



School of International Arbitration

IACL  
International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London**  
**International Arbitration Case Law**

*Academic Directors: Ignacio Torterola, Loukas Mistelis\**

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**Award Name and Date:** CMC Muratori Cementisti CMC Di Ravenna SOC. Coop.; CMC Muratori Cementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch; and CMC Africa Austral, LDA v. Republic of Mozambique (ICSID Case No. ARB/17/23) – Award – 24 October 2019.

**Case Report by:** María de las Mercedes Lovaglio Rivas\*\*, Editor Ignacio Torterola\*\*\*

**Summary:** The Claimants (collectively, “CMC” or “Claimants”) brought an action for relief against the Republic of Mozambique (“Respondent” or “Mozambique”) pursuant to the International Centre for Settlement of Investment Disputes (“ICSID”) Convention and the Italy- Mozambique BIT (the “BIT”). The dispute arises out of the Claimant’s completion of a project to reconstruct a portion of Mozambique’s principal north-south highway, for which they requested additional compensation for supplementary works. After an unsatisfactory determination of the amount due by the project engineer (the “Engineer”), the parties engaged in a period of negotiations that resulted in a settlement offer made by Respondent on 30 October 2009, to which the Claimants responded in a letter dated 2 November 2009. CMC characterized its letter as an acceptance of the settlement offer, while the Respondent asserted that Claimants’ letter was a counteroffer not accepted by Mozambique. CMC started this arbitration claiming that Respondent’s failure to pay the amount proposed in the settlement offer breached several of its obligations under the BIT. The Respondent objected to the ICSID Tribunal’s jurisdiction stating that the jurisdiction of the Tribunal has been superseded by the Cotonou Convention or by the implications of the *Achmea* ruling. While the Tribunal ruled that it had jurisdiction to hear the case, it rendered a decision on the merits in favour of the Respondent, dismissing each of Claimant’s claims, as it concluded that no settlement agreement was ever reached.

**Main Issues:** Jurisdiction – Competence of the ICSID Tribunal –Effect of the *Achmea* decision – Effect of the Cotonou Convention; Existence of a settlement agreement; Treaty obligations – Fair and Equitable Treatment; Damages.

**Tribunal:** Mr. John M. Townsend (President), Mr. J. Brian Casey (Arbitrator) and Mr. Peter Rees QC (Arbitrator).

**Claimant's Counsel:** Mr. Alan Del Rio, Mr. Donal Larkin (LDR Consultants, Dublin); Mr. Luis González García (Matrix Chambers, London).

**Respondent's Counsel:** Mr. Juan C. Basombrio Esq., Ms. Erica Chen Esq. (Dorsey & Whitney LLP, California).

\* Directors can be reached by email at [ignacio.torterola@internationalarbitrationcaselaw.com](mailto:ignacio.torterola@internationalarbitrationcaselaw.com) and [loukas.mistelis@internationalarbitrationcaselaw.com](mailto:loukas.mistelis@internationalarbitrationcaselaw.com)

\*\* María de las Mercedes Lovaglio Rivas graduated from the University of Buenos Aires (UBA) Law School and holds a Master of Laws (LL.M.) degree from Tulane University School of Law. She is a judicial intern at the New York State Supreme Court. IACL's case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author. Ms Lovaglio Rivas can be contacted at [mercedeslovaglio@gmail.com](mailto:mercedeslovaglio@gmail.com).

\*\*\* Ignacio Torterola is co-Director of International Arbitration Case Law (IACL) and a partner in the International Arbitration and Litigation Practice at GST LLP.

## Digest:

### 1. Relevant Facts

The Claimants are three companies: Cooperativa Muratori & Cementisti - CMC Di Ravenna Società Cooperativa ("CMC Ravenna"), a company incorporated under the laws of Italy with its head office in Ravenna, Italy; CMC Ravenna S.C.R.L. Maputo Branch ("CMC Maputo"), a branch of CMC Ravenna registered in Mozambique; and CMC Africa Austral, LDA ("CMC Africa Austral"), a wholly owned subsidiary of CMC Ravenna incorporated under the laws of Mozambique with its head office in Maputo, Mozambique (¶ 2).

Mozambique's Ministry of Public Works and Housing, responsible for public works and infrastructure in the country, delegates responsibility for the development and maintenance of the road network to the *Administração Nacional de Estradas* ("ANE") (¶ 85). In 2004, the government of Mozambique devised the "Namacurra-Rio Ligonha Project" to rehabilitate a 374.85 km stretch of the *Estrada Nacional 1*, Mozambique's main road (¶ 87). To make it more manageable, the project was divided into three "Lots" (¶ 88). This dispute arises out of the rehabilitation of Lot 3, which consists of a 106.020 km stretch between Alto Molócuè and the Ligonha River (the "Lot 3 Project") (¶ 89).

Respondent arranged to receive funding for this project from the European Development Fund (the "Fund" or "EDF") (¶ 90). After a public tender process, the Lot 3 Project was awarded to the Claimants in January 2005 (¶¶ 91-92). The Lot 3 Contract was a unit price contract for a revised total of €29,769,760.53 (¶¶ 95-104).

