Caldeira newsletter provides a  
10 statement directly on those issues. It's from the  
11 same month in which the legal opinion was issued; it  
12 explains the understanding of the legal opinion and  
13 contradicts the position that has been taken here.

14           This is not just any law firm; this is  
15 their lawyers, what they said contemporaneously at  
16 the same time in March of 2013. The point of  
17 clarification is that we need to have a complete  
18 record, so I understand that at this point the  
19 Tribunal is saying that they will not admit it, but  
20 we need to have in the record what we were  
21 submitting with the Tribunal's decision that at this  
22 time it's not admitted.

23           So I would request to append it to the  
24 record as a document that has not been admitted, as  
25 you ruled, by the Tribunal but we need to have it in

1 the record so that we can have a record of what it  
2 is that I was submitting.

16:19

3           **PRESIDENT:** You -- I mean, sorry for that,  
4 I mean if we have it in the record, then we'll read  
5 it and then it will impact on what we decide. You  
6 could have asked for -- on Saturday, you could  
7 have -- if you found it on Saturday, you could  
8 have -- and it has been in the web page of Caldeira  
9 presumably since 2013, you could have asked for it  
10 as Claimant asked for some documents some months  
11 ago. We would have ruled on it on the beginning of  
12 the hearing. You could on Saturday evening have  
13 sent us an e-mail asking for an extraordinary  
14 request. It is -- there is a problem -- there is an  
15 evident problem that in the middle of examination of  
16 an expert we cannot -- we are losing a lot of time  
17 with trying to decide something which should have  
18 been decided well in advance, and it has nothing to  
19 do with the credibility of Professor Medeiros.

20           So, no, I don't think it can be appended  
21 to anything, and if you want to make a request for  
22 it to be submitted, you -- I mean, we all know the  
23 rules. You write to us, you say we have found on  
24 Saturday this document, we think it is important.  
25 I give the floor then to Ms Vasani or to Ms Martins,

1 and they react and we take a decision, but not in  
2 the middle of the examination of Professor Medeiros.  
3 That is clearly not -- it's not conducive to a  
4 proper, well organised procedure. It's just the  
5 timing.

6 I have no problem with the document. It  
7 may or not be relevant, but it is not the moment to  
8 submit it in the middle of an examination.

9 **MR BASOMBRIO:** We will respect that, and  
10 we will submit something formally, but we just  
11 clarify again for the record that we believe it was  
12 proper as an impeachment document, but I'll move on.

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

14 **MR BASOMBRIO:** We'll submit it formally.

15 So let's turn to C-51, which is the legal  
16 opinion of Sal & Caldeira that has been put into the  
17 record by Patel, and, Professor Medeiros, I will  
18 draw your attention to page 4, paragraph 2.4,  
19 please, of Exhibit C-51.

20 I'm going to read that paragraph. It  
21 states --

22 **PRESIDENT:** Shall we all read it for  
23 ourselves because, you know, it is so intensive in  
24 effort to have it interpreted. Let's all read it  
25 and then you put the question.

1 Professor Medeiros, you do read English,  
2 don't you?

3 **PROF MEDEIROS:** Indeed I do.

4 **MR BASOMBRIO:** Could you please read  
5 paragraph 2.4, and let me know when you're done.

6 **PROF MEDEIROS:** I'm done.

7 **MR BASOMBRIO:** The legal opinion from  
8 Sal & Caldeira states that PEL has expressed its  
9 intention to exercise -- and they use the words  
10 "right of first refusal".

11 Do you see that?

12 **PROF MEDEIROS:** Indeed I do.

13 **MR BASOMBRIO:** They say this is to  
14 "implement the project per the MOI", and then Sal &  
15 Caldeira says "but has not yet submitted its bid  
16 price in order to actually exercise that right as  
17 provided for in article 13(5) of the PPP Law". Do  
18 you know what this refers to when it quotes article  
19 13(5) of the PPP Law?

20 **PROF MEDEIROS:** It refers to the margem de  
21 preferência, the 15 per cent bonus.

22 **MR BASOMBRIO:** OK, let's turn to the PPP  
23 Law, please. The English version is CLA-65A, and it  
24 is tab 48 in the Core Bundle, and the Portuguese  
25 original version is RLA-6. It's not in the Core

1 Bundle, so we're going to hand out copies of that if  
2 you allow me, Mr President.

16:24

3 **PRESIDENT:** Of course.

4 **MR BASOMBRIO:** Ready, Professor Medeiros?

5 **PROF MEDEIROS:** Yes.

6 **MR BASOMBRIO:** OK. Let's look at the  
7 Portuguese version, which is up on the screen.

8 So you indicated that Sal & Caldeira's  
9 comment was referring to subsection 5 of article 13.  
10 That would be as indicated here, right? This is the  
11 article 13 and subsection 5 that you were referring  
12 to?

13 **PROF MEDEIROS:** Yes, indeed.

14 **MR BASOMBRIO:** And in the Portuguese it  
15 indicates -- it refers to the term, *direito e margem*  
16 *de preferência*, correct?

17 **PROF MEDEIROS:** Correct.

18 **MR BASOMBRIO:** So when Sal & Caldeira  
19 provided its legal opinion to Patel and used the  
20 English words "right of first refusal", you  
21 understand that to have been referring to the  
22 *direito de preferência* that provides the 15:  
23 Per cent margin in article 13(5)?

24 **PROF MEDEIROS:** I'm a law professor.  
25 I can't interpret what the author of this opinion



1 meant. I don't know what he was thinking about.

16:27

2 He does refer to *direito de preferência*  
3 for the implementation of the project, and then he  
4 adds, furthermore, the right enshrined in number  
5 13(5).

6 I do not know what exactly he meant and  
7 how he wanted to use both references. The way  
8 I read it, they cannot be brought together. They  
9 cannot be merged.

10 **MR BASOMBRIO:** In your opinion, a right of  
11 first refusal and a 15 per cent scoring advantage  
12 cannot be merged? And now I'm using the English  
13 term "right of first refusal". I'm not using the  
14 Portuguese term "*direito de preferência*".

15 **PROF MEDEIROS:** In my very first opinion  
16 I said black and white that inasmuch as I was not an  
17 expert in English law, I was not going to speak to  
18 the difference between right of first refusal and  
19 *direito de preferência*.

20 So I always worked with the *expression*  
21 *direito de preferência* in Portuguese, and, as I see  
22 it, it's crystal clear that *direito de preferência*  
23 cannot be confused with a 15 per cent bonus. It's  
24 crystal clear that *direito de preferência* can  
25 co-exist with a tender where, when the time comes to

1 adjudicate, to award, the preferring bidder will be  
2 awarded the bid that was scored the top most amount,  
3 but it does not go together, as I think I've said  
4 clearly in my first and second opinions, with a  
5 bonus system.

6           Why? Because a bonus system, it can vary  
7 between 0.1 per cent and 99.9 per cent. A bonus  
8 system, all it says is tell us that bid will be  
9 given a bonus, but it does not tell us that should  
10 the government decide to move forward with that  
11 project, it will be awarded in the conditions to be  
12 decided upon. Quite the opposite.

13           In a bonus system, the preferred bidder  
14 may not be awarded the contract, so the  
15 *direito de preferência*, as it was constructed, it is  
16 not a promissory contract. It does not ensure the  
17 concession, it does not guarantee the concession,  
18 but it does guarantee that, should the government  
19 decide to go down the concession route, even through  
20 a tender procedure, at the end thereof, the  
21 preferred bidder might accept the bid of the third  
22 best scored, and this one would be given the award.  
23 The bonus is nothing like this.

24           Funnily enough, the law now refers to  
25 *direito "e" margem de preferência*, which is curious

1 inasmuch as the 2010 procurement system also  
2 referred to *margem de preferência*, not to *direito*  
3 but *margem de preferência*, in it's article 26, and  
4 this *preferência*, this preference, was to the  
5 benefit of national bidders, and it was the very  
6 same logic that the legislator in 2010 in the  
7 legislation which was in effect when the MOI was  
8 signed did not refer to *direito de preferência* but  
9 to *margem de preferência*.

10 Candidly, as I see it, I see no way of  
11 having a *direito de preferência* co-exist with a  
12 bonus system.

13 **MR BASOMBRIO:** The only way you can  
14 provide a 15 per cent scoring advantage to one  
15 bidder is if there are other bidders, right? If  
16 there's a tender process.

17 **PROF MEDEIROS:** Indeed.

18 **MR BASOMBRIO:** So let's concentrate on  
19 this article 13 and section 5, if we can, so let's  
20 go back to it, if we may.

21 It states initially, and I'm going to be  
22 loosely translating -- and you tell me if you  
23 disagree -- it begins by stating: Proposals for PPP  
24 enterprises submitted by private initiative. So  
25 this specific article 5 governs what happens when

1 there is a proposal for a PPP enterprise submitted  
2 by private initiative. Would you agree?

3 **PROF MEDEIROS:** Partially only. It  
4 governs when no recourse is had to ajuste directo,  
5 that is spelled out in number 3. Number 3 enshrines  
6 a rule that waives number 5. In other words, the  
7 private initiative proposals benefit from this  
8 margem de preferência if there are no weighty  
9 circumstances for which grounds are duly provided  
10 which justify the recourse to direct negotiation and  
11 ajuste directo.

12 **MR BASOMBRIO:** We will get to the step --  
13 you're suggesting there's some sort of step  
14 procedure here. We're going to get to that. But  
15 first I want to understand subsection 5.

16 So my question was subsection 5 begins by  
17 stating: Proposals for PPP enterprises presented by  
18 a private initiative. Would you agree that  
19 subsection 5 deals with the issue of how to treat  
20 proposals for PPP enterprises submitted by private  
21 initiative?

22 **PRESIDENT:** I think the expert has already  
23 answered.

24 **PROF MEDEIROS:** Partially.

25 **MR BASOMBRIO:** And they say that such

1 proposals are subject to public bidding procedures,  
2 right?

3 **PROF MEDEIROS:** In number 5, yes.

4 **MR BASOMBRIO:** And it is within that  
5 bidding procedure that the proponent, the  
6 unsolicited proposal proponent would be provided  
7 that 15 per cent?

8 **PROF MEDEIROS:** Yes, indeed.

9 **MR BASOMBRIO:** Let's go to the top of  
10 article 13. Can you hear me? You were waving.  
11 It's good?

12 Let's go to the top of article 13. So  
13 article 13 is an article that sets forth the legal  
14 framework under the PPP Law for contracting of PPP  
15 concessions, would you agree?

16 **PROF MEDEIROS:** Yes, we do.

17 **MR BASOMBRIO:** So let's go first to  
18 section number 1.

19 Section number 1 indicates that the  
20 general legal framework in Mozambique is the public  
21 tender. Would you agree?

22 **PROF MEDEIROS:** I do agree.

23 **MR BASOMBRIO:** In other words, the general  
24 approach is public tender, correct?

25 **PROF MEDEIROS:** General, yes.

1           **MR BASOMBRIO:** Now, *ajuste directo* is an  
2 exception to the general rule. It's not the general  
3 rule, correct?

**16:36**

4           **PROF MEDEIROS:** Indeed, sir. Very  
5 correct.

6           **MR BASOMBRIO:** So then let's move down to  
7 section 2, if we may.

8           Now, section 2 basically provides two  
9 different ways to conduct a public tender, with pre  
10 qualification or two-stage competitive tender  
11 processes, correct?

12           **PROF MEDEIROS:** Correct.

13           **MR BASOMBRIO:** So section 2 is not an  
14 alternative to section 1; it's just explaining two  
15 different ways in which the law allows to conduct a  
16 public tender in section 1?

17           **PROF MEDEIROS:** Yes, that's it.

18           **MR BASOMBRIO:** Section 3 is the first  
19 exception to the general rule, and that's the *ajuste*  
20 *directo* exception, right?

21           **PROF MEDEIROS:** Right.

22           **MR BASOMBRIO:** We don't need to go over  
23 the specifics, but it basically says that in  
24 ponderous and duly substantiated situations, that  
25 also becomes an option. *Ajuste directo* also becomes

1 an option.

2 **PROF MEDEIROS:** Right.

3 **MR BASOMBRIO:** Now let's go to section 4.

4 Section 4 does not create a different avenue, a  
5 different vehicle for contracting, but further  
6 clarifies how you apply the options of public tender  
7 and *ajuste directo*, correct?

8 **PROF MEDEIROS:** I don't think so. I think  
9 that what number 4 does is to create new grounds for  
10 *ajuste directo*, which is quite common in Portuguese  
11 law and European Union law. In other words, other  
12 than the grounds for *ajuste directo* spelled out in  
13 number 3, if once the public tender is launched  
14 nobody is awarded, if there are no bids or similar  
15 grounds, there will be another, an alternative  
16 reason for *ajuste directo*, so this is additional  
17 grounds different vis-à-vis those in number 3. It's  
18 a second exception as opposed to a specification of  
19 numbers 1 and 2.

