

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**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)

PROCEDURAL ORDER NO. 3

Members of the Tribunal

Mr. John M. Townsend, President of the Tribunal
Mr. J. Brian Casey, Arbitrator
Mr. Peter Rees QC, Arbitrator

Secretary of the Tribunal

Ms. Ella Rosenberg

August 15, 2018

Background

1. On December 8, 2017, the Tribunal issued Procedural Order No. 1, together with Annex A, which set out the procedural calendar for this proceeding.
2. On July 20, 2018, pursuant to Annex A of Procedural Order No. 1, the Respondent filed its Memorial on Preliminary Objections to Jurisdiction as well as its Request for Bifurcation. In its Request for Bifurcation, the Respondent requested that the Tribunal bifurcate the proceeding so as to consider the jurisdictional objections raised by the Respondent in an initial phase before the merits and damages phases of this case. The jurisdictional objections raised by the Respondent are:¹
 - (i) The dispute must be arbitrated pursuant to the arbitration rules of the Cotonou Convention, not the ICSID Arbitration Rules;
 - (ii) The Tribunal has no jurisdiction under Article 25 of the ICSID Convention and the Italy-Mozambique BIT (the “BIT”), because the Claimants’ claims do not arise from an investment but from a legal act (a settlement agreement);
 - (iii) The nature of this dispute is contractual and thus not within ICSID jurisdiction;
 - (iv) The settlement agreement on which the Claimants base their claims is not an “investment” under the ICSID Convention or for the purposes of the BIT;
 - (v) The contract between the Claimants and the Ministry of Public Works and Housing of Mozambique cannot be the basis for this Tribunal’s jurisdiction, because the Claimants have disavowed asserting any claims based on that contract; and

¹ Respondent’s Request for Bifurcation, paras. 12-27.

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(vi) The Claimants have failed to produce documentation establishing that each of them has made a protected investment.

3. On August 3, 2018, the Claimants filed their Response to the Respondent's Request for Bifurcation, opposing the Respondent's Request for bifurcation.
4. On August 10, 2018, the Tribunal held a hearing on the application for bifurcation at the offices of the World Bank in Washington D.C. The following people attended the hearing:

Members of the Tribunal

Mr. John M. Townsend, President of the Tribunal
Mr. J. Brian Casey, Arbitrator
Mr. Peter Rees QC, Arbitrator

ICSID Secretariat:

Ms. Ella Rosenberg, Secretary of the Tribunal
Ms. Anna Devine, Paralegal

On behalf of the Claimants:

Mr. Luis Gonzalez Garcia, Matrix Chambers
Mr. Alan Del Rio, LDR Consultants

On behalf of the Respondent:

Mr. Juan Basombrio, Dorsey & Whitney LLP
Ms. Erica Haggerty, Dorsey & Whitney LLP

Court Reporter:

Mr. David Kasdan, Worldwide Reporting LLP

5. After hearing arguments from both Parties, the Tribunal deliberated and thereafter rendered its decision on bifurcation orally, on the record of the hearing. That decision is restated in this Procedural Order.

Tribunal's Ruling

6. The Tribunal's ruling on the application for bifurcation is as follows:

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- a. The Tribunal agrees with the Parties that no presumptions apply either in favor of bifurcation or against bifurcation.
- b. The Tribunal accepts the Respondent's formulation of the principal considerations to be taken into account in ruling on an application for bifurcation:
 - (1) Has a *prima facie* showing been made of the likelihood of success of an objection to jurisdiction;
 - (2) would bifurcation result in a savings of time and costs, and how; and
 - (3) to what extent are the jurisdictional issues intertwined with the merits. The Tribunal agrees those are the right tests.
- c. Having considered the objections to jurisdiction raised by the Respondent in light of these considerations, the Tribunal has decided not to bifurcate this proceeding. The Tribunal has arrived at this conclusion reluctantly, because, from the Tribunal's point of view, there would be a great deal of intellectual attraction to dealing with jurisdiction as an isolated issue.
- d. Of course, if the objections to jurisdiction are ultimately successful, there would be a time and cost saving to ending the case earlier rather than later. The Tribunal has nevertheless decided that other considerations outweigh that potential benefit.
- e. One of those considerations is that the Tribunal anticipates that these jurisdiction issues will be difficult to resolve, and the outcome is not

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obvious. One reason for this is that a number of factual matters are disputed by the parties, and the Tribunal does not believe that the timetable on which a bifurcated proceeding would be conducted would allow sufficient time to develop the disputed issues of fact sufficiently to permit the Tribunal to decide them.

- f. Another key consideration for the Tribunal is the calendar. The Tribunal is unable to see a way to give itself the luxury of deciding jurisdiction as a preliminary issue, while also preserving the hearing dates set for the Hearing on the Merits. The Tribunal is acutely conscious that the amount in controversy here is relatively modest, and that extending the schedule would be likely to have a substantial effect on costs. The current schedule will get this arbitration to hearings at the end of April, and the Tribunal sees substantial economic benefits to getting the case finished on that schedule.
- g. While the Tribunal has decided not to bifurcate this proceeding, the Tribunal wishes to stress that it accepts at least the preponderance of the Jurisdiction Objections as serious. None of them is frivolous, and some of them present novel issues, which should receive appropriate attention. However, each of those objections has to be applied to a set of facts. The Tribunal is not confident that it has at this point a sufficiently developed set of facts to which to apply the objections. To make sure that the Tribunal has a complete, firm, factual record to which to apply the objections and on

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which to make a ruling, the Tribunal has decided to go forward with the non-bifurcated schedule as it appears in Annex A to Procedural Order No. 1.²

7. After having heard the Tribunal's ruling on bifurcation, the Respondent requested that the Tribunal consider bifurcating the proceeding so as to consider only the jurisdictional objection based on the Cotonou Convention on a preliminary basis.³
8. The Claimants opposed the Respondent's modified proposal.⁴
9. After deliberating with respect to the Respondent's modified proposal, the Tribunal denied the Respondent's request. The Tribunal noted that it found the modified proposal appealing, but the Tribunal did not feel that isolating the Cotonou Convention issue would solve the need for a firm factual foundation for any ruling on jurisdiction.⁵
10. For all the reasons noted above, the Tribunal denies the application for bifurcation as originally made and also as modified at the hearing.

[*Signed*]

John M. Townsend

President of the Tribunal (on behalf of the Tribunal)

Date: August 15, 2018

² Hearing Transcript P122:L2-P124:L8.

³ Hearing Transcript P126:L1-P127:L2.

⁴ Hearing Transcript P128:L13-P129:L17.

⁵ Hearing Transcript P130:L1-L9.