CMC started work on the Lot 3 Project on 1 May 2005 and completed the project by November 2007, although some additional repairs were completed in 2008 (¶¶ 105-106). On 25 March 2009, CMC Maputo accepted responsibility for the Lot 2 Project, as well (¶ 107). Prior to this, Claimants submitted twenty claims involving additional works, delays, and disruptions regarding their work on the Lot 3 project valued at €12,759,498.18 (¶¶ 109-110). On 11 May 2009, ANE informed the Claimants that the project Engineer had determined that CMC was entitled only to €2,440,925.00 for their additional claims (¶¶ 110-111). Despite their objections to the Engineer's decision, upon recommendation of ANE, CMC submitted an interim payment certificate ("IPC 27") for the sum awarded by the Engineer, which was authorized by ANE on 15 October 2009 (¶¶ 112-115). Nevertheless, CMC continued its efforts to increase the amount awarded by the Engineer (claiming a total of €13,315,000), and informed ANE that this situation risked the continuation of their work in Lot 2 (¶¶ 117-122).

On 30 October 2009, ANE sent CMC an offer to settle the dispute for €8,220,228, requesting a written confirmation in case of acceptance within 7 days (¶ 129). CMC responded by letter of 2 November 2009, stating that they agreed with the proposal, and clarifying that the amount offered was *in addition to* the € 2,440,925.00 previously awarded by the Engineer (¶ 131).

Following a period of silence by ANE and a few inquiries in 2010 and 2011 by CMC, ANE informed the Claimants on 8 August 2011 that there was no undue balance owed to them (¶¶ 137-141). ANE issued a Final Acceptance Certificate for the Lot 3 on 14 July 2011, certifying that CMC had completed its obligations under the Contract (¶ 139). On 8 August 2011, ANE replied to Claimants repeated objections by transmitting the opinion of its independent contractor, Consultec, to support the finding that there was no obligation to pay on behalf of ANE (¶¶ 140-145). On 18 August 2016, the Claimants sent ANE a letter putting the Government on notice of the dispute under Article 9(3) of the BIT, after years of unsuccessful efforts to negotiate and several meetings held between the Parties (¶¶ 146-155).

Claimants subsequently filed a Request for Arbitration against Mozambique, in accordance with the ICSID Convention and the Italy-Mozambique BIT (¶ 1). CMC claims that Mozambique breached the just and fair treatment standard and the non-discrimination provision established in Article 2(3) of the Treaty; breached its obligation under Article 2(4) of the Treaty by failing to observe in good faith specific undertakings entered into with the Claimants; and failed to afford the Claimants no less favourable treatment than afforded to investors and investments of third countries as required by the Most Favoured Nation (“MFN”) clause in Article 3 of the BIT (¶ 209).

## 2. Procedural History

CMC Maputo and CMC Africa Austral filed a Request for Arbitration against Mozambique on 8 May 2017, which was registered by ICSID on 10 May 2017 (¶ 10). On 23 June 2017, CMC filed an Amended Request including CMC Ravenna as a claimant and making other changes to the request (¶ 14). On 14 July 2017, ICSID registered the Amended Request and sent the Parties the Notice of Registration (¶ 19). The Tribunal was constituted on 4 October 2017 (¶¶ 20-24). Following a first conference call with the Parties on 29 November 2017, the Tribunal issued Procedural Order No.1 providing, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of the proceeding would be in Washington, D.C. (¶¶ 25-26).

On 19 March 2018, the Claimants submitted their Memorial on the Merits (¶ 27). After the Parties exchanged requests for documents, on 22 May 2018 the Tribunal issued Procedural Order No. 2 in response to each request (¶¶ 28-30). On 20 July 2018, the Respondent submitted a Request for Bifurcation and Objections to Jurisdiction and Memorial in Support Thereof (¶ 31). On 3 August 2018, CMC submitted their Response to Bifurcation (¶ 33). In a hearing held on 10 August 2018, the Tribunal decided not to bifurcate the proceeding after hearing oral arguments from both Parties (¶¶ 34-37). The Tribunal issued Procedural Order No. 3 confirming this decision on 15 August 2018 (¶ 38).

On 2 November 2018, Mozambique submitted its Counter-Memorial on the Merits (¶ 39). On 31 January 2019, Respondent submitted its Observations Regarding the European Court of Justice’s (“ECJ”) decision in *Slovak Republic v. Achmea* (“*Achmea*”), raising an additional jurisdictional objection (¶ 42). The Claimants submitted their Reply on the Merits and

Counter-Memorial on Jurisdiction on 4 February 2019, and by letter of 6 February 2019 they objected to Respondent's *Achmea* Observations (¶¶ 44-45). On 15 February 2019, after a pre-hearing organizational phone conference held on 8 February 2019, the Tribunal issued Procedural Order No. 5 concluding that Respondent's *Achmea*'s observations were to be admitted into the record (¶¶ 46-47). CMC submitted their Comments to the Observations concerning the *Achmea* decision on 18 March 2019 (¶ 48). On 1 April 2019, the Respondent submitted its Rejoinder on the Merits, Reply on Jurisdiction and Reply on *Achmea* Observations (¶ 49). Since one of Claimants' main witnesses, Mr. Gridella, could not appear at the hearing, the Claimants requested permission to add Mr. Alicandri to its witness list on 14 April 2019, which Respondent opposed by email of the same day (¶¶ 60-61). On 18 April 2019, the Tribunal issued Procedural Order No. 7 deciding, *inter alia*, that Mr. Alicandri's testimony would not be accepted, and that Mr. Gridella's statements would remain part of the record, although ultimately the Tribunal found no need to rely on them (¶¶ 63-75).