20 **MR BASOMBRIO:** And, if we understand it  
21 the way you're proposing, Professor Medeiros, what  
22 are those two exceptions specifically? Would they  
23 be if, one, no bidder submits a bid and, two, if the  
24 winner of the public tender withdraws from  
25 developing the partnership? Would those be the two

1 exceptions that allow the government to negotiate  
2 again an *ajuste directo*?

3           **PROF MEDEIROS:** If we refer to two  
4 exceptions, I'd rather refer to three. Two, number  
5 one, is the one in section 3, for weighty ponderous  
6 public interest reasons, the recourse to *ajuste*  
7 *directo* is legitimate.

8           Secondly, irrespective thereof, either  
9 because A, nobody tabled bids for tender or, B,  
10 because the awardee gave up, withdrew, it is  
11 possible to have recourse to *ajuste directo*. So the  
12 second chance, the second avenue, has two sub  
13 avenues. One would be the no bid being tabled, and  
14 the other one would be the awardee withdrawing and  
15 not entering into the contract.

16           **MR BASOMBRIO:** Ok. Now let's concentrate  
17 on that, we'll just call it third exception for ease  
18 of discussion, and I'm referring to the language  
19 that says if the winner withdraws from developing a  
20 public private partnership.

21           Do you understand that to mean that in a  
22 public tender process, the winner has the option not  
23 to go forward with the public tender, even though  
24 they were adjudicated the winner?

25           **PROF MEDEIROS:** In strict legal parlance



1 the law does not say that. It does not say that the  
2 awardee may not pursue the award. What it does say  
3 is that from the point of view of the state or the  
4 awarding authority, should that come to pass, as a  
5 matter of fact it does not say that legally he or  
6 she has that right. It is rather saying that, as a  
7 matter of fact, the awardee does not honour and does  
8 not enter into the contract, does not execute the  
9 contract, in that case the public entity may have  
10 recourse to ajuste directo.

11 It is not stipulating that the awardee is  
12 entitled to but, rather, just stating that it may,  
13 as a matter of fact, come to pass that the awardee  
14 eventually does not execute the contract.

15 **MR BASOMBRIO:** Let's go back to number 5  
16 now. Number 5 starts with the clause: Proposals  
17 for PPP enterprises submitted by private initiative  
18 are subject to public bidding procedures.

19 Doesn't that mean what it says, that  
20 unsolicited private proposals have to be put to the  
21 public bidding process, public tender process?

22 **PROF MEDEIROS:** That's precisely where  
23 earlier I answered yes but only partially. Number 5  
24 has to be read together with number 3. If there are  
25 no grounds, if no decision is made for ajuste

1 directo, in that case the unsolicited proposals are  
2 subject to a tender procedure where they will be  
3 given a 15 per cent bonus.

4 **MR BASOMBRIO:** But where do you see in  
5 subsection 5 any such limitation on the application  
6 of that language? Let me explain to you why I'm  
7 asking that question.

8 All I see here is a section that applies  
9 to unsolicited proposals, and it says they are  
10 subject to public bidding procedures. There's  
11 nothing here, is there, that says that's only the  
12 case if there's no ajuste directo. It's identifying  
13 a different category, unsolicited proposals, and  
14 saying those have to be put to public bidding  
15 process, isn't that right?

16 **PROF MEDEIROS:** No, I'm sorry but no.

17 Article 9 of the Mozambican Civil Code  
18 should not be limited to the letter of the law but,  
19 rather, reconstitute the legislative thinking,  
20 bearing in mind the systematic dimension. In the  
21 systematic dimension of the interpretation, one has  
22 to pay heed, first and foremost, to the neighbouring  
23 relationships. Number 5 has to be read together  
24 with the other sections in article 13.

25 Therefore, if number 3 says that, in

1 general, there can be an exception to the public  
2 tender procedure, if number 2 specifies what a  
3 tender is like and number 5 tells us what to do when  
4 there's a USP, this means that whenever there are  
5 grounds for ajuste directo, one waives the general  
6 rule in number 1, and that goes for each and every  
7 such case, but, I add, with the testing of this  
8 rule, which is easy to undertake.

9           Does it make sense for the law to admit  
10 under 13(3) ajuste directo if the proposal is not  
11 solicited and to ban it if the proposal is  
12 unsolicited? In other words, to allow under 13(3)  
13 ajuste directo for proposals authored by the  
14 government and to exclude in 13(3) ajuste directo  
15 when proposals come from private entrepreneurs where  
16 there are additional reasons to precisely allow for  
17 ajuste directo?

18           What sense does it make to interpret in a  
19 restrictive manner section 3, saying that it cannot  
20 be applied if the proposal is not solicited, opting,  
21 rather, for granting to the private developer a less  
22 favourable regime than the one it asked for, than  
23 the one it will be given, had it been a governmental  
24 proposal. I must admit that I do not understand the  
25 sense of such a way of reading this, but perhaps

1 I misread.

2 **MR BASOMBRIO:** But your criticisms are  
3 criticisms directed at the policy of the legislator  
4 of Mozambique when they enacted the PPP Law. We  
5 have to look at what the legislator actually  
6 enacted, not whether it was wise or not.

7 It would not be our place, as attorneys  
8 interpreting the law, to talk about what they should  
9 have done. We must talk about the words they used,  
10 correct?

11 **PROF MEDEIROS:** No, not at all. I did not  
12 levy any criticism to the Mozambican legislature.  
13 I believe that it is well drafted. Article 13 is  
14 well drafted.

15 What I said is that the Mozambican  
16 legislature itself under article 9 of the Civil Code  
17 stipulates that interpretation cannot stop at the  
18 level of the letter of the law, but it must, rather,  
19 look into the *raison d'être*, the reason behind the  
20 text of the law, and basically what I did was to use  
21 two arguments in order to show that the  
22 *raison d'être*, the reason for this law, is to admit  
23 for an unsolicited proposal the *ajuste directo* under  
24 section 3. This is the first systematic argument.

25 The first section spells out the general

1 rule of tender. Number 2 spells out that it can be  
2 through pre qualification or two stage -- again,  
3 this is a rule for all cases. Number 3, an  
4 exception. There may be ajuste directo on these  
5 grounds.

6 Number 4, there's a second exception,  
7 ajuste directo in case of no bid or withdrawing from  
8 the bid, and, number 5, should a tender take place  
9 involving an unsolicited proposal, the author  
10 thereof will be given a 15 per cent bonus. I did  
11 not risk any assessment of the correctness of the  
12 legal solution. I'm only interpreting the  
13 Mozambican law according to the interpretation rules  
14 in article 9 of the Mozambican Civil Code.

15 **MR BASOMBRIO:** I have one more question  
16 about section 5, and then we'll move on.

17 Going back to the specific language there,  
18 it says proposals for PPP enterprises submitted by  
19 private initiative are subject to public bidding  
20 procedure.

21 You're suggesting that's true only  
22 partially. If the legislature wanted to subject  
23 unsolicited proposals partially, only partially, to  
24 public bidding procedures, could they have said here  
25 instead proposals for PPP enterprises submitted by

1 private initiative are partially subject to bidding  
2 procedures? Could they have inserted that word in  
3 there if they had wanted to indicate what you are  
4 suggesting?

5 **PROF MEDEIROS:** Not at all. No need for  
6 additional words.

7 It is of foremost importance -- and I've  
8 been involved in drafting several legal pieces of  
9 legislation, including the Portuguese Public  
10 Procurement Code, and in drafting a law the intent  
11 is not to over-complicate the language in legal  
12 precepts, and that's why we have legal experts  
13 capable of interpreting.

14 As I see it, article 13 is quite alright  
15 as it is and it is crystal clear. As a rule there's  
16 a tender procedure. Should the tender procedure  
17 include a bidder with an unsolicited proposal, that  
18 bid will be given a 15 per cent bonus, but,  
19 exceptionally, there may be *ajuste directo*, be it on  
20 the grounds spelled out in number 3, which do not  
21 limit inasmuch as in number 3 it is not said it does  
22 not apply to an unsolicited proposal, and number 4.  
23 So there's no reason. I'd even go further than  
24 that. I'd even say that number 3 is applied just  
25 like number 4.

1           Please note, let us imagine that we have a  
2 tender with an unsolicited proposal and that the  
3 author thereof is given a 15 per cent bonus, but for  
4 whatever reason the awardee does not wish to execute  
5 the contract. I ask does section 4 not apply? In  
6 such case would number 4 not apply, ie a USP that  
7 goes to tender, there's a 15 per cent bonus. The  
8 awardee at a later stage does not execute the  
9 contract. I therefore ask is there or isn't there  
10 grounds for the Mozambican government thereafter to  
11 launch *ajuste directo*? In your reading the answer  
12 would be negative. Numbers 3 and 4 would never  
13 apply to USPs.

14           The moral of this tale would be that the  
15 Mozambican government would have its hands tied. Is  
16 that what the legislator wants?

17           **MR BASOMBRIO:** Does section 3 make any  
18 reference to unsolicited proposals?

19           **PROF MEDEIROS:** I've said it, neither to  
20 unsolicited or to solicited proposals. It is a  
21 generally worded exception.

22           **MR BASOMBRIO:** And so you would agree,  
23 then, that section 5 deals with the situation of  
24 unsolicited proposals? I'm not asking you how it  
25 deals with it. Would you agree that section 5,

1 then, is the subsection in article 13 that addresses  
2 unsolicited proposals?

3 **MS MARTINS:** I'm sorry, but Mr President,  
4 I think the witness has answered repeatedly.

5 **PROF MEDEIROS:** I've explained -- I have  
6 explained that it deals partially. I've said from  
7 it the outset. Partially. So I can't say that each  
8 and every unsolicited proposal can only fit under  
9 number 5.

10 **MR BASOMBRIO:** OK. Let's move to section  
11 7, please.

12 It says all PPP in the process of  
13 contracting, as well as those who are awarded  
14 contracts in each financial year, must be listed in  
15 an annexe to the State budget proposal.

16 What is that referring to, do you know?

17 **PROF MEDEIROS:** I would say that each and  
18 every PPP undergoing a procurement procedure.

19 **MR BASOMBRIO:** What do you have to -- what  
20 do you have to do with them?

21 What is this section saying that must be  
22 done?

23 **PROF MEDEIROS:** PPPs have a problem, which  
24 is on a mid to long-term basis they imply heavy  
25 expenses for the State, because more often than not,



1 there's financing of the PPP through project  
2 finance, and the charges incurred by said funding  
3 will be borne during the period in which the PPP is  
4 in place, and this will mean that there comes a  
5 point in time when states are left holding the baby,  
6 as it were.

7           Why? Because suddenly something which at  
8 the beginning did not imply an increase of public  
9 debt on a mid to long-term basis, that will indeed  
10 be the case, because somebody will have to keep  
11 funding these PPPs for the private corporation to  
12 have a reasonable profit margin. Therefore, the  
13 underlying logic of PPP systems is to preclude, to  
14 stop PPPs from escaping the budget control and,  
15 therefore, the idea is to record on State budget  
16 documents, PPPs, with future charges that will arise  
17 therefrom.

18           Unfortunately, by way of this note, in  
19 Portugal this is an extremely serious issue, and  
20 I know quite well whereof I speak.

21           **MR BASOMBRIO:** For the Tribunal's benefit,  
22 I probably have about 20 minutes left and I'll be  
23 done.

24           Let's turn to the MOI, I had a couple of  
25 questions, but before we turn to it, let me ask you

1 a question.

2 Are you aware that there are four  
3 different versions of the MOI?

4 **PROF MEDEIROS:** I've always heard about  
5 three, one Portuguese and two English.

6 **MR BASOMBRIO:** So your understanding is  
7 that the two Portuguese versions, the one that came  
8 from Mozambique's files and the one that came from  
9 Patel's files, are identical?

10 **PROF MEDEIROS:** I don't know. I was  
11 just -- I looked at one Portuguese version, one, and  
12 the English version. I understood that there was a  
13 second English version. I do not know of any second  
14 Portuguese version.

15 **MR BASOMBRIO:** To ease our discussion,  
16 what I'll represent to you is that there were two  
17 Portuguese MOIs, one produced by Patel and one  
18 produced by Mozambique, and stating it in as neutral  
19 a way as I can, the text of the two appear to be  
20 identical, but there might be a location where there  
21 was a formatting change, but otherwise they're the  
22 same.

23 So what I will do because the Portuguese  
24 version that Patel has is a better -- it's a better  
25 photocopy, I will ask you from that one, and that

1 would be C-5B, which is tab 3 in the Core Bundle,  
2 but as my colleague looks for that, let me first  
3 inquire -- I'm not going to get to that yet. Let me  
4 ask you some general questions first.

5           You said you also understand that there  
6 are two English versions, is that correct?

7           **PROF MEDEIROS:** Correct.

