

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**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**

Claimants

and

REPUBLIC OF MOZAMBIQUE

Respondent

ICSID Case No. ARB/17/23

AWARD

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

Date of dispatch to the Parties: 24 October 2019

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TABLE OF ABBREVIATIONS

ANE	<i>Administração Nacional de Estradas</i> , the national roads administration of Mozambique
BIT	Agreement between the Government of the Italian Republic and the Government of the Republic of Mozambique on the Promotion and Reciprocal Protection of Investments dated 14 December 1998
C-[number]	Claimants’ Exhibit [number]
CL-[number]	Claimants’ Legal Authority [number]
CM	Claimants’ Memorial on the Merits, 19 March 2018
CMC or the Claimants	The Claimants collectively
CMC Africa Austral	Claimant CMC Africa Austral, LDA, a wholly owned subsidiary of CMC Ravenna incorporated under the laws of Mozambique
CMC Maputo	Claimant CMC Ravenna S.C.R.L. Maputo Branch, a branch of CMC Ravenna registered in Mozambique
CMC Ravenna	Claimant Cooperativa Muratori & Cementisti – CMC Di Ravenna Società Cooperativa, incorporated under the laws of Italy
COA	Claimants’ Comments to the Respondent’s Observations Concerning the <i>Achmea</i> Decision, 18 March 2019
Cotonou Convention	Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000
Cotonou Arbitration Rules	Arbitration rules adopted by decision of the Council of Ministers at the first meeting following the signing of the Cotonou Convention
CRB	Claimants’ Response to Bifurcation, 3 August 2018
CRMJ	Claimants’ Reply on the Merits and Counter-Memorial on Jurisdiction, 4 February 2019
DEN	<i>Direcção de Estradas Nacionais</i> , the Engineer/Supervisor on the Lot 3 Project
ECJ	European Court of Justice

EDF	European Development Fund
Engineer	DEN, the Engineer/Supervisor of the Lot 3 Project
EU	European Union
Joint Declaration	Declaration of 22 EU Member States of 15 January 2019 on the Legal Consequences of the <i>Achmea</i> Judgment and on Investment Protection
Lot 3 Contract	Public Works Contract No 307/DEN/04 for the Lot 3 Project
Lot 3 Project	Road Rehabilitation project between Namacurra and the Ligonha River, Lot 3, Section E
Ministry	The Ministry of Public Works and Housing of Mozambique
R-[number]	Respondent's Exhibit [number]
RA or Amended Request	Claimants' Amended Request for Arbitration, 23 June 2017
RCM	Respondent's Counter-Memorial on the Merits, 2 November 2018
Revised Cotonou Convention	Cotonou Convention as revised on 25 June 2005 and on 22 June 2010
RL-[number]	Respondent's Legal Authority [number]
ROA	Respondent's Observations Regarding the European Court of Justice's <i>Achmea</i> Decision, 31 January 2019
ROJ	Respondent's Objections to Jurisdiction and Memorial in Support Thereof, 20 July 2018
RRA	Respondent's Reply on <i>Achmea</i> Observations, 1 April 2019
RRB	Respondent's Request for Bifurcation, 20 July 2018
RRJ	Respondent's Reply on Jurisdiction, 1 April 2019
RRM	Respondent's Rejoinder on the Merits, 1 April 2019
Tr. [date]	Transcript of hearing on date given [date]
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969

I. INTRODUCTION

1. This arbitration was commenced by a Request for Arbitration against the Republic of Mozambique dated 8 May 2017 in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965 (the “ICSID Convention”) and the Agreement Between the Government of the Italian Republic and the Government of the Republic of Mozambique on the Promotion and Reciprocal Protection of Investments dated 14 December 1998 (the “BIT”). The International Centre for Settlement of Investment Disputes (“ICSID”) registered the Request on 14 July 2017.
2. The Claimants are three companies (together referred to as the “Claimants” or “CMC”)¹:
 - a. 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;
 - b. CMC Ravenna S.C.R.L. Maputo Branch (“CMC Maputo”), a branch of CMC Ravenna registered in Mozambique; and
 - c. 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.
3. The Respondent is the Republic of Mozambique (the “Respondent” or “Mozambique”).
4. This dispute arises out of the participation by the Claimants in a project to reconstruct a portion of the principal north-south highway in Mozambique. The Claimants entered into a contract with Mozambique’s national roads administration, *Administração Nacional de*

¹ Only CMC Maputo and CMC Africa Austral were named as claimants in the Request for Arbitration. CMC Ravenna, the company of which CMC Maputo is a branch, was added as a claimant in the Amended Request for Arbitration.