A Hearing on Jurisdiction and the Merits was held from 29 April 2019 to 1 May 2019 (the "Hearing") (¶ 76). At the Hearing, the Parties agreed that no post-hearing submissions on the merits would be needed (¶ 78). After the Hearing, on 8 May 2019, the Tribunal invited the Parties to comment on the relevance to the Respondent's jurisdictional objections of the Opinion of the European Court of Justice of 30 April 2019 on CETA ("Opinion 1/17") and on the decision of the arbitral tribunal in *Eskosol v. Italy* (on Italy's request for immediate termination and jurisdictional objection based on the inapplicability of the ECT to Intra-EU disputes) (¶ 79). Both Parties submitted their comments on both documents on 22 May 2019 (¶ 80). The Parties filed their submissions on costs on 29 May 2019 (¶ 81). Finally, the proceeding was closed pursuant to ICSID Arbitration Rule 38(1) on 24 September 2019 (¶ 84).

### 3. Jurisdiction

Respondent raised the following objections to the jurisdiction of the Tribunal.

#### *3.1 The Requirement of Article 1 of the BIT that the Claimants Be Investors with an Investment in Mozambique*

Respondent objected that the Claimants failed to prove that each of them has made an investment in Mozambique to qualify as an "investor" as defined by the BIT (¶ 157). Moreover, the Respondent asserted that the settlement agreement that the Claimants identified as their investment did not fall within any of the categories of "investment" listed in Article 1(1) of the BIT, because the phrase "any investment" in this article is more restrictive than just any kind of asset (¶ 158). Furthermore, Respondent claimed that CMC did not "effect" the alleged settlement agreement as the BIT requires, and that Claimants have waived the Lot 3 Contract as a basis for jurisdiction because they did not invoke provisions of the Contract to assert treaty claims (¶¶ 159-160).

The Claimants pointed out that the Lot 3 Contract and its associated work would qualify as an investment, and that both CMC Africa Austral and CMC Maputo invested in this project, therefore being investors. CMC Ravenna also qualified as an investor given its connection with its subsidiaries (¶ 161). Claimants further argued that the broad term "any investment effected" in Article 1(1) of the BIT included rights and claims associated with construction and rehabilitation works (¶ 162). Claimants also contended that the settlement agreement could not be viewed in isolation from their investment, and that they did "effect" it because

they had clearly caused their investment to come into being, which is the literal definition of “effect” (¶¶ 163-165).

The Tribunal decided that all the Claimants qualified as investors within the meaning of the BIT (¶ 171). In addition, the Tribunal found that since Claimant’s participation in the Lot 3 Project constituted an investment in Mozambique, and the settlement agreement constituted a “credit for sums of money [...] connected to an investment” as required by the BIT definition, CMC’s claims were sufficient to establish a *prima facie* case that satisfied the jurisdictional requirements of the BIT and the ICSID Convention (¶¶ 173-175).

### 3.2 The requirements of Article 25 ICSID Convention

Article 25(1) of the ICSID Convention provides that the jurisdiction of the Centre shall extend to legal disputes between contracting parties arising directly out of an investment (¶ 176). Respondent objected that the settlement agreement, which was merely a legal act and not an investment, extinguished any claims based on the underlying Lot 3 Contract; therefore, the Tribunal lacked jurisdiction to decide this case (¶ 177-179). Additionally, Respondent argued that Claimants’ alleged investment (the settlement agreement) did not meet the requirements established in *Salini Construttori S.p.A. v. Kingdom of Morocco* (“*Salini*”), because it was not a contribution of money or assets of economic value that added to Mozambique’s economic development, with a certain duration and a risk associated with the investment, as Claimants faced an ordinary commercial risk (¶¶ 180-181).

Claimants responded that the settlement agreement was connected to and arises from the Lot 3 Project, and that their claim was broader than just “non-payment”; it encompassed treaty claims based on the conduct of ANE, the unfair treatment by the highest authorities of the Government, and the international responsibility of Mozambique (¶¶ 182-183). Additionally, CMC argued that, since Respondent repudiated the settlement agreement, it did not extinguish the underlying Contract claims (¶ 184). Regarding the *Salini* test, Claimants stated that it did not apply to this case and that it has been criticized in several decisions (¶¶ 185-186). Alternatively, the Claimants argued that they would pass this test because the Lot 3 Contract met the required criteria (¶ 187).

The Tribunal held that the Claimants had an investment within the meaning of Article 25(1) of the ICSID Convention as well as Article 1(1) of the BIT (¶196). The Tribunal recognized the test derived from *Salini*, but clarified that it is not universally applied, as neither is the “double-keyhole” test approached by the *Joy Mining v. Egypt* tribunal (¶¶ 190-192). The Tribunal reached its conclusion by applying a middle ground test, which considers whether the definition of “investment” in the BIT “exceeds what is permissible” under the ICSID Convention – in this case, it did not (¶ 193). Furthermore, the Tribunal found that all Claimants were Italian investors in Mozambique, within the term “national of another contracting state” in the BIT and the ICSID Convention (¶ 201).

### 3.3 Have the Claimants made treaty claims or purely contractual claims?

Respondent objected to the Tribunal’s jurisdiction on the grounds that Claimants’ claims were purely contractual, and therefore outside of ICSID jurisdiction (¶¶ 202-203). Mozambique asserted that it did not use its sovereign authority to alter the contractual relationship unilaterally (¶ 203). Moreover, Respondent added that Claimants failed to

identify the sovereign acts and specific conducts that amounted to a breach of the BIT to support their argument alleging the presence of *puissance publique* (¶¶ 205-206).