8           **MR BASOMBRIO:** And did you have an  
9 opportunity to review both English versions?

10          **PROF MEDEIROS:** Yes.

11          **MR BASOMBRIO:** And you were told by --

12          **PROF MEDEIROS:** But I worked on the Patel  
13 English version, having been told that was the  
14 relevant version. All my work was based on the  
15 English version which Patel considered to be the  
16 relevant version for this effect, but I saw both  
17 versions of the English text.

18          **MR BASOMBRIO:** But you were instructed by  
19 Patel's counsel for your analysis to consider the  
20 Portuguese version from Patel and the English  
21 version from Patel, is that correct?

22          **PROF MEDEIROS:** I don't know what  
23 instructions are. Given the two versions, the  
24 English version -- the two English versions, I asked  
25 counsel what does this mean, and I was told that the

1 relevant version was the version which I studied,  
2 and the other was a simple translation of the  
3 Portuguese version. This was told to me right from  
4 day one when I started my work.

5 **MR BASOMBRIO:** Before we get to the MOI,  
6 let me ask you a couple of questions about how you  
7 prepared your legal opinions, if that's OK.

8 **PROF MEDEIROS:** Of course.

9 **MR BASOMBRIO:** Did you prepare the legal  
10 opinions, the two legal opinions by yourself, or did  
11 you have assistance in preparing the legal opinions?

12 **PROF MEDEIROS:** Fortunately in my case  
13 I have a young team, high quality, that helps me in  
14 research of legislation, in finding out about the  
15 pertinent doctrine, et cetera.

16 **MR BASOMBRIO:** This would have been a team  
17 of the law firm from which you're partner?

18 **PROF MEDEIROS:** Yes.

19 **THE INTERPRETER:** OK, back to English now.  
20 Sorry about this.

21 **PROF MEDEIROS:** Yes, so my team works with  
22 me in Sérvulo & Associados. I'm one of the  
23 partners.

24 **MR BASOMBRIO:** And the lawyers at your law  
25 firm that assisted you, none of them are licensed in

1 Mozambique, correct?

2 **PROF MEDEIROS:** That is correct.

3 **MR BASOMBRIO:** Were the legal opinions  
4 initially prepared, the drafts, in Portuguese or in  
5 English?

6 **PROF MEDEIROS:** First legal opinion, half  
7 of the legal opinion was written in English, and  
8 then because it was easier for us, we started  
9 writing in Portuguese. In the second legal opinion  
10 the majority was written in Portuguese, and then  
11 inside my law firm I have a colleague that writes  
12 and reads English perfectly, and he did the  
13 translation and I reviewed that translation.

14 **MR BASOMBRIO:** So you agree with the  
15 translations to English to the extent they were  
16 translated, and with the written English in both of  
17 your legal opinions?

18 **PROF MEDEIROS:** I agree with them, yes.  
19 Obviously I can't guarantee that certain adjectives  
20 are the most rigorous, but I have no doubt that  
21 I know what is written and I stand by what is  
22 written.

23 **MR BASOMBRIO:** OK. Let's go to the first  
24 legal opinion. Let's go back to paragraph 15,  
25 please.

1           In the first paragraph, this is something  
2 you already referred to, you told us earlier that  
3 you were not providing a legal opinion regarding  
4 whether first right of refusal means  
5 *direito de preferência* or not because you're not an  
6 expert in English law.

7           So you are excluding that from your legal  
8 opinion, correct?

9           **PROF MEDEIROS:** Correct.

10          **MR BASOMBRIO:** In the second sentence you  
11 say, "My analysis will focus only on the right of  
12 preference, typical of the Portuguese-speaking  
13 world".

14          In your opinion, is the correct way to  
15 translate *direito de preferência* to English to  
16 translate it to, quote, "right of preference"?

17          **PROF MEDEIROS:** I would say yes. I would  
18 say that *direito de preferência* is right of  
19 preference.

20          **MR BASOMBRIO:** And because you are not an  
21 expert in English law, you could not comment on  
22 whether there's a difference between first right of  
23 refusal and right of preference either, correct?

24          **PROF MEDEIROS:** That is correct.

25          **MR BASOMBRIO:** OK. Let's turn back now to

1 the MOI, please, so I'm going to refer specifically  
2 to the Patel Portuguese version, which is C-5B, tab  
3 3 in the Core Bundle.

4 You have that in front of you, Professor?

5 **PROF MEDEIROS:** Yes.

6 **MR BASOMBRIO:** And this is the Portuguese  
7 version of the MOI that you reviewed, correct?

8 **PROF MEDEIROS:** That is correct.

9 **MR BASOMBRIO:** Does this document refer  
10 anywhere to the term *ajuste directo*?

11 **PROF MEDEIROS:** No.

12 **MR BASOMBRIO:** Does this document refer  
13 anywhere to the term *direito de preferência*?

14 **PROF MEDEIROS:** Yes. To clause 2.

15 **THE INTERPRETER:** Number 2, I believe what  
16 is the speaker said. You have to ask him to repeat  
17 it because I didn't hear it.

18 **MR BASOMBRIO:** I'm confused by the  
19 translation. The translator is asking me to ask you  
20 to please repeat your answer.

21 **PROF MEDEIROS:** Yes. Clause 2, number 2,  
22 grants PEL a *direito de preferência* if the  
23 pre-feasibility is approved.

24 **MR BASOMBRIO:** Clause 2 does not say that  
25 if the feasibility is approved, PEL will have an

1 "ajuste directo", correct?

2 **PROF MEDEIROS:** Correct. I've already  
3 told you that.

4 **MR BASOMBRIO:** I have no more questions.

5 **PRESIDENT:** Thank you. Now let's see if  
6 Ms Martins has any questions.

7 **MS MARTINS:** Just a few clarifications, if  
8 you wouldn't mind, Mr Chairman.

9 **PRESIDENT:** Yes.

10 Re-examination by Claimant

11 **MS MARTINS:** Maybe, Professor Medeiros, at  
12 this very last topic that was addressed, when you  
13 responded to my colleague, Mr Basombrio, that you  
14 believe the correct translation would be "right of  
15 preference", did you mean that this is the literal  
16 translation or, not being a native speaker and not  
17 qualified to opine on legal meanings in English,  
18 what would you say you meant when you said that this  
19 was the correct translation?

20 **MR BASOMBRIO:** I must object on the  
21 grounds that this is a leading question. She's  
22 clearly instructing.

23 **MS MARTINS:** Well, I'm in redirect.

24 **MR BASOMBRIO:** I can, please, put my  
25 objection.



1           You can have the redirect, but in the  
2           redirect or direct you cannot have leading  
3           questions, and you just gave him the answer in the  
4           way you formulated the question.

5           **MS MARTINS:** Mr President, may I rephrase  
6           the question then?

7           **PRESIDENT:** Yes, please. I was looking at  
8           something which Professor Medeiros had written in  
9           his report, and I thought it would not be a  
10          difficult and contentious question. I thought the  
11          first question normally tends not to be contentious  
12          and, to be very frank, I was not listening.

13          So you will have to repeat the question,  
14          and I'm sorry but from time to time I also do not  
15          listen, and I don't know if we should or not delete  
16          that from the transcript!

17          **MS MARTINS:** Thank you for your candour,  
18          Mr Chairman, but that's good because then I can just  
19          ask the question as if it never happened.

20          **PRESIDENT:** Please do put it in a way  
21          which is not too leading.

22          **MS MARTINS:** I will.

23          Professor Medeiros, you were asked if the  
24          correct translation of *direito de preferência* into  
25          English would be "right of preference", to which you

1 responded that you believed so. What I want to ask  
2 you is what did you mean when you said that?

17:13

3           **PROF MEDEIROS:** Let me underline once  
4 again, given my academic activity, I had to learn  
5 many languages. English is my third language.  
6 I speak German, Italian, et cetera, and I don't have  
7 any pretension or to say rigorously how we say  
8 *direito de preferência* in the strict sense of the  
9 term in English. I am not a language expert so  
10 German/English legal terms, I don't want to go down  
11 that road. I prefer to speak Portuguese, and so  
12 I have no objective of saying whether right of  
13 preference is *direito de preferência* or something  
14 else. I can't tell you with that rigour. I don't  
15 know sufficiently in English; I couldn't even say in  
16 Portuguese. So to be honest, I can't tell you  
17 whether that term is good or bad. That's why  
18 I started by saying that I wouldn't discuss or argue  
19 whether *direito de preferência* was the same as right  
20 of first refusal. I don't know.

21           So I humbly confess to all of you that  
22 I am not an expert in translation. I may or may not  
23 be an expert in Mozambican legislation --

24           **MS MARTINS:** Thank you, Professor, for  
25 that clarification.

1           Another clarification that I would like  
2 you is the following. In the initial part of your  
3 testimony to my colleague's questions, you made a  
4 distinction between acting as a lawyer and, to use  
5 the Portuguese word, *jurisconsulto*, someone who  
6 provides expert opinions.

7           Is that a correct statement of what you  
8 said?

9           **PROF MEDEIROS:** That is correct. We have  
10 many legal experts, law professors, who are not  
11 lawyers, and who have an important role in issuing  
12 opinions.

13           **MS MARTINS:** My colleague referred you to  
14 article 54 of the Mozambique Bar Association by-laws  
15 or statute, as you would call it. Now, he did not  
16 mention number 3 of that exact same provision, which  
17 I represent to you states that teachers in law  
18 schools that provide legal opinions are not  
19 considered to be exercising *advocacia*, so practising  
20 acts of law as lawyers, and as such are not bound to  
21 registration with the Bar Association.

22           Is this the rule that you referred similar  
23 to the one that exists in Portugal?

24           **PROF MEDEIROS:** When I heard a reference  
25 made to article 53 of the by-laws of the Bar

1 Association of Mozambique, I saw that that situation  
2 was very similar to the one that we have in  
3 Portugal, so I understood that probably an exception  
4 was accepted in terms of law professors from law  
5 faculties, and that reference only confirms my  
6 understanding.

7 Law professors in Mozambique, as in  
8 Portugal, do not need to be lawyers to prepare and  
9 issue their legal opinions.

10 **MS MARTINS:** Sorry, I'm just checking in  
11 my notes to see if there's anything else.

12 Just one final question that relates to --  
13 you mentioned that the PPP procedure is a complex  
14 procedure that entails several stages. What I would  
15 like to ask you is in your opinion, and with your  
16 knowledge of the facts of this case, do you believe  
17 that such a procedure was being followed or not?

18 **PROF MEDEIROS:** I would say that, given  
19 PPP legislation, which lays down the different  
20 stages up to the signing of the contract, that  
21 basically that process was under way. The  
22 conception, the studies of the project, then there  
23 was a decision to go forward approving the studies,  
24 after that we had the negotiation stage, after that  
25 we would have to have approved by the government the

1 project as a whole, including the project finance  
2 part, and after that we would go into the stage of  
3 signing the contract.

4 This was interrupted abruptly before the  
5 negotiation took place.

6 **MS MARTINS:** Thank you, Professor  
7 Medeiros. No further questions. I'm sorry. Pardon  
8 me.

9 No, that's all, thank you.

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

11 **MR BASOMBRIO:** No. I just want to thank  
12 Professor Medeiros for answering my questions.

13 **PRESIDENT:** Any questions? Yes,  
14 Dr Perezcano has some questions of you.  
15 Questions by the Arbitral Tribunal.

16 **MR PEREZCANO:** Good afternoon, Professor  
17 Medeiros. I have a few questions.

18 What is the difference under Mozambican  
19 law between *ajuste* and *adjudicação*?

20 **PROF MEDEIROS:** *Ajuste*? Can you tell me  
21 *ajuste* or *ajuste directo*?

22 **MR PEREZCANO:** I'm referring generally to  
23 *ajuste* versus *adjudicação*. I understand that *ajuste*  
24 *directo* means the direct -- I'll continue to use the  
25 word in Portuguese because this is what I want to

1 understand -- so I understand that *ajuste directo* is  
2 a form of *ajuste*, but I want to understand this  
3 difference between the concept of *ajuste* and  
4 *adjudicação*.

5           **PROF MEDEIROS:** I don't know the term  
6 "ajuste" as a legal term to be used in this field.  
7 For me, *ajuste* -- I *ajuste* with the other parts --  
8 with the other part the conditions and terms of a  
9 contract, but in this context I am not aware of the  
10 expression.

11           *Ajuste directo*, it doesn't go against  
12 *adjudicação*, so the State or the entity that  
13 adjudicates decides to enter into a contract, and  
14 then amongst other things it can say I'm going to  
15 enter into a contract either by public tender or I'm  
16 going to enter into a contract by *ajuste directo*.  
17 In both cases we have a procedure with different  
18 steps, and further along, when the proposal is  
19 presented in the public tender, you have the  
20 *adjudicação*.