Estradas (“ANE”), financed by the European Development Fund (the “EDF”), to rehabilitate approximately 106 kilometers of that highway designated as “Lot 3.”

5. The Claimants completed the work on the Lot 3 portion of the highway in 2007, and entered into a period of discussions with ANE and the project engineer (the “Engineer”) concerning certain elements of additional compensation they asserted to be due to them for that work.
6. The Engineer’s determination of the amounts due to the Claimants was issued in May of 2009. Unhappy with certain of the Engineer’s conclusions, the Claimants entered into discussions with ANE to seek additional compensation. ANE ultimately made an offer on 30 October 2009 to settle the Claimants’ claims for EUR 8,220,888, to which the Claimants responded in a letter dated 2 November 2009. The Claimants characterize their 2 November 2009 letter as an acceptance of ANE’s offer. The Respondent characterizes that letter as a counteroffer that ANE did not accept, as a result of which ANE’s settlement offer expired.
7. To the extent the amount offered in ANE’s letter of 30 October 2009 exceeded the amount awarded by the Engineer, it was never paid to the Claimants, although demands, discussions, and correspondence on the subject continued from 2010 well into 2016.
8. The Claimants commenced this arbitration in 2017, asserting that the conduct of ANE and the Government of Mozambique with respect to the failure to pay the amount offered by ANE in its letter of 30 October 2009 breached a number of the obligations to investors from Italy that Mozambique agreed to in the BIT. The Respondent contends that this Tribunal lacks jurisdiction to consider those claims, and that the claims are in any event without merit.
9. This Award first describes the procedural history of this arbitration, and then describes in more detail the factual background out of which the Claimants’ claims arise. Next, it considers each of the Respondent’s objections to the Tribunal’s jurisdiction, and concludes that the Tribunal has jurisdiction to consider those claims. Finally, the Award examines each of the Claimants’ claims on the merits, and finds no liability to the Claimants on the part of the Respondent for any of those claimed breaches of the BIT.

II. PROCEDURAL HISTORY

A. Registration of Request

10. On 10 May 2017, ICSID received a Request for Arbitration dated 8 May 2017 from CMC Maputo and CMC Africa Austral against Mozambique (the “Request”).
11. On 26 May 2017, ICSID sent a letter to CMC Maputo and CMC Africa Austral asking for further information and clarifications (the “First Set of Questions”).
12. By letter of 16 June 2017, CMC Maputo and CMC Africa Austral answered the First Set of Questions and further indicated that they intended to file an Amended Request for Arbitration adding CMC Ravenna as a party.
13. On 20 June 2017, ICSID sent a letter to CMC Maputo and CMC Africa Austral noting their intention to file an amended request for arbitration and stating that, once the Amended Request for Arbitration was received, the Secretary-General would complete her review and decide whether to register the Request.
14. On 23 June 2017, ICSID received an Amended Request for Arbitration adding CMC Ravenna as a requesting party and making other changes to the Request.
15. On 26 June 2017, ICSID sent a letter to the Claimants asking for further information and clarification on CMC’s investments and date of consent to arbitration (the “Second Set of Questions”), as well as for a confirmation that the Amended Request was meant to be read in conjunction with their letter of 16 June 2017.
16. By letter of 28 June 2017, ICSID asked for further information and clarification (the “Third Set of Questions”) from the Claimants.
17. By letter of 6 July 2017, the Claimants answered the Second Set of Questions and confirmed that the Amended Request should be read in conjunction with their letter of 16 June 2017.
18. By letter of 7 July 2017, the Claimants answered the Third Set of Questions.

19. On 14 July 2017, the Secretary-General of ICSID registered the Amended Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

B. Constitution of Tribunal and First Meeting with the Parties

20. By letter of 17 July 2017, the Claimants appointed Mr. Peter Rees QC, a national of the United Kingdom, as arbitrator in this case.
21. By letter of 3 August 2017, the Respondent appointed Mr. J. Brian Casey, a national of Canada, as arbitrator in this case and proposed a method of constitution for the arbitral tribunal.
22. On 9 August 2017, the Claimants agreed to the method of constitution proposed by the Respondent. According to the Parties' agreement, the arbitral tribunal should consist of three arbitrators, one appointed by each party, with the co-arbitrators jointly appointing the President, after consultation with the Parties.
23. On 1 October 2017, the co-arbitrators, after consulting with the Parties, agreed to appoint Mr. John M. Townsend, a national of the United States, as President of the arbitral tribunal.
24. On 4 October 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was constituted on that date. Ms. Ella Rosenberg, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
25. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 29 November 2017 by conference call.
26. Following the first session, on 8