The Claimants argued that each of their claims was a treaty claim based on the conduct of Mozambique that required the Tribunal to consider and decide contractual issues (¶ 209). They further contended that, while Respondent's conduct may have amounted to a breach of contract, it also violated the Treaty and created an element of *puissance publique*, because it altered unilaterally the equilibrium of the contract by way of sovereign acts (¶¶ 211-216). In addition, Claimants argued that their claim clearly contained extra-contractual elements, since it relied on the conduct of parties who were not signatory parties to the contract (¶ 217).

The Tribunal found that, although it would have no jurisdiction over purely contractual disputes, the Claimants asserted multiple claims under the BIT, falling under the jurisdiction of the Tribunal (¶¶ 219-222).

### 3.4 Cotonou Convention Arbitration

Mozambique and Italy are both parties to the Cotonou Convention (¶ 223). The Respondent argued that the dispute resolution clause in Article 68 of the General Conditions to the Lot 3 Contract required that any dispute between the parties that is submitted to international arbitration be conducted pursuant to the arbitration rules of the Cotonou Convention (¶¶ 224-229). Furthermore, Mozambique claimed that Article 30 of Annex IV of the Cotonou Convention required that the present dispute be submitted to its procedure, because the underlying project was financed by the Fund (¶ 225). Respondent also asserted that Article 91 of the Original Cotonou Convention established that it superseded the BIT (¶ 226). Respondent further argued that, because this case involved a transnational contract, the only dispute resolution mechanism available was Cotonou Convention arbitration as provided in Section 68.5(ii) of the General Conditions (¶ 234). In support of this argument, Mozambique relied on the 2008 General Court decision in *Cestas v. Commission of the European Communities*, where the Court concluded that contracts within the framework of projects financed by the EDF were covered by the Cotonou Arbitration Rules (¶ 235). Respondent contended that a Cotonou arbitration would be consistent with the BIT, which allows for a choice of international arbitration arrangements, and claimed that by agreeing to the terms of the Lot 3 Contract, Claimants gave up their right to elect other dispute resolution mechanisms (¶¶ 236-239). Moreover, Respondent maintained that Article 68 of the General Conditions is not a mere "forum selection clause", because its terms provided for the exclusive and compulsory jurisdiction of a Cotonou tribunal, and because it did not require litigation before national or municipal Courts, contrary to the *Salini* case (¶¶ 237-238). Based on an argument of separability, Respondent claimed that the arbitration clause included in the Lot 3 Contract remained part of the superseding settlement agreement (¶ 241).

According to Respondent, the Cotonou Convention: (1) applied to this dispute, because, as the Cotonou framework requires, it arose "during the performance" of an EDF financed Contract (the Lot 3) or, alternatively, it is a dispute "relating to a contract" of such kind, and (2) it superseded and precluded application of the BIT, because both relate to the same subject matter (¶¶ 244-248). Respondent contended that an ICSID tribunal cannot administer a dispute under the Cotonou Arbitration Rules, and that this Tribunal could not comply with those rules because not all arbitrators were nationals from a signatory state (¶ 251). Finally, Respondent added that no MFN provision applied to procedural obligations or overrode the intent of the parties (¶ 252).

On the other hand, Claimants argued that the Lot 3 Contract merely contained a forum selection clause that in no case could deprive an investor of its rights under a BIT to resolve a treaty claim, even if it was an exclusive jurisdiction clause (¶¶ 253-254). The Claimants further contested that Article 68 does not apply in this case since: (1) this was not a contractual dispute, but rather an investment dispute governed by international law; (2) the dispute did not arise during the performance of the Lot 3 Contract, because performance was completed before the events that gave rise to this dispute; and (3) the settlement agreement was not financed by the EDF (¶ 256). Regarding the separability argument that Respondent raised, Claimants asserted that it was an issue to be decided by domestic law, and that Respondent had failed to establish the existence of this principle in Mozambican law (¶ 257). Moreover, Claimants argued that the Cotonou arbitration provision in the Lot 3 Contract applied solely to breaches of the contract, but it did not affect the jurisdiction of an international tribunal to consider breaches of the Treaty and international law (¶ 258). They also contested that Article 68 of the General Conditions was a boilerplate provision that did not prove any specific intention to waive ICSID jurisdiction (¶ 259). The Claimants further contended that the Cotonou Convention allowed the parties to settle disputes in accordance with their national legislation or established international practices, such as BITs (¶ 261). According to Claimants, since the Cotonou Convention required its arbitral tribunals to apply municipal law and that all domestic administrative procedures are exhausted before bringing a claim, it could not be applied to BITs (¶ 262). As to the *Cestas* case, they interpreted it to say that the arbitration procedures in the Cotonou convention only applied to contractual disputes (¶ 263). Additionally, CMC considered that the Cotonou Convention did not supersede the BIT, because the Convention was not an investor protector treaty and they did not relate to the same subject matter; to this extent, the BIT was *lex specialis* in relation to the Convention (¶ 264).

The Tribunal decided that the Cotonou Convention did not supersede the BIT, since the overlap regarding their subject-matter was minor and their provisions were entirely compatible (¶ 277). Additionally, Article 78 of the Cotonou Convention and Article 15(2) to its Annex II contained provisions explicitly encouraging the parties to enter into BITs, which proved that the Convention itself was not an investment promotion and protection agreement, consequently differing in subject-matter from the BIT (¶¶ 274-276).