21           Also in the *ajuste directo*, the logic is  
22 the same. In *ajuste directo*, the first thing that  
23 the government does is to invite a company, company  
24 X, to present a proposal. That proposal can be  
25 interesting or not. It can lead to the State

1 wanting to negotiate or not wanting to negotiate.  
2 At the end of the day, in this procedure of *ajuste*  
3 *directo*, it ends up with adjudicação. Awarding,  
4 adjudicating. The word adjudicação happens both in  
5 *ajuste directo* and in public tender. It's an  
6 intermediate stage of the contracting procedure.

7           In the PPP legislation it says you have  
8 the project design, basic principles. After the  
9 project has been prepared you have the studies. All  
10 this is common both for a public tender or for  
11 *ajuste directo*. Then that is ready, and you can go  
12 either down the road of *ajuste directo* or public  
13 tender. After the studies, after all the work has  
14 been done, if the State decides to go ahead if  
15 there's a public tender they launch a public tender,  
16 if this is being negotiated with somebody in  
17 particular they negotiate the proposal, they discuss  
18 the proposal, and in both cases they award. They  
19 adjudicação. And after they award, you still have  
20 to negotiate a whole series of items in a very  
21 complex contract like a PPP.

22           It's very common in *ajuste directo*  
23 procedure, and it's just as common in a procedure of  
24 public tender. So *ajuste directo* is -- one is an  
25 opposite to a public tender. Adjudicação, the award

1 stage, is choosing the best in a public tender or  
2 the single proposal in an *ajuste directo* procedure.

3 I hope I've been clear.

4 **MR PEREZCANO:** Yes. The reason I'm asking  
5 is, first of all, if it's an *ajuste directo*, it  
6 suggests to me that there is some other type of  
7 *ajuste* that is not *directo*. That would be *directo*  
8 or some other type but because it's qualified as  
9 *ajuste directo* it suggested to me that there may be  
10 other types.

11 The second reason is in my personal  
12 experience, I have usually just seen *adjudicação* or  
13 the equivalent, whether it's award in English,  
14 *adjudicación* in Spanish and so on, then there can be  
15 *adjudicação* in general terms or *adjudicação directo*  
16 where -- from the direct awarding of a contract, a  
17 concession, of a public tender.

18 So I was -- that was the reason for my  
19 question, trying to understand the difference  
20 between *ajuste* and *adjudicação*.

21 So if I understood you correctly, the  
22 difference would be between *ajuste directo* and  
23 *concurso*, and both would eventually lead to  
24 *adjudicação*. Did I understand you correctly?

25 **PROF MEDEIROS:** Perfectly. Perfectly.



1 Both in the public tender and the *ajuste*  
2 *directo* we're talking about two different procedures  
3 that lead to an adjudication, to an award. We call  
4 it an *ajuste directo* because the Portuguese  
5 legislature decided to baptize it in that manner,  
6 and in Mozambique they decided to adopt the same  
7 terminology, but there is no science behind it.  
8 There is no *ajuste* that isn't a direct *ajuste* in  
9 procurement.

10 If we look at EU directives, there are  
11 procedures open to competition. There's a limited  
12 one, an open one, and then we also have restricted  
13 procedures where you're not open to competition, as  
14 it were.

15 The Portuguese legislature in those  
16 restricted procedures, the Mozambique one, called it  
17 *ajuste directo*.

18 **MR PEREZCANO:** I think you may have partly  
19 responded to my second question, which is what are  
20 the legal requirements for each -- and by "each"  
21 I mean *ajuste directo* as you explained it now -- and  
22 *adjudicação* to take place.

23 So I understand that *ajuste directo*  
24 precedes *adjudicação*, but what would be sort of the  
25 legal requirements in the chain leading from

1 proposal to *ajuste directo* to adjudicação under  
2 Mozambique law?

3           **PROF MEDEIROS:** Just to be very clear, I'm  
4 going to give you an analogy.

5           So we have this UNCITRAL procedure, these  
6 proceedings. I believe there's an ICC set of  
7 proceedings as well. The UNCITRAL proceedings,  
8 let's call it the tender. The ICC, let's call it  
9 *ajuste directo*. It's such a proceeding that begins  
10 in a different manner.

11           In the tender I have a notice indicating  
12 that it's open to all interested parties. In *ajuste*  
13 *directo* I begin by indicating an invitation to only  
14 one specific company. But then in the UNCITRAL  
15 proceedings and in the ICC proceedings there are  
16 different phases or stages.

17           The same applies to *ajuste directo* and to  
18 public tender. There are studies. There is the  
19 adjudication, for example a decision or an award,  
20 and negotiations. All of this they have in common.

21           The adjudication is like the arbitral  
22 award, whether it is in the UNCITRAL or in the ICC  
23 proceedings. In both cases there will be an  
24 adjudication, adjudicação. *Ajuste directo* is just  
25 one set of proceedings. It begins with an

1 invitation and then follows the different stages,  
2 and this is important because article 17 of the PPP  
3 regulations indicates expressly that also in *ajuste*  
4 *directo*, with of course certain adaptations, the  
5 stages in article 9 need to be followed.

6 **MS MARTINS:** For the record this is CLA-64  
7 of Claimant's Core Bundle. It's Decree 16/2012 of  
8 4 June 2012.

9 **MR PEREZCANO:** Professor, so you were  
10 saying?

11 **PROF MEDEIROS:** So basically it's this.  
12 *Ajuste directo* is one thing, tender is another, like  
13 ICC and UNCITRAL. *Adjudicação* is the way the  
14 winning bid is selected. In the public tender that  
15 would be the best bid presented among a series of  
16 different bids. In *ajuste directo*, it means  
17 choosing the only proposal submitted if, of course,  
18 it merits being chosen.

19 **MR PEREZCANO:** How is each of these legal  
20 acts, I'll call them -- *ajuste directo* and  
21 *adjudicação* -- communicated to the interested party  
22 and to the public at large? What are the  
23 transparency requirements for each, the *ajuste*  
24 *directo* and the *adjudicação*? Of course under  
25 Mozambican law.

1           **PROF MEDEIROS:** The first means of  
2 communication is the notification of the winning  
3 bidder. The Angolan constitution in article 223, I  
4 think it is, says expressly that in the negotiations  
5 between private entities and the public  
6 administrations, the private entities have the right  
7 to be notified.

8           **MR PEREZCANO:** Sorry about that. I was --  
9 the translation was still -- or the interpretation  
10 was still coming through so I apologise.

11           You referred to the Angolan constitution.  
12 My question was specifically under Mozambican law?

13           **PROF MEDEIROS:** I only referred to it  
14 because the first way of communicating is via a  
15 notice or notification, and in the case of the  
16 tender, because there are a number of different  
17 bidders and only one is the winning bidder, the  
18 result has to be published so that all interested  
19 parties can become aware of it. Those that were not  
20 the winning bidders should have the possibility to  
21 go to court if they want to.

22           But even in the *ajuste directo* there's a  
23 growing thrust towards more transparency, more  
24 control of the decisions made by the administration,  
25 and so there will also be some way of making the

1 decision public, the decision of adjudicating or  
2 awarding to a particular entity under the *ajuste*  
3 *directo* procedure. Because this also is a way of  
4 controlling the way the public administration  
5 operates. Of course, there may always be a third  
6 party that wants to impeach the *ajuste directo*  
7 procedure, stating, for example, that there were no  
8 grounds for an *ajuste directo*, so in addition to  
9 that notifying there has to be a way of publishing  
10 the information, these decisions.

11 **MR PEREZCANO:** But that was precisely my  
12 question. What are those forms of communication to  
13 the public? A notification to the interested party  
14 in *ajuste directo* or the participants in a tender  
15 procedure, that I understand, a direct notification  
16 to the one or each one of them, but what are those  
17 forms of communication to the public?

18 And, again, in my experience I've seen  
19 several different types. I've seen --

20 **PROF MEDEIROS:** There's different ways of  
21 communicating this to the public. There is  
22 communication via the official journal, there is  
23 publication in a newspaper. In Portugal, for  
24 example, there's an internet platform where all  
25 contracts, whether they be *ajuste directo* or via

1 tender, have to be published on the day on which  
2 they're executed, so there are many different ways  
3 of communicating this publicly.

4 **MR PEREZCANO:** What would be the form of  
5 communicating in Mozambique? I apologise again,  
6 this was my fault. We have to wait for the  
7 translation to conclude and I apologise. That is my  
8 fault.

9 Again, my question is in Mozambique, what  
10 would be specifically the form of communication?  
11 And, again, I understand that there are many forms,  
12 and that's what I was going to say. In my  
13 experience I have seen the platforms like in  
14 Portugal -- Mexico has similar platforms. In other  
15 places I have seen the publication in the Official  
16 Journal. I have seen specialised publications in  
17 the matter of procurement and concessions.

18 But my question is in Mozambique what  
19 would be that form of communication of both acts,  
20 the *ajuste directo* and the act of *adjudicação*?

21 **PROF MEDEIROS:** I fully understand your  
22 question, but I confess that I analysed the set of  
23 issues that I was instructed to analyse. I cannot  
24 say, because I didn't look into that specifically,  
25 I cannot say what ways communication of *adjudicação*

1 in a tender or *ajuste directo* are communicated. I  
2 didn't look at that. I didn't carry out that  
3 analysis. I'd have to do that. I'm not aware off  
4 the cuff. I don't know what the chosen form would  
5 be to communicate publicly in addition to the  
6 notification.

7 **MR PEREZCANO:** Thank you, Professor  
8 Medeiros. Thank you, Chair. Those were my  
9 questions.

10 **PRESIDENT:** Professor Tawil has some  
11 questions for you.

12 **PROFESSOR TAWIL:** Good afternoon,  
13 Professor Medeiros. I just have one question, and  
14 I'm sure you probably have addressed this, but with  
15 all the things that were said I want to have it a  
16 little bit more clear.

17 When the MOI was executed, the PPP Law  
18 didn't exist. If we need to understand what was the  
19 legal framework existing at that time, how should we  
20 read the reference to *direito de preferência*?  
21 Because you were taken to the PPP Law.

22 I want to have clear what was the  
23 situation if we need to understand the reference at  
24 that time?

25 **PROF MEDEIROS:** You're right, it did not

1 yet exist. The PPP Law did not yet exist, but in my  
2 analysis these preliminary contracts are very often  
3 contracts with a view to taking into account a  
4 revision of the regulatory framework which has not  
5 yet occurred.

6 So, as I see this, there is the clear  
7 assumption made by the parties that there is a  
8 legislative procedure under way and, as such, the  
9 definitive or final contract is a contract that will  
10 have to be adapted to that new legislation.

11 If you look at the recitals of the MOI, it  
12 is significant that they refer to a PPP project at a  
13 time when there was no PPP Law, but clearly it was  
14 based on the assumption that this project would fall  
15 under the PPP framework that was being prepared and  
16 which was approved and published three, four months  
17 after that.

18 **PROFESSOR TAWIL:** Sorry. Just a follow-up  
19 question.

20 I cannot say this was for personal reasons  
21 but I'm not that fluent in Portuguese.

22 Now, the reference in the English version  
23 says to the proposed port through a public private  
24 partnership, a PPP. It doesn't refer to a PPP  
25 regime. Does that change anything of what you said?



1 And I'm going to give you a little bit more of  
2 background.

17:42

3 It was said here by a witness, a fact  
4 witness, that the reference to the PPP Law and to  
5 the regime of the PPP Law was something that was a  
6 sort of factor-in much afterwards than what happened  
7 here.

8 So I want to understand if we didn't have  
9 the PPP Law, how should we understand the  
10 *direito de preferência*? And I mean if you consider  
11 the answer is the one that you've given, that's  
12 fine. Thanks.

13 **PROF MEDEIROS:** Thank you very much. I'd  
14 like to add that the reference is not to a PPP law,  
15 indeed; the reference is to public private  
16 partnerships, which at that point in time was a  
17 concept that did not exist in Mozambican  
18 legislation. This means, as I read it, that the PPP  
19 Law published four months later, on August the 10th,  
20 defines what a PPP is. I wondered, I asked myself  
21 whether, when a concept is imported, unknown  
22 theretofore in Mozambican legislation, in a  
23 framework where there's an ongoing process of a  
24 system for this institute, one that starts by  
25 christening and qualifying what a PPP actually is,

1 I would say the parties in the MOI objectively  
2 considered that this was a new reality, unregulated  
3 that far, which was about to be given a framework by  
4 the Mozambican legislator.

5 **PROFESSOR TAWIL:** OK. Thank you.

6 **PRESIDENT:** Thank you. Thank you very  
7 much, Professor Medeiros, for having come and helped  
8 us. I don't know if you can stay until the end of  
9 this session with us just in case at the end of the  
10 day there should be any additional questions?

11 **PROF MEDEIROS:** No problem whatsoever, and  
12 allow me to thank you for the way in which questions  
13 were levied to me.

14 **PRESIDENT:** It's 17.45 and we'll come back  
15 at 17.55, in ten minutes, and we will then be  
16 examining Dr Muenda.

17 (Short break from 17.45 to 17.58)

18 DR TERESA MUENDA

19 **PRESIDENT:** Very good. We resume the  
20 hearing, and we do so to greet and to examine the  
21 expert witness, Dr Teresa Filomena Muenda.

22 Dr Muenda, nice to have you. Thank you  
23 for having come from Mozambique to be here today  
24 with us.

25 You are a jurist, you know the rules, so

1 the first thing we have to do is to take your  
2 declaration as an expert witness. Can I kindly ask  
3 you that you stand up? Do you solemnly declare upon  
4 your honour and conscience that you will speak the  
5 truth, the whole truth and nothing but the truth,  
6 and that your statement will be in accordance with  
7 your sincere belief?

8 **MS MUENDA:** I declare, upon my honour and  
9 conscience to speak the truth and nothing but the  
10 truth.

11 **PRESIDENT:** Very good. So, Dr Muenda,  
12 I will give the floor to the Republic of Mozambique  
13 to introduce the expert.

14 **MS BEVILACQUA:** Thank you Mr President.  
15 Examination by Respondent

16 **MS BEVILACQUA:** Good evening, Dr Muenda,  
17 do you have --

18 **MS MUENDA:** Good afternoon.

19 **MS BEVILACQUA:** Do you have there with you  
20 to your left copies of your two expert opinions  
21 submitted in this matter?

22 **MS MUENDA:** I do.

23 **MS BEVILACQUA:** The first copy, your first  
24 opinion is dated the 18th of March, 2021?

25 **MS MUENDA:** Yes.

1           **MS BEVILACQUA:** And that's your signature  
2 on page 12?

**18:01**

3           **MS MUENDA:** I confirm it is.

4           **MS BEVILACQUA:** Did you have any additions  
5 or corrections that you would like to make to your  
6 first expert opinion?

7           **MS MUENDA:** I do, with the permission of  
8 the president.

9           It is not an addition that will change the  
10 contents but, given what was said with regards to  
11 legislation I put in the presentation I will be  
12 making, I would like to add to page 7, paragraph  
13 (h), I would like to add to the investment law --  
14 it's not very relevant in terms of contents, but  
15 I thought it would be best in order to clarify the  
16 meaning of "investor" and how this law is applied,  
17 so the requirements of the exchange law, I thought  
18 it would be relevant to clarify what "investor"  
19 means.

20           It doesn't really change much because  
21 "investor" is also defined under the PPP Law. Thank  
22 you.

23           **MS BEVILACQUA:** And then, Dr Muenda, if  
24 you would look at the second opinion that you have,  
25 which has the cover page of RER-7, is that your --

1           **MS MUENDA:** Yes.

2           **MS BEVILACQUA:** -- signature on the last  
3 page?

4           **MS MUENDA:** Yes, it is. This is my  
5 signature on page 32.

6           **MS BEVILACQUA:** And this report is dated  
7 the 26th of November 2021?

8           **MS MUENDA:** I confirm it is.

9           **MS BEVILACQUA:** Did you have any additions  
10 or corrections to your second report?

11          **MS MUENDA:** No, I do not.

12          **MS BEVILACQUA:** Thank you, Dr Muenda.

13                   With that, I turn it back over to the  
14 president.

15          **PRESIDENT:** Thank you. Thank you very  
16 much.

17                   Ms Martins, do you have any questions for  
18 Dr Muenda?

19          **MS MARTINS:** Well, I would just have --

20          **THE REPORTER:** Wrong channel.

21          **PRESIDENT:** I don't know if there was --  
22 you had a point with regard to the --

23          **MS MARTINS:** I can leave it for  
24 cross-examination, if you prefer, Mr President.

25          **PRESIDENT:** It may be better, because I

1 didn't know if you wanted to do it now or  
2 afterwards.

3 **MS MARTINS:** No, the objection is stated,  
4 and in cross examination I will question the witness  
5 as to this addendum.

6 **PRESIDENT:** Very good.

7 Then, Dr Muenda, you have the floor to  
8 make your presentation, which is the number H-16.  
9 Presentation

10 **MS MUENDA:** Thank you very much,  
11 president.

12 Let me, first and foremost, begin by  
13 greeting the presidium. Allow me also to greet  
14 everyone who is in this room.

15 I would like to begin my presentation at  
16 this point. You can see the order of the different  
17 points in my presentation. I'll begin with my  
18 qualifications. I will then talk about the law  
19 applicable to the MOU. I will then talk about  
20 foreign investment under Mozambican law. I will  
21 speak about the validity of the MOU. I will also  
22 look at the MOU and the right to a concession, and  
23 towards the end I will speak to the legal matter  
24 that has been discussed abundantly during these  
25 sessions, the *direito de preferência*, and then

1 I will draw a few brief conclusions.

2 Let me begin by outlining my  
3 qualifications. As I said earlier, I have a degree  
4 in law from the Eduardo Mondlane University. That's  
5 a public Mozambican university. I did a post  
6 graduation, an MBA, through a partnership between  
7 two universities, ISPU and ISCTE Lisbon, and I did a  
8 post graduation in oil law. This also was a  
9 partnership between a Mozambican university and a  
10 Brazilian university.

11 I did a Master's in Legal Sciences, also a  
12 partnership between the Eduardo Mondlane University  
13 and the Law School Lisbon and I'm currently doing a  
14 PhD in Legal Sciences, again a partnership between  
15 the Eduardo Mondlane University and the School of  
16 Law of Lisbon.

17 I've been a lawyer for more than 20 years.  
18 I'm a member of the Mozambican Bar Association. 286  
19 is the registration number. I'm a member of a team  
20 that launched the initiative to begin commercial  
21 arbitration in Mozambique. I'm an arbitrator,  
22 registered in arbitration. I'm also a member of the  
23 team that set up Labour Mediation Arbitration  
24 Centres and not only am I a member of the founding  
25 team, I helped develop the regulatory instruments

1 that govern these centres, and I have trained many  
2 of those who work in the centres throughout the  
3 country.

4 I participated in the revision of the law  
5 that led to the current procurement regulation,  
6 that's the 2010 regulation, and I was part of the  
7 team that advocated, disseminated this regulation  
8 throughout the country.

9 I'm a member of the team that promoted the  
10 public consultation movement, in particular in  
11 connection with all laws applied to the private  
12 sector. Also laws that have an impact on the  
13 economic sector. And thanks to this movement what  
14 we managed to achieve was that all these laws were  
15 subject to consultation before their approval,  
16 consultation of the private sector and also the Bar  
17 Association.

18 So I'm a member of the team that promoted  
19 what we call the CCT, the labour advising committee,  
20 which discusses all matters pertaining to labour  
21 relations with the private sector and the  
22 government, and I was part of the first team that  
23 laid down the first rules to determine the minimum  
24 wage in Mozambique.

25 Right now I am an entrepreneur



1 ombudsperson, a type of ombudsperson at the Chamber  
2 of Commerce, where I am also secretary general.  
3 I also participated in PPP negotiations and, as a  
4 lawyer, I also provided legal consultancy to a  
5 number of companies helping to prepare public  
6 procurement processes, and this was right from  
7 negotiating through to executing the contracts.

8 I'm an academic. I teach Transportation  
9 Law and Law of Obligations. And I have also worked  
10 on a number of international cases, arbitration  
11 cases. So this is more or less the presentation of  
12 my qualifications in a nutshell.

13 Let me move on to second point, law  
14 applicable to the MOU. If we look at the MOU and in  
15 particular at article 8 thereof, and if we look at  
16 clause 10 of the MOU, what we will see is that there  
17 is reference made on the one hand to the fact that  
18 the implementation of the project will be done in  
19 accordance with the principles approved by the  
20 Mozambican government. Of course, this means  
21 Mozambican legislation. And then article 10  
22 indicates that arbitration for settlement of  
23 conflicts arising out of the MOU shall be governed  
24 by Mozambican law. It says expressly and clearly  
25 indicating that the applicable law is Mozambican

1 law.

2           And if we look at the Civil Code, article  
3 35 also indicates that the applicable law is the law  
4 that governs the substance of the transaction, so it  
5 is clear that Mozambican law applies to the MOU.

6           Then a brief note to recall that  
7 Mozambican law, like other law in other countries,  
8 has a particular hierarchy. The constitution of the  
9 Republic prevails over any other rule or contract.  
10 In other words, no other inferior law can contradict  
11 what is laid down in the Mozambican constitution. A  
12 contract also cannot contradict the general  
13 principles in the constitution of the Mozambican  
14 Republic.

15           In the third point of my presentation  
16 I talk about foreign investment under Mozambican  
17 law, and I indicated that I brought Law 3/93 because  
18 it is the law on investment in Mozambique, and  
19 I mention also the respective regulation. That is  
20 where "foreign investor" is defined and all the  
21 requirements are laid down. It is the legal or  
22 natural person that brought capital or own resources  
23 to Mozambique from abroad. That will then be  
24 applied on a project previously authorised by the  
25 competent authority, and then there is a definition

1 of foreign direct investment. That's an investment  
2 where capital is brought from abroad, capital  
3 brought by a company that is registered and  
4 operating in Mozambique. So I just wanted to  
5 explain that I brought this law to give you the  
6 context to what comes right after this.

7           Looking now at clause 4 of our MOU, which  
8 indicates that all costs necessary to conduct the  
9 feasibility study shall be borne by PEL, in other  
10 words, should there be costs, that means there is  
11 capital that will be invested in this study, in  
12 principle, and under Law 11/2009 capital invested in  
13 Mozambique must be registered with the Bank of  
14 Mozambique. This is a stricter requirement these  
15 days because of what we've seen worldwide pertaining  
16 to money laundering, and when I analysed the  
17 materials, I saw that PEL, at least based on the  
18 information I had access to, did not register the  
19 capital used to do the prefeasibility study and  
20 therefore did not respect the legal requirements for  
21 an investor and therefore cannot be considered a  
22 foreign investor under Mozambican law.

23           The next point is the validity of the MOU  
24 and here, as has been the object of rebuttal on a  
25 number of occasions, three conflicting versions were

1 noted. There is an English version presented by the  
2 State which does not coincide with the English  
3 version presented by PEL, and there is a Portuguese  
4 version which, in terms of its content, with the  
5 exception of the specificities that were clearly  
6 outlined by the experts, the content of the  
7 Portuguese version matches in the copies attached by  
8 both the parties.

9           Now, the law indicates that firstly, if  
10 there is a difference in the content of what in  
11 principle should be an agreement, should there be a  
12 difference in the contents, that means that the  
13 parties did not come to an *encontro de vontades*.  
14 Literally an agreement of wills or a meeting of the  
15 minds.

16           Now, if we do not consider the parts of  
17 the memorandum that -- we have two options, either  
18 not to consider the part where there is no meeting  
19 of the minds or to not consider the whole document,  
20 but if we look at the Civil Code -- I don't know if  
21 I may read what is in the Civil Code?

22           **PRESIDENT:** Why not?

23           **MS MUENDA:** Thank you. If we look at  
24 article 232 that I refer to here, the contract is  
25 not concluded until the parties have agreed on all

1 clauses where they had considered an agreement was  
2 required.

3           Now, if we look at article 237, it says  
4 the following: Doubtful cases. Should there be  
5 doubts on the meaning of the statement or  
6 declaration in non onerous transactions, the less  
7 damaging to the proponent will be applied, those  
8 that incur more costs, those that lead to a balance  
9 in the payments.

10           And then if we look at 238, it is still  
11 attempting to interpret and integrate. It says that  
12 in formal transactions, the declaration cannot be  
13 taken to mean something that does not have a minimum  
14 correspondence in the text of the document, even if  
15 imperfectly stated.

16           And then it adds: That meaning can,  
17 however, stand if it corresponds to the real  
18 intention of the parties and the determining reasons  
19 behind the type of business if there is no  
20 opposition to said validity.

21           So given all of this that I have just  
22 read, given this dissonance in the two, the  
23 divergence between the two options, you can either  
24 decide that the whole document is not valid, or you  
25 can decide that only the excerpt where there is no

1 evidence of agreement should be invalidated, thereby  
2 striking a balance, thinking of the areas where  
3 there is a meeting of the minds.

4           Then there is the issue of language. As  
5 I was saying at the outset, there is no legislation  
6 that prevails over the constitution of the Republic.  
7 The constitution of the Republic indicates that the  
8 official language is Portuguese.

9           And then we see a reference in the  
10 procurement regulation, and I'll begin with the  
11 procurement regulation because that was the one that  
12 was initially in force.

13           If we look at article 5, number 2, it  
14 clearly indicates that the parties may even decide  
15 to execute in ten languages, but to all intents and  
16 purposes the document that prevails is the document  
17 written in the Portuguese language.