Furthermore, the Tribunal noted that the BIT did not preclude Arbitration under the Cotonou Convention, because it could be considered as “established international practices” (¶ 279-280). The Tribunal found no conflict in the subject matter for which each treaty provides for arbitration (¶ 281). It considered that the present case fell within the arbitration provisions of the BIT, which focused on disputes on investment (¶ 282). Consequently, this claim did not fall within the Cotonou Convention arbitration provision, because the dispute did not arise “during performance of the contract”, but instead after completion (¶¶ 283-287). Moreover, the Tribunal observed that the Convention would not apply directly to the Claimants, who are private parties (¶ 288). Whether the contract is national or transnational, the Tribunal found it irrelevant to this case (¶ 290). Given that the Tribunal previously decided that the present dispute did not involve contractual claims, the Lot 3 Contract did not by its terms require the submission of Claimant’s BIT claims to arbitration under the Cotonou Convention (¶¶ 291-295).

### 3.5 The ECJ's *Achmea* Judgment

Mozambique argued that the arbitration clause in the BIT had been rendered invalid by the ECJ's decision in *Achmea*. In that case, the Court addressed whether treaties between EU member states that provide for investor-state arbitration are compatible with EU law, when a tribunal that is not part of the EU system may resolve disputes concerning the interpretation of EU law, and that tribunal cannot submit preliminary questions to the ECJ and its decisions are not sufficiently reviewable by EU Courts (¶ 296).

Responding to Claimant's objection on the timeliness of this issue, Respondent explained that the Joint Declaration of 22 EU Member States, including Italy, on the effects of this decision was issued on 15 January 2019. The Respondent contended that this Declaration articulated that the *Achmea* decision also applied to the Energy Charter Treaty ("ECT"), which includes non-EU states (¶ 297). Respondent asserted that, applying the reasoning of the Joint Declaration, the *Achmea* decision should also apply to BITs between member-states like Italy and non-member states like Mozambique. According to Respondent, the Cotonou Convention is part of EU law and conflicted with the arbitration clause in the BIT, which invalidated this provision and deprived this Tribunal of jurisdiction. Allowing this procedure would require an international tribunal to decide on matters of EU law and render an award unreviewable by EU Courts, neither of which was permissible under *Achmea* (¶ 298). Respondent further stated that the *Achmea* decision did reference the ICSID Convention, contrary to the holdings in *UP and C.D. Holding v. Hungary* (¶¶ 299-300). The Respondent indicated that Italy (as well as 22 other EU member States) had stated that *Achmea* applied to treaties involving non-EU member states (¶ 302). At a minimum, Mozambique claimed that the *Achmea* decision confirmed that this case should be arbitrated under the Cotonou Convention, which is compatible with EU law (¶¶ 303-304). Regarding the case *Eskosol v. Italy*, where the tribunal held that the *Achmea* decision did not affect arbitral jurisdiction over an intra-EU ECT arbitration, Respondent asserted that, unlike *Eskosol*, in this case there were provisions that expressly preempted the application of the BIT, and that the purported consent was void *ab initio* because Italy did not have authority to enter into the BIT. As to Opinion 1/17, where the ECJ held that an investor-state dispute resolution clause in the CETA between Canada and the EU is compatible with EU law, Respondent argued that a specific arbitration clause that preempted application of the ICSID was absent in that opinion and that in this case the Tribunal was being asked to interpret EU law (¶ 306).

The Claimants asserted that Respondent's objections in this respect were untimely and should have been raised with their Memorial on Jurisdiction (¶ 307). Moreover, they reached the conclusion that EU law (and the *Achmea* judgment) were not relevant to questions where an international tribunal was asked to apply international law, given that EU law does not constitute principles of international law. Moreover, Claimants argued that the BIT regime and EU law operate independently, and therefore the BIT was compatible with EU law (¶ 308). Claimants contended that *Achmea* did not apply to the BIT because it did not involve an intra-EU dispute (¶ 309). To this extent, Claimants asserted that Opinion 1/17 further clarified that the fact that an ISDS mechanism is not part of the EU judicial system does not mean that it adversely affects the EU legal order, and that an international tribunal can take EU law into consideration as a matter of fact (¶ 310). The Claimants drew an analogy between the ECJ's decision and this arbitral proceeding, stating that the Tribunal had to apply the provisions of the Italy-Mozambique BIT and also the principles of international law recognized by the two contracting parties (¶ 311). Finally, they relied on *Eskosol v. Italy* to



establish that *Achmea* could not be considered as a matter of international law to automatically invalidate an international treaty or the parties' consent to arbitration (¶ 312).