18           So, as I see it, what is in the other  
19 documents in other languages is not very relevant  
20 because the law itself is clear. It indicates that  
21 the Portuguese language document prevails. It may  
22 not seem fair, not everything that's legal is fair,  
23 but it's in the law and it says that the Portuguese  
24 language prevails over the languages used in any  
25 other documents on the same matters. This is

1 imperative. Not even the Ministry of Transport, not  
2 even the minister could alter this or ignore it.

18:22

3 Now, the MOU and the right to a  
4 concession.

5 If we look at the MOU, we can easily see  
6 that the MOU sought to regulate the prefeasibility  
7 study and that there was a *direito de preferência*  
8 given to the entity that was carrying out the  
9 prefeasibility study. A *direito de preferência*.

10 Let me just say that we cannot confuse  
11 *direito de preferência* and *ajuste directo*, *ajuste*  
12 *directo* as understood to meaning a direct contract.  
13 We can't do that because, even if we look at the  
14 clauses in the MOU, nowhere does it refer to *ajuste*  
15 *directo*.

16 So we cannot imply a content that is not  
17 content that can be extracted from the actual MOU,  
18 and the *direito de preferência* -- before I look at  
19 the definition which is a little further on in my  
20 presentation, let me just first speak about the MOU  
21 and the right to a concession. Looking specifically  
22 at this right to a concession, understood to be a  
23 promissory contract for a concession. Can we  
24 consider that this MOU could be seen as a contract  
25 promising a concession, a promissory contract for a

1 concession, as defined under article 410 of the  
2 Civil Code?

3 I listened carefully to Professor  
4 Medeiros, who I respect tremendously. He indicated  
5 that the MOU was a preliminary contract, a  
6 preliminary contract, contract preliminary to the  
7 concession contract.

8 Now, if it is a preliminary contract to a  
9 concession contract, then the MOI should be seen as  
10 a promissory contract, and if it is understood to be  
11 a promissory contract, and if we go back to the  
12 Civil Code yet again to article 410, which I will  
13 now read, article 410 indicates the following:

14 A promissory contract. Applicable regime.  
15 The pact or convention through which somebody  
16 commits to executing a contract is governed by the  
17 legal precepts applicable to the contract in  
18 question, with the exception of those on form, the  
19 reason being that they should not be seen to extend  
20 to the promissory contract.

21 So article 410 is clearly stating that if  
22 in fact the MOU can be seen to be a promissory  
23 contract for the concession, then it should have  
24 followed the legal regime of a concession, and if we  
25 look at the MOI, we cannot in the MOU see the basic



1 requirements provided for in the law that will allow  
2 to be considered preliminary to a concession  
3 contract.

4 In other words, what we see in the MOU,  
5 the pages in the MOU do not contain the required  
6 elements or the elements required in the procurement  
7 law under article 45 and the PPP Law as well --  
8 I need to correct something.

9 Article 37 gives us the basic  
10 requirements, namely identification of the parties,  
11 of the price, of the way in which the investment  
12 will be carried out, environmental impact issues,  
13 how those will be dealt with, risks -- so what  
14 benefits will this PPP contract produce in economic  
15 and social terms. How labour issues will be dealt  
16 with under the contract. Tax issues, how will those  
17 be treated. How will the implementation of this  
18 project be evaluated for all parties involved.

19 And, as Professor Medeiros was saying, PPP  
20 contracts are complex contracts with a fiscal impact  
21 for the State, and so the State has every interest  
22 to control these contracts. Contracts that are PPP  
23 contracts are complex, have many, many pages, and  
24 very often there are predefined templates, and this  
25 does not fit with what we have in the MOU presented

1 here, in any of the versions presented, I would add,  
2 but specifically the Portuguese version.

3           And now the fundamental issue to consider  
4 when talking about PPPs is that, under Mozambican  
5 law, the contractual terms and concession agreements  
6 are approved by the Council of Ministers and  
7 published in the decree, so it is a public  
8 procedure.

9           Professor Medeiros was saying that the  
10 procurement regulation, the 2010 procurement  
11 regulation couldn't be applied to the PPP regime.  
12 Yes, it could, because concessions are also said to  
13 be covered by the procurement regulation regime, so  
14 there is also the need to indicate the type of  
15 investment that would be made under this project,  
16 all of this leading to the conclusion, therefore,  
17 that the MOU could never be seen to constitute a  
18 right to a concession.

19           And what of the *direito de preferência*?  
20 What is it?

21           We can look at the PPP from two  
22 perspectives. We can look at it under the general  
23 law, that would be article 414 and following  
24 articles, which is the right to be told first about  
25 the requirements that would be necessary at the

1 moment of execution, requirements for a meeting of  
2 the minds and for execution of the contract, but the  
3 *direito de preferência* is a right that does not  
4 necessarily imply that it will be materialised. The  
5 *direito de preferência* under the general law is  
6 always subject to conditions.

7           To cite the example by Professor Medeiros,  
8 if I sell a building, I sell it to you -- if I sell  
9 it. I may not sell that building, so it may not  
10 materialise. And if I decide to sell it, what if  
11 I decide to sell it and I've given you the right  
12 *direito de preferência*, the only minimum obligation  
13 that I declare the *direito de preferência*, the only  
14 obligation is to communicate the conditions required  
15 by me in order for me to sell the building. I'll  
16 sell you the price, for example, at that time.  
17 Unless under *direito de preferência* we've already  
18 decided on these elements, I'll tell you when I want  
19 you to pay me, how I want you to pay me -- all of  
20 those elements will be discussed at a future date  
21 under the *direito de preferência* and under the  
22 general law and the Civil Code.

23           Now, if we look at this under PPPs we will  
24 see that *direito de preferência* is the margem said  
25 to be a 15 per cent advantage in a public tender, so

1 it is the margem de preferência under the PPPs,  
2 which is only applicable in accordance with the  
3 conditions set out in article 13, paragraph 5 of the  
4 PPP Law.

5 Allow me also to indicate that  
6 *direito de preferência* should never be confused with  
7 an ajuste directo. An ajuste directo is very  
8 clearly defined in Mozambican law, very clearly  
9 defined, both in the public procurement regulation  
10 and in the PPP Law. It has nothing to do with the  
11 *direito de preferência*.

12 Conclusions, now. I think I gave you my  
13 conclusions as I made my presentation, but  
14 I indicated that the MOU is governed by Mozambican  
15 law. There was no foreign investment. If we look  
16 at the letter of the law, in the case of PEL that  
17 is, PEL is therefore not considered an investor  
18 under Mozambican law. It might have become an  
19 investor at a later date, that is true.

20 The Portuguese version of the MOU prevails  
21 over any other version, for reasons I already  
22 explained. The MOU is not a concession agreement  
23 because it does not meet the essential legal  
24 requirements. The *direito de preferência* under the  
25 PPP Law means the 15 per cent advantage in a public

1 tender and when the evaluation thereof is carried  
2 out, and *direito de preferência* is not to be  
3 confused with the ajuste directo.

4 Thank you very much. That was, in a  
5 nutshell, what I wanted to present to you. I'm  
6 happy to field any questions you might have, any  
7 further clarifications you require. Thank you.

8 **PRESIDENT:** Thank you. Thank you,  
9 Dr Muenda. With this, I now give the floor to  
10 Ms Martins.

11 **MS MARTINS:** Thank you, Mr Chairman.

12 Cross-examination by Claimant

13 **MS MARTINS:** Good afternoon, Ms Muenda.  
14 Thank you so much for your presence here today. By  
15 now you know my name, so I will be asking you some  
16 further questions. Obviously our time is limited,  
17 and it's been an extremely long day for everyone, so  
18 let's try to make this as efficient as possible, and  
19 I would kindly ask you if you could answer my  
20 questions as concisely and directly as possible,  
21 too.

22 I know we're both native Portuguese  
23 speakers, and it's a bit confusing for both of us to  
24 be speaking in a language -- or for me -- to be  
25 speaking in a language that is not our common

1 language, but we have to because it's the language  
2 of the proceedings.

18:37

3 I do believe that you understand some  
4 English, you make some quotes in your legal opinions  
5 in English, but anyway, you have the benefit of  
6 translation, so obviously if there's any doubt on  
7 any of my questions please do feel free to ask me  
8 and I will repeat them again.

9 I would start by the beginning of your  
10 presentation here today. Your CV, your  
11 qualifications in general, were not attached to any  
12 of your legal opinions. Actually, the first legal  
13 opinion there is no reference whatsoever to your  
14 experience or expertise, or even the capacity in  
15 which you issued that opinion, and then in the  
16 second legal opinion you have a paragraph where you  
17 merely mention that you are a Mozambican lawyer and  
18 that you have experience in areas such as commercial  
19 tax, different contracts including PPPs,  
20 arbitration, and among others.

21 Today you provided some further  
22 information on your professional expertise, and  
23 I note that there is a great emphasis on labour  
24 issues.

25 What I would like to ask you, first of

1 all, is were you not informed prior to this hearing  
2 that, according to the Procedural Order No 1 of this  
3 Tribunal, you were supposed to attach a CV and  
4 indicate your qualifications in your first legal  
5 opinion that was attached to the Statement of  
6 Defence?

7 **MS MUENDA:** Thank you very much. No,  
8 I was not given that information that I should have  
9 annexed my detailed CV.

10 **MS MARTINS:** And when were you told that  
11 you should provide some more information on your  
12 experience and background?

13 **MS MUENDA:** I was not told, but I thought  
14 it would be relevant in my presentation to begin by  
15 introducing myself because I hadn't and because  
16 I heard that others had done so. That's why.

17 **MS MARTINS:** But you did not think it  
18 relevant when you issued your first expert opinion  
19 in these proceedings?

20 **MS MUENDA:** No, I did not deem it to be  
21 too relevant, although I could have but I didn't.  
22 Thank you very much.

23 **MS MARTINS:** I notice also, Ms Muenda,  
24 that in the presentation you gave today, you gave  
25 some further input that we were unaware of until

1 today, but basically you have a postgraduate MBA in  
2 co-operation with ISCTE Lisboa and also a Master's  
3 in -- I don't know if the correct translation of  
4 Ciências Jurídicas is Legal Sciences. I believe  
5 also together in a protocol with the University  
6 Eduardo Mondlane, and the University of Lisbon, the  
7 faculty of law of the University of Lisbon, and that  
8 you are currently attending your PhD or doing your  
9 PhD also under a protocol between Universidade  
10 Eduardo Mondlane and the faculty of law of the  
11 University of Lisbon.

12 Now, what I would like to ask you is the  
13 following. These protocols imply, to the best of my  
14 knowledge that, part of the faculty, both in the  
15 Master's and in the PhD, are precisely Portuguese  
16 professors. Is that not the case?

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

18 **MS MARTINS:** Also these professors -- this  
19 is a PhD and a Master's in Mozambican law, correct?  
20 Sorry.

21 **PRESIDENT:** It's so easy to fall into when  
22 one is listening in --

23 **MS MARTINS:** We've all fallen --

24 **PRESIDENT:** Why doesn't your colleague put  
25 a hand on you.



1           **MS MARTINS:** He's doing that.

**18:41**

2           **PRESIDENT:** Because otherwise the  
3 interpreters and the court reporters will get angry  
4 with us.

5           **MS MARTINS:** It's a difficult exercise and  
6 I excuse myself yet again. Ricardo Saraiva is  
7 punching me in the arm so ...

8           **PRESIDENT:** Yes.

9           **MS MARTINS:** Would you like me maybe to  
10 repeat the question so that Ms Muenda can reply  
11 again?

12                   So if I'm not lost, I think my question  
13 was that these are a Master's that has already  
14 been -- and a PhD on Mozambican law, correct?

15           **MS MUENDA:** Yes, that is correct.

16           **MS MARTINS:** And at least part of the  
17 faculty are Portuguese law professors, correct?

18           **MS MUENDA:** Correct.

19           **MS MARTINS:** And, just out of curiosity,  
20 you've already concluded your Master's. Could you  
21 let us know who oriented your Master's thesis, in  
22 your Master's?

23           **MS MUENDA:** Professor António Barbas  
24 Homem.

25           **MS MARTINS:** A Portuguese law professor.

1           **MS MUENDA:** Indeed.

2           **MS MARTINS:** I will repeat the question.

3           So Professor Barbas Homem is a Portuguese  
4 law professor, is that not correct?

5           **MS MUENDA:** Correct.

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

7           Now, Ms Muenda, do you have any specific  
8 expertise in public international law?

9           **MS MUENDA:** Not specific, no. Throughout  
10 my training and my practice as a lawyer, I entered  
11 into contact with that topic, but I have no  
12 specialised training in that field. I have worked,  
13 like I said, in some cases and during my training in  
14 legal sciences. Part of the subjects covered public  
15 international and private international law.

16           **MS MARTINS:** Ms Muenda, I'd like to direct  
17 you to paragraph 142 of your second legal opinion,  
18 142 and 143.

19           Have you read them, Ms Muenda?

20           **MS MUENDA:** Yes, indeed. Thank you very  
21 much.

22           **MS MARTINS:** In these two paragraphs you  
23 do opine on the implications of the BIT that was  
24 entered into between India and Mozambique, is that  
25 not so?

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

2           **MS MARTINS:** So I would like you now to  
3 have a look, please, to article 10 of the BIT which  
4 you refer to in your legal opinion. This is CLA-1.  
5 It is not in the Core Bundle, but a hard copy is  
6 being handed out now.

7           **MS MUENDA:** Could I be shown the  
8 Portuguese version, please?

9           **MS MARTINS:** Mr President, the Portuguese  
10 version is not attached to the proceedings. I do  
11 have it in electronic format. I don't know if I'm  
12 allowed to show it to Ms Muenda.

13           **PRESIDENT:** Yes.

14           **MS BEVILACQUA:** For the record,  
15 Mr President, we would have no objection.

16           **PRESIDENT:** Let us see if Dr Muenda can  
17 survive with the English version, but if she prefers  
18 the Portuguese version, you only have it -- it's not  
19 in the record? It's not in the record?

20           **MS BEVILACQUA:** May I check for a moment,  
21 Mr President? It may be attached as a Respondent's  
22 legal exhibit.

23           **PRESIDENT:** Because I only have the  
24 English, too. Dr Muenda, can you survive with the  
25 English text or -- I think we have it here now on

1 the screen in Portuguese.

2 **MS MARTINS:** So, Ms Muenda, you refer in  
3 your legal opinion at paragraphs 142 and 43 to  
4 article 10. Now, does this provision refer to  
5 disputes between investors and States?

6 **MS MUENDA:** It refers between the  
7 contracting parties. That's what I read. Should a  
8 dispute between contracting parties cannot be  
9 solved --

10 **MS MARTINS:** -- ... (overspeaking)

11 **MS MUENDA:** ... parties subject to this  
12 contract, I may have misunderstood.

13 **MS MARTINS:** Who are the contracting  
14 parties to the treaty?

15 **MS MUENDA:** MOU?

16 **MS MARTINS:** No.

17 **PRESIDENT:** Dr Muenda, you remember this  
18 is --

19 **MS MUENDA:** The Mozambican State and the  
20 Indian State were parties to the treaty. I'm very  
21 sorry. I was not -- the Indian and the Mozambican  
22 party is my answer.

23 **MS MARTINS:** Can you have a look, please,  
24 at article 9? Ms Muenda, I put it to you that the  
25 correct provision to quote would have been article 9

1 and not article 10.

2 **MS MUENDA:** I agree. Indeed, this may  
3 have been a mistake in my drafting. It should have  
4 been article 9. In any case, it's the same  
5 deadline, six months. Thank you very much.

6 **MS MARTINS:** Actually, it's not, because  
7 while in article 10 there is the word "should", in  
8 article 9 it says "may", so the wording is not the  
9 same.

10 Do you agree?

11 **MS MUENDA:** The problem is "may", should  
12 they want to do so. They may, should they want to  
13 do so, follow the alternative settlement of  
14 disputes, and should they not want to do so, they  
15 may not do anything. That's how I read it. In  
16 other words, not necessarily that they must.

17 **MS MARTINS:** Exactly. Let's move on to  
18 another topic, Ms Muenda.

19 Still in connection with your professional  
20 experience, in your second legal opinion -- and  
21 today you mentioned that you have worked on several  
22 international arbitration cases where you've issued  
23 opinions on Mozambican law.

24 Now, was Mozambique party to any of those  
25 international arbitration cases that you worked in?

1           **MS MUENDA:** International arbitration?

2       Yes, they were party.

3           **MS MARTINS:** In all of them or some?

4           **MS MUENDA:** In all. All of them.

5           **MS MARTINS:** Now, when did these cases  
6       take place?

7           **MS MUENDA:** I'm afraid I haven't got the  
8       dates. I can't tell you when, but probably some of  
9       them -- I can't give you the date. 2014 probably.  
10       I really can't tell you. I would have to make it  
11       up.

12           **MS MARTINS:** Ms Muenda --

13           **MS MUENDA:** But I had cases that came  
14       under ICSID.

15           **MS MARTINS:** Would one of those cases be  
16       Oded Besserglik v the Republic of Mozambique.

17           **MS MUENDA:** Versus the Republic of  
18       Mozambique, yes. Oded Besserglik. Yes, I confirm,  
19       that is indeed one of the cases.

20           **MS MARTINS:** Ms Muenda, is it not true  
21       that in that case you were actually representing the  
22       Republic of Mozambique as counsel?

23           **MS MUENDA:** Yes. I issued an opinion on  
24       the Mozambican legislation. I believe so, in the  
25       proceedings where the Mozambican State was a party

1 to as well as Oded, and I issued my opinion in  
2 favour of the Mozambican State, to the best of my  
3 recollection.

4 So in all of them I intervened for the  
5 State of Mozambique. That one and another one, CMC  
6 v the State of Mozambique.

7 **MS MARTINS:** My question was slightly  
8 different, but thank you for confirming also this  
9 other case, that in the Oded Besserglik case you  
10 appear as counsel on the record to the State of  
11 Mozambique.

12 **MS MUENDA:** Could well have been. Perhaps  
13 I was part of the legal team, yes.

14 **MS MARTINS:** And who was counsel to the  
15 Republic of Mozambique in these cases?

16 **MS MUENDA:** Dorsey was it.

17 **MS MARTINS:** So, as I understand it, in  
18 all these cases that you acted -- so these two cases  
19 you mentioned, Mozambique was the Respondent and  
20 Dorsey & Whitney, Mr Basombrio, were counsel on the  
21 record, correct?

22 **MS MUENDA:** Not himself alone. It was a  
23 team for his company, for his firm. I must say  
24 I don't remember every name. It was a team, of  
25 which he was also a member.

1           **MS MARTINS:** Did you work with  
2 Mr Basombrio, Dorsey & Whitney, on any other case,  
3 if not arbitration, also as expert for Mozambique?

4           **MS MUENDA:** Yes. Like I said, I issued a  
5 legal opinion in a case whose proceedings were  
6 taking place under ICSID on Mozambican legislation.

7           **MS MARTINS:** That was not my question.  
8 Besides these two arbitrations, so Besserglik case  
9 and the CMC case, have you acted together with  
10 Mr Basombrio of Dorsey & Whitney on any other case  
11 outside of Mozambique, as an expert or as counsel?

12           **MS MUENDA:** These were the two, plus the  
13 present proceedings where I'm also involved.

14           **MS MARTINS:** Ms Muenda, do you not recall  
15 having issued an expert opinion in a case Edumoz LLC  
16 v the Republic of Mozambique, and the Ministry of  
17 Education of Mozambique?

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

19           I had forgotten it, but yes, I was also  
20 involved in those proceedings.

21           **MS MARTINS:** And do you recall when that  
22 took place?

23           **MS MUENDA:** When? I can't tell you, but  
24 I know that I issued a legal opinion, and I think we  
25 managed to strike an agreement. My recollection



1 isn't comprehensive, but I think that was it.

2 I issued opinions in those proceedings, yes.

3 **MS MARTINS:** I put to you that this was  
4 around 2012, according to publicly available  
5 information.

6 So you have been working with Dorsey &  
7 Whitney and with Mr Basombrio in particular, besides  
8 other members of his team, for the Republic of  
9 Mozambique, both as expert and as counsel, for the  
10 past ten years, is that not so?

11 **MS MUENDA:** If that is your record, I  
12 could not remember the date. That must be it.  
13 There's no arguing with facts.

14 **MS MARTINS:** And did you not think that it  
15 would be relevant to disclose to this Tribunal this  
16 relationship with counsel and with the Republic of  
17 Mozambique in past cases?

18 **MS MUENDA:** I did not deem it exceedingly  
19 relevant. I've worked with them and I've worked  
20 with other lawyers. I did not see ...

21 **MS MARTINS:** So, Ms Muenda, I take it that  
22 you were also not informed, besides that you should  
23 present your CV, that this Tribunal directed in its  
24 Procedural Order No 1, that all expert opinions  
25 should be accompanied by a statement of any past or

1 present relationship to any of the parties and their  
2 counsel? This information was not provided to you?

3 **MS MUENDA:** I'm now listening to it.

4 **MS MARTINS:** So, Ms Muenda, let's move on  
5 to merits, and let's begin with the question of the  
6 foreign investment law. Now, you at the  
7 beginning -- and sorry, let me just collect your  
8 first legal opinion. You said that you were making  
9 an addendum to paragraph 11, subparagraph (h), page  
10 7 of your first legal opinion. You have your first  
11 legal opinion in front of you, I assume?

12 Now, this paragraph refers to the duty to  
13 register with the Bank of Mozambique for import of  
14 capitals. What does the Mozambican investment law  
15 have to do with registration with the Bank of  
16 Mozambique for the purpose of import of capitals?

17 **MS MUENDA:** The Law on Investments, as  
18 I showed earlier, if I understood you correctly, the  
19 law on investment provides a definition of what a  
20 foreign investor is and refers to foreign capital.  
21 That's what I wanted to use by way of a bridge with  
22 the Law on Exchange Operations, and the fact that a  
23 foreign investment qualified in that manner usually  
24 brings equity, brings capital funds. That's what  
25 I wanted to focus on, and that's why I referred to

1 the Law on Foreign Investment, to clarify what a  
2 foreign investor is according to the law.

3 **MS MARTINS:** Ms Muenda, nothing of what  
4 you said in your presentation today has any  
5 resemblance to what you stated in your legal opinion  
6 in this single paragraph. This is, in fact, an  
7 argument that was made by counsel in pleadings, but  
8 that was never addressed by you. But anyway, let's  
9 go to that, and I would like you to be confronted  
10 with Law 3/93, the foreign investment law, which is  
11 Exhibit RLA-8.

12 I'm sorry, but given this was a surprise  
13 it was not prepared obviously, but I will ...

14 It's in the core bundle. I'm sorry for  
15 this interruption but, given that this was not  
16 supposed to be part of the questioning, it wasn't  
17 prepared in advance. Here. I think it's here.  
18 Actually it was submitted in the Core Bundle for  
19 Professor Medeiros, but no questions were asked on  
20 that, RLA-8.

21 **MS KUZNETSOVA:** If you don't mind, I will  
22 take your bundle, what is there.

23 **MS MARTINS:** It's on the screen in any  
24 event, if that's OK.

25 **PRESIDENT:** Very good.

1           **MS MARTINS:** So, Ms Muenda, can I please  
2 direct you to article 2 of this statute? Is it not  
3 true, Ms Muenda, that this statute only applies when  
4 the investor wishes to benefit from the guarantees  
5 that this law confers?

6           **MS MUENDA:** I didn't understand your  
7 question.

8           **MS MARTINS:** Is it not true, Ms Muenda,  
9 that it is not mandatory to register as a foreign  
10 investor for the purposes of the Foreign Investment  
11 Law. Only those who wish to benefit from the  
12 guarantees of this law have to register, is that not  
13 so? And I would like you to look at article 2,  
14 number 1 and 2, also at article 3.1, and also at  
15 article 21 and 22 where I believe this is quite  
16 clear.

17           **MS MUENDA:** It's true, yes, if we look at  
18 this law, but investments, foreign investment,  
19 normally they have to export capital.

20           **MS MARTINS:** Sorry to interrupt. We'll  
21 get to the Forex issue. Now I'm talking about this  
22 law which you decided to quote today, not having  
23 quoted it before in legal opinions.

24                   Can I ask you to look at article 22 in  
25 particular, at paragraph 22.2. What is the legal

1 consequence of not registering under the Foreign  
2 Investment Law, Ms Muenda?

3 **MS MUENDA:** I didn't understand the  
4 question. You asked me what was the consequence of  
5 not --

6 **MS MARTINS:** Of not registering.

7 **MS MUENDA:** I was explaining, when you cut  
8 me off, what I was saying was that I mentioned this  
9 law because if an investor does not register in  
10 Mozambique as under the scope of this law, he loses  
11 the right to export his capital, and his operations  
12 of importing capital have to be registered. That's  
13 why I described or mentioned this law.

14 As I said at the beginning, with this  
15 law -- or without this legislation, the PPP  
16 legislation defines what an investor is and we  
17 reached the same conclusion.

18 **MS MARTINS:** Ms Muenda, does this law say  
19 that if you don't apply, you cease to be an  
20 investor?

21 **MS MUENDA:** No, you don't cease to be an  
22 investor.

23 **MS MARTINS:** Thank you.

24 Let's move on then --

25 **MS MUENDA:** But as foreign investor you

1 have to register as foreign investor. You can be an  
2 investor, you can be an investor but you lose. If  
3 you don't register you lose the rights of a foreign  
4 investor.