The Tribunal decided in this respect that the *Achmea* objection was timely because it was raised within two weeks after issuance of the Joint Declaration, upon which Respondent based its argument (¶¶ 313-315). Nonetheless, the Tribunal held that the *Achmea* decision did not deprive this Tribunal of jurisdiction, which was therefore competent to address the merits of the dispute (¶ 339). To reach this conclusion, the Tribunal identified that the relevant issue with *Achmea* is whether it applied to extra-EU BITs and invalidated the mutual consent of the Parties, as expressed in the BIT, to arbitrate disputes about investments (¶ 316). *Achmea* addressed that arbitration provisions in intra-EU BITs were incompatible with EU treaties, but it expressed no view with respect to extra-EU treaties, such as the BIT under which this arbitration was commenced (¶¶ 317-318). Even though the Joint Declaration was signed by Italy, this document focused mainly on intra-EU investment arbitration, brought under treaties concluded between member states of the EU or under the ECT (¶¶ 319-321). Still, the Joint Declaration made no mention of extra-EU treaties or arbitration proceedings pursued under them (¶ 322). Respondent interpreted Italy's signing of the Joint Declaration as a reflection of its position regarding their consent to arbitration under the BIT (¶ 323). The Tribunal found this analysis unpersuasive, and concluded that the Joint Declaration did not make reference to extra-EU treaties to which the signatory states are parties, especially when no party to this case had taken any steps to denounce or terminate the BIT pursuant to Article 15(1) (¶¶ 324-325). Consequently, neither *Achmea* nor the Joint Declaration appeared to invalidate the binding agreement of the parties in an extra-EU treaty to arbitrate (¶ 326). The Joint Declaration, according to the Tribunal, did not advocate extending the effect of the *Achmea* decision to extra-EU BITs, and this decision had no application to BITs between EU member states and non-member states (¶ 336).

The Tribunal further found that even if the *Achmea* decision implied that tribunals formed outside of the EU legal order should not interpret EU law, the only element of EU law present in this case related to the arbitration provision in the Cotonou Convention, which was deemed not applicable (¶¶ 327-328). That finding would not be impermissible under EU law, as Opinion 1/17 established (¶¶ 329-330). Based on its holding regarding the Cotonou Convention objection, the Tribunal found no provision of the BIT to be inconsistent with any expression of EU law or the Cotonou Convention and bring *Achmea* into play (¶¶ 331-337). Additionally, the Tribunal identified no expression of hostility to bilateral investment treaties (in general or as to extra-EU) in the Cotonou Convention or in the Regulation 1219/2012 adopted by the European Parliament and the Council of the EU (¶ 333).

#### 4. Merits

The Claimants asserted that Mozambique breached Articles 2(3), 2(4) and 3 of the BIT (¶ 340). They contended that these treaty obligations were infringed by Mozambique's following behaviors: (1) its refusal to honor its undertaking to pay the amount detailed in the settlement agreement; (2) its unreasonable delay in responding to Claimants' request for payment; (3) its unjustifiable delay in issuing the Certificate of Completion; (4) its decision to revisit and ignore the settlement agreement, seeking advice and relying on Consultec's opinion without informing and involving the Claimants in the process; and (5) its Government's contradictory, inconsistent and non-transparent conduct throughout the whole process after the settlement offer (¶ 341). Respondent denied having breached any of its

obligations under the BIT and asserted that Claimants' unreasonable delay in bringing this action had caused the statute of limitations to expire (¶ 342).

#### 4.1 *The existence of a settlement agreement*

Claimants argued that a settlement agreement was formed by their acceptance on 2 November 2009 of the offer made by ANE on 30 October 2009 (¶ 345). Both parties agreed that ANE's letter constituted an offer to enter into a settlement agreement, but they disagreed as to whether CMC's response constituted an acceptance of that offer (¶ 348). Also, the Parties concurred that the applicable law to decide this issue was Mozambican law (¶ 349).

Both Parties' experts on Mozambican law agreed on the substance of the law. Claimant's expert, Mr. Timbane, asserted that any acceptance with additions, limitations, or other modifications amounts to a rejection of the offer, unless it is sufficiently precise, complete, and adequate in form to constitute a counteroffer (¶ 351). Respondent's expert, Ms. Muenda, concurred that an attempt to accept an offer on different terms creates a counteroffer understood as a rejection of the original offer (¶ 358). Both experts testified that correspondence between the parties and their conduct could be considered as well to establish the formation of an agreement (¶¶ 353-359). However, the experts disagreed as to the application of the law to this case. Mr. Timbane concluded that CMC's letter constituted an acceptance to Respondent's settlement offer, because a counteroffer would only be present "*if the modification is sufficiently precise*", which was not the case since CMC only stated a clarification of their understanding of the offer that in no way suggested a modification (¶ 352). On the other hand, Ms. Muenda asserted that, because the answer given by CMC did not reflect the image and content of ANE's offer, it could not be considered as an acceptance (¶ 358).

Claimants insisted that ANE's offer of €8,220,888 was *in addition to* the amount determined by the Engineer and certified in IPC 27, and that their response was intended as a clarification of this (¶ 350). Based on the expert's testimony, Claimants insisted that the subsequent conduct of the parties and the documents exchanged between them confirmed that CMC's acceptance was not contested by ANE (¶¶ 354-356). Respondent contended that no settlement agreement was ever reached because there was no meeting of the minds on the amount to be paid (¶ 357). Respondent further argued that a comparison between the amounts awarded by the Engineer and the corresponding amounts offered by ANE proved their offer to adjust, not add to, the Engineer's determination (¶¶ 364-366). Respondent asserted that if the amount offered was additional to the amount certified by the Engineer, it would exceed the € 8.2 million that their letter stated as the total (¶ 368). Finally, Respondent pointed out that no other communication was received within the seven-day expiration date except for CMC's counteroffer (¶ 369).