5 **MS MARTINS:** ... (overspeaking) and as a  
6 foreign investor, it's not a mandatory requirement,  
7 is it, to register under this law? We're talking  
8 about this law only.

9 **MS MUENDA:** Yes. What I said -- and  
10 I will repeat my position, if you don't register,  
11 you lose the rights of being legally treated as a  
12 foreign investor.

13 **MS MARTINS:** For the purposes of exporting  
14 profit, full stop, not your quality of being a  
15 foreign investor? Two different things, correct?

16 **MS MUENDA:** As foreign investor, he  
17 imports and exports capital. That's why he's a  
18 foreign investor.

19 **MS MARTINS:** Ms Muenda, we're moving in  
20 and around circles.

21 **PRESIDENT:** I think the law stands for  
22 itself. Why don't we move on?

23 **MS MARTINS:** Thank you, Mr Chairman.

24 Let's move on to the argument you made on  
25 the Forex legislation.

1           Now, you referred in your presentation to  
2 article 6 of Law 11/2009 of 11 March. So this is  
3 RLA-134. Is it not true, Ms Muenda, that article 6,  
4 number 2 fairly states that current transactions are  
5 free from any form of authorisation?

6           **MS MUENDA:** 6, number 2? Yes, that's  
7 correct.

8           **MS MARTINS:** You referred to this law, but  
9 you did not refer, nor did you attach to your legal  
10 opinion, to Decree 83/2010, which is the regulation  
11 of the Forex Law. Are you familiar with that  
12 regulation?

13           **MS MUENDA:** What is the Decree?

14           **MS MARTINS:** 83/2010 of 31st December.

15           **MS MUENDA:** I have to look at it.

16           **MS MARTINS:** So you're not familiar with  
17 the regulation? You failed to mention it in your  
18 legal opinion. That's why I'm asking.

19           **MS MUENDA:** I didn't mention it. I don't  
20 have it with me.

21           **MS MARTINS:** Well, I put it to you that  
22 under the Forex regulation, which regulates the  
23 Forex Law, which you failed to mention, the  
24 registration for this type of transaction that you  
25 mention would not be mandatory at all, and in any

1 event, it would be for the commercial bank dealing  
2 with a transaction and not for the foreign investor  
3 to register.

4 Would you agree, or do you not know?

5 **MS MUENDA:** I do not agree.

6 **PRESIDENT:** I'm looking with some  
7 trepidation at the watch.

8 **MS MARTINS:** I'll move on.

9 **PRESIDENT:** Because, out of respect to  
10 court reporters and interpreters, at some stage we  
11 have to break for the day, so either you finish in a  
12 reasonably quick time or we'll have to resume  
13 tomorrow.

14 **MS MARTINS:** I'll try to speed up, but  
15 obviously there was a lot of information said here  
16 today. Anyway, let's move on to a different topic,  
17 Ms Muenda, and basically general questions on  
18 Mozambican law. I think it's undisputed right now  
19 that the Civil Code that is in force in Mozambique  
20 today is still the Civil Code that was approved by  
21 Portuguese Decree Law 47/344 of 25th November, save  
22 from minor amendments in both countries; you confirm  
23 that, right?

24 **MS MUENDA:** Can you repeat that? The  
25 Civil Code?



1           **MS MARTINS:** The Civil Code that is in  
2 force in Mozambique today is still the same  
3 Civil Code that was enacted and approved in 1966,  
4 before independence, with minor amendments on both  
5 sides.

6           **MS MUENDA:** For the Portuguese I can't  
7 speak about it, Civil Code, but for Mozambique it's  
8 not the same from 1966, that is for sure. It has  
9 been subject to some changes. The Family Civil Code  
10 is not the same. The inheritance rules have  
11 changed. Certain aspects can be the same but  
12 Civil Code is not for sure the same as Portugal's.

13           **MS MARTINS:** ... (overspeaking) ... the  
14 same but with amendments. Let's focus on the Law of  
15 Obligations. Is it the same?

16           **MS MUENDA:** Yes, it's the same statute.

17           **MS MARTINS:** And --

18           **MS MUENDA:** But I don't know the  
19 Portuguese decree law. The one we have is the 1966  
20 decree law, plus the changes done to that decree  
21 law.

22           **MS MARTINS:** Thank you, that's the  
23 information I was seeking. Can you please confirm  
24 that it is common in Mozambique for both State  
25 courts and practitioners alike, such as yourself, to

1 resort to Portuguese authors and case law on matters  
2 of Law of Obligations?

3 **MS MUENDA:** In those in which we don't  
4 have local doctrine, where we don't have local  
5 jurisprudence for sure, given the roots -- not  
6 because of the similarity of the Portuguese law  
7 being the same as Mozambican law but because, as you  
8 know, Mozambique was a Portuguese colony so its law  
9 has its roots in Portuguese law.

10 **MS MARTINS:** And I assume that is why --  
11 well, in your first legal opinion you quote no  
12 authorities. In your second legal opinion you do  
13 quote some authorities, and all of them, both  
14 authors and jurisprudence case law, they're all  
15 Portuguese, are they not, from Portuguese courts  
16 and/or from Portuguese authors, both deceased and  
17 alive and kicking. I would put it that way.

18 **MS MUENDA:** Yes. I quote for a very  
19 simple reason. Mozambican law is new. The law is  
20 still being built on. Most of jurisprudence still  
21 has to be set up. It's difficult to access all the  
22 different cases. And the Portuguese jurisprudence  
23 is easy to reach, and the doctrine in Mozambique is  
24 still being set up. Maybe a few more years I can  
25 follow the footsteps of Professor Medeiros.

1           **MS MARTINS:** Thank you for your candour.  
2 I just wanted to clarify this, and please don't take  
3 this as an offence, but the ability of Portuguese  
4 professors has been questioned, so obviously I must  
5 establish that despite some differences, there is  
6 still a great commonality, and this is what many  
7 practitioners still use, especially in respect of  
8 Law of Obligations, but not only.

9           Ms Muenda, I would like now to turn to the  
10 public law statutes. Do you agree that they're also  
11 inspired in former Portuguese legislation, or would  
12 you not be in a position to opine on that?

13           Statutes, if you could please translate as  
14 "legislation"? I'm sorry, Ms Muenda, there was a  
15 translation problem.

16           So public law legislation is also inspired  
17 on former Portuguese legislation, is it not?

18           **MS MUENDA:** As I was saying initially,  
19 there are some roots there, yes, but especially when  
20 it comes to public law there are lots of things that  
21 have already changed in Mozambique. A lot of  
22 things.

23           **MS MARTINS:** Let's go back to the Law of  
24 Obligations or, more, to the rules on  
25 interpretation, so what we in Portuguese would call

1 "teoria geral do direito civil", which is outside  
2 the Law of Obligations and interpretation of  
3 contracts.

4 So I assume that as anyone who has a  
5 degree in law in Mozambique or in Portugal or in  
6 another lusophone jurisdiction that you are familiar  
7 with the theory of the impression of the recipient,  
8 correct?

9 **MS MUENDA:** Yes.

10 **MS MARTINS:** You actually referred to it  
11 in your second legal opinion.

12 Now, would you agree with me that what  
13 this theory sets forth is that the interpreter must  
14 discover the meaning that an ordinary recipient of a  
15 declaration who is placed in the position of the  
16 actual recipient of the declaration would perceive?  
17 Is this a fair summary of this theory? Or in other  
18 words, let me rephrase it. A tribunal that is asked  
19 to interpret the will of the parties should,  
20 according to the provisions of article 236 of the  
21 Civil Code, place itself in the position of the  
22 recipient and assess what it would have deduced in  
23 that same position. Is this a fair summary of this  
24 theory?

25 **MS MUENDA:** Yes, it is a fair summary, but

1 there always has to be correspondence, a match,  
2 between the verbal and written meaning and the  
3 interpretation you want to make. You cannot  
4 interpret outside what the average person placing  
5 themselves in the position of the parties would  
6 infer. You cannot go beyond that.

7 **MS MARTINS:** We totally agree.

8 And you would also agree that the  
9 contemporaneous behaviour of the parties is  
10 paramount to the interpretation of contractual  
11 clauses? That's one of the elements of  
12 interpretation under Mozambican law, is it not?

13 **MS MUENDA:** Yes, it is. That is what we  
14 have.

15 **MS MARTINS:** So to correctly interpret a  
16 given clause, this Tribunal must look at the  
17 contemporaneous fact -- well, must look at the  
18 wording of the agreement, obviously, as you  
19 correctly pointed out, but then it must also look at  
20 the contemporaneous facts, place itself in the  
21 position of PEL and of Mozambique, and see how it  
22 would have understood the meaning that the clauses  
23 included in the MOI in light of the other parties'  
24 behaviour would have? You agree with me?

25 **MS MUENDA:** I wouldn't agree fully, but

1 I would say yes, it is necessary, not forgetting the  
2 imperative rules. So if we were to look at this  
3 specific case, it would have to be the declaration  
4 in the document considered to be legally valid on  
5 the one hand and, on the other hand, we would have  
6 to look at all documentation to see where there is a  
7 real meeting of wills, encontro de vontades, and as  
8 I see it, this real meeting or effective meeting of  
9 wills is in the Portuguese version. The Portuguese  
10 version submitted by one of the parties, and by the  
11 other party, is where the contents are located. I'm  
12 extrapolating your interpretation to the concrete  
13 case.

14 **MS MARTINS:** Sorry to interrupt, but my  
15 question -- we'll get to the detail -- I'm speaking  
16 about the theory, just the theory. It has been said  
17 in these proceedings that this theory would mean  
18 that the subjective will of one of the parties  
19 prevails over the other, and I would ask you to  
20 confirm that in light of what we have just concluded  
21 and agreed upon, the both of us, this is not the  
22 meaning of the theory of the impression of the  
23 recipient.

24 The will of one of the parties does not  
25 prevail over the other. It is the Tribunal that

1 must assess the will of the parties from an  
2 objective and impartial position. Is that not so?

3 **MS MUENDA:** That is exactly right. It has  
4 to be assessed in accordance with the objective  
5 elements linked to the declarations of the party.

6 **MS MARTINS:** Thank you.

7 **PRESIDENT:** We have been now going on for  
8 an hour and a half and we, for obvious reasons of  
9 protection of the interpreters and the court  
10 reporters, we must stop.

11 So nolens volens, as the Romans said. Let  
12 me get a time check from the secretary.

13 How much time do the parties have?

14 **MS JALLES:** Claimant has used in its  
15 cross-examination 46 minutes, and so Claimant still  
16 has left one hour and 19 minutes until it's overall  
17 time.

18 **PRESIDENT:** And that excludes the --

19 **MS JALLES:** It excludes the closing  
20 statements in which each of the parties has one  
21 hour.

22 **PRESIDENT:** Very good. And Respondent?

23 **MS JALLES:** And Respondent has used 14  
24 hours so it still has one hour and a half roughly.

25 **PRESIDENT:** So both parties have time.

1 There is no way we can continue today, it becomes  
2 senseless, so I think we have no other alternative  
3 but to break. It's now 7.30. We have been going on  
4 since 9.30.

5 We are off the record now.

6 We close for the day, and this is also for  
7 the transcript, 9.30 with a promise that Claimants  
8 will not use more than one hour from 9.30 to 10.30  
9 --

10 **MS MARTINS:** I didn't make that promise!  
11 I said one hour and 19 minutes. On the record,  
12 please.

13 **PRESIDENT:** One hour and 19 minutes, but  
14 they will try to do an hour, because there may be  
15 some questions from the Tribunal and some redirect,  
16 but we have all a firm commitment that by 12 noon  
17 the examination will be over.

18 Dr Muenda, I don't know if it's good or  
19 bad news but can I kindly ask you that from now  
20 until tomorrow in the morning you do not speak to  
21 any member of the counsel team of the Republic of  
22 Mozambique, nor with any other person related to  
23 Mozambique? Can I have that statement, please?

24 **MS MUENDA:** I confirm that I will do as  
25 instructed.



1           **PRESIDENT:** Thank you very much, Professor  
2 Medeiros, for being here with us. I think with this  
3 we can thank you for having sat through the whole  
4 afternoon with us. If you want to stay with us, you  
5 are most welcome, but we don't want to -- you may  
6 have other commitments.

7           I don't know if you want to be here until  
8 the end, you are welcome, but I don't want to impose  
9 on you the duty to be with us. Do it the way you  
10 think is appropriate.

11           **MS VASANI:** I believe Mr Medeiros has to  
12 be in Lisbon tomorrow morning, but he can join via  
13 zoom if that's OK.

14           **PRESIDENT:** Let him go to Lisbon. Thank  
15 you very much. Have a safe trip back.

16           (The hearing was adjourned at 7.32 pm)

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