The Tribunal identified that, since the experts agreed on the applicable law, it was necessary to define whether CMC's acceptance was unconditional or a counterproposal (¶¶ 370-371). The Tribunal considered that no amount of "clarification" by the offeree could change what the offeror intended, unless subsequently agreed to, so the relevant issue turned to ANE's intention (¶ 373). The Tribunal concluded that, based on the documentary record, ANE did not intend in its letter of 30 October 2009 to offer €8,220,888 in addition to the €2,440,925 awarded by the Engineer, but rather it intended that total amount to resolve all claims (¶ 389). In reaching this conclusion, the Tribunal noted its difficulty in comparing the items and amounts assigned by the Engineer, CMC and ANE in their various communications, since

they differed constantly (¶ 383). When the Engineer awarded his determination of € 2,440,925 due to CMC, it was against a claim of € 12,759,498. From certain items in CMC's complaint to ANE about the Engineer's determination, it seemed that CMC did not subtract the amounts awarded by the Engineer (¶¶381-382). The settlement offer letter sent by ANE referenced a total claimed amount of €15,802,053 (minus interest, €14,052,053), against which ANE offered to pay €8,220,888 in settlement for the larger claim (¶ 378-379). If ANE's settlement offer letter had been intended to be additional to the amount awarded by the Engineer, it would amount to a total of €16,492,978, an amount higher than any sum CMC ever claimed or that ANE ever considered (¶ 388). Consequently, the Tribunal concluded that CMC's "clarification" was not an unqualified acceptance of ANE's offer, but rather it amounted to a counteroffer, which under Mozambican law equaled a rejection of the offer unless accepted by the original offeror (¶¶ 390-391). Therefore, the Tribunal found that no binding settlement agreement was ever reached between the Parties (¶ 392).

#### *4.2 Article 2(3) of the BIT: Did Mozambique Treat the Claimants Justly and Fairly?*

The Claimants contended that Mozambique violated the Fair and Equitable Treatment ("FET") standard by the conducts described below, and thus breached Article 2(3) of the BIT (¶¶ 393-394). Respondent argued that Mozambique treated Claimant's investment justly and fairly, as required by the BIT, given that non-payment of a non-existent agreement cannot be a basis for violation of this standard (¶ 406). Since the Tribunal found that no settlement agreement was concluded, it rejected this claim (¶ 413).

##### *4.2.1. Arbitrary, Inconsistent, and Contradictory Conduct*

Claimants contended that Mozambique's acted in an arbitrary way by repudiating the settlement agreement after months of silence, surprises, and shocks. Moreover, Claimants argued that Mozambique's conduct breached the FET standard because it failed to abide by an undertaken commitment, engage in good faith discussions or respond to Claimants' repeated requests for payment, and inform CMC that its position regarding the settlement agreement had changed (¶¶ 398-399). Based on the finding that there was no contractual obligation by which Respondent was required to abide, the Tribunal disposed this claim (¶ 413).

##### *4.2.2. Frustrating the Claimant's Legitimate Expectations*

The Claimants argued that a predictable legal framework is an essential element of the FET standard, which includes the obligation to protect the legitimate expectations arising from specific representations made by the State to an investor, even after the investor has made its initial investment. In this case, their legitimate expectation was their right to payment under the settlement agreement, and it was originated when the Lot 3 Contract was signed (¶¶ 400-401). Respondent considered that, since no sovereign action was taken to change the legal order to the detriment of Claimants after their investment, they had failed to prove that Mozambique did not provide a stable and predictable environment. Respondent insisted that no agreement existed to justify legitimate expectations (¶ 408). Because there was no evidence in the record to support a finding of CMC's alleged legitimate expectations, the Tribunal dismissed this claim (¶ 413).

#### *4.2.3. Acting in Bad Faith*

Claimants argued that Mozambique acted in bad faith, in violation of the FET standard, by its conduct following the settlement offer (¶ 402). Respondent denied this declaration and asserted that Claimants were given numerous opportunities to substantiate their claims and even meet with high authorities of Mozambique. Respondent also claimed that it engaged an independent third party to analyze the issue without being required to do so (¶ 409). The Tribunal explained that good faith is not in itself a source of obligation arising from a BIT, but rather an inherent component of the FET standard (¶ 415). To this extent, the Tribunal did not find the Respondent's conduct in any of the claimed respects to amount to bad faith, given that Claimants had failed to establish that the Respondent shifted its position at all (¶¶ 416-417). The Tribunal asserted that both Parties could have communicated better, but that no party had shown evidence of bad faith on the other (¶ 418). For these reasons, and because no settlement agreement existed, the Tribunal rejected this claim (¶¶ 419-420).

#### *4.2.4. Not Acting in a Sufficiently Transparent Manner*

Claimants argued that Mozambique did not conduct itself in a transparent manner because it failed to maintain a legal framework that was readily apparent to the Claimants, to which they could trace any decision affecting them (¶ 403). The FET standard is breached when an investor is not treated in an even-handed and just manner, and Claimants related this to Respondent's lengthy delays and lack of valid reasons (¶ 404). The Tribunal found no evidence of a lack of transparency or confusion about who was responsible for making the decisions, and stated that, since the deficiencies in communication were chargeable to both Parties, they did not amount to a denial of fair and just treatment (¶¶ 421-424).

#### *4.2.5. Coercing the Claimants*

Claimants asserted that Mozambique violated the FET standard by pressuring them into "agreeing to a predetermined result", considering that Respondent's refusal to honour his commitment intended to force renegotiation of the Lot 3 Project and the two additional disputes (¶ 405). Respondent contended that it was CMC who engaged in coercion by attempting to leverage the Lot 2 Contract to affect the settlement of their Lot 3 claim (¶ 411). The Tribunal found no evidence of improper pressure being exerted by Mozambique, or of any agreement to any result being reached by the Parties (¶¶ 425-427).

#### *4.3 Article 2(3) of the BIT: Did Mozambique Impair the Claimants' Investments by Unjustified or Discriminatory Measures?*

CMC contended that Mozambique's conduct regarding the settlement offer breached the non-discrimination provision comprised in Article 2(3) of the BIT (¶ 428). It did so, according to Claimants, by disregarding its obligation to pay the amount agreed with no justifiable reason (¶ 429). In response, Respondent asserted that ANE followed the procedures established in the Lot 3 Contract, and that ANE never altered its position on what was due after Claimant's rejected its settlement offer (¶ 431). The Tribunal dismissed this claim based on Claimants' failure to establish an underlying obligation of the State or to advance any evidence of discrimination (¶ 433).

#### *4.4 Article 2(4) of the BIT: Did Mozambique Fail to Create and Maintain a Legal Framework Apt to Guarantee the Claimants the Continuity of Legal Treatment of All Undertakings Assumed?*

The Claimants asserted that Article 2(4) of the BIT provided a guarantee of good faith for all undertakings assumed by the State, and that Mozambique breached this provision by “repudiating its obligation to pay” (¶¶ 435-436). Respondent contended that this provision would not be applicable to this case, as it applied only to an investor’s legitimate expectations regarding undertakings and representations made by the state to induce investments (¶¶ 437-438). The Tribunal dismissed this claim, finding that no valid settlement agreement, no undertaking that the State failed to honor and no deficiency in the legal framework available to Claimants existed (¶¶ 439-441).

#### *4.5 Does the MFN Clause Allow Claimants to Import an Umbrella Clause from the Switzerland-Mozambique BIT?*

Article 3 of the BIT established an MFN clause, under which Claimant’s claimed to be entitled to rely on other bilateral investment treaties to which Mozambique was a party that were more favourable to them than the BIT (¶¶ 442-443). Claimants invoked Article 11(2) of the Switzerland-Mozambique BIT, which provided that each party “shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting party”, to argue that Mozambique’s failure to comply with the settlement agreement constituted a breach of Article 3 of the BIT (¶ 444). Since the underlying obligation upon which Claimants intended to bring an “umbrella clause” was the settlement agreement, and the Tribunal had concluded that no such agreement was reached, the Tribunal dismissed this claim (¶¶ 447-449).

#### *4.6 Are the Claimants’ Claims Timely?*

Respondent asserted that the BIT required investments to be in conformity with the laws of Mozambique (¶ 450). Respondent stated that CMC’s claim would have come into existence at the end of 2010, and that Claimant’s did not pursue this arbitration until 2017 (¶ 451). According to Ms. Muenda’s testimony, Mozambican law provides for one, two, or three-year statutes of limitation, besides the 20-year period that applies only when no limitation period fits the case (¶ 452). Respondent argued that the Claimants had unreasonably delayed in bringing their claims (¶¶ 453-455).

The Claimants contested that this issue of admissibility should have been raised in Respondent’s Memorial on Jurisdiction (¶ 456). Given that Mozambique had stated that it would accept the jurisdiction of a Cotonou tribunal, Claimants considered it was estopped from taking a different position before this tribunal (¶ 457). Claimants also contended that the BIT did not establish a limitation for issues of international law, to which a domestic statute is inapplicable (¶ 458). Alternatively, Claimants also argued that that the settlement agreement would be bound by the general limitation of 20 years, and that, in any case, Respondent’s dishonest behavior lasted until 2016 (¶¶ 459-461).

As the claims arose under the BIT and international law, and neither provides a limitations period, the Tribunal dismissed Respondent’s timeliness objection (¶¶ 462-464).

#### *4.7 Summary of the Tribunal's Decision on the Merits*

The Tribunal dismissed each of Claimant's claims and found in favour of Respondent (¶ 465).

### **5. Damages**

The Claimants had argued two theories of damages. Their primary theory was that they have suffered damages in the sum of €8,220,888, resulting from Respondent's failure to honour the settlement agreement for that amount, in violation of international law (¶ 466). Claimants' alternative theory argued that the Respondent was unjustly enriched in the amount of €8,220,888 by Claimants' additional works (¶ 467). For both theories, Claimants' requested interest at the EURIBOR three-month rate plus a 5% risk from January 2019 until full payment was received (¶ 468).

The Respondent argued that both Claimants' theories should fail. The primary one, because there was no binding settlement agreement. The alternative one, because it was raised too late and Claimant's failed to prove that they were underpaid for their work on Lot 3 (¶¶ 469-471).

Having found no breach of any article of the BIT by the Respondent, the Tribunal awarded no damages to the Claimants and found that there was no need to address the subject of interest or potential claims under the Lot 3 Contract (¶¶ 472-474).

### **6. Costs**

The Tribunal found that, although the Respondent prevailed on the merits of the claims, the Claimants prevailed on the many objections to the Tribunal's jurisdiction, including the effect of the Cotonou Convention, which was an issue of first impression in an ICSID arbitration (¶ 483-485). Therefore, the costs of the arbitration should be borne equally by the Parties, and each party should bear its own costs and expenses (¶ 486).

### **7. Award**

The Tribunal decided unanimously as follows (¶ 489):

- The Tribunal had jurisdiction to hear the claims presented by the Claimants.
- The Respondent prevailed on the merits, and accordingly each of the Claimant's claims was dismissed.
- The costs of the arbitration should be borne equally by the Parties, and each party should bear its own costs and expenses.
- The Tribunal dismissed all other requests for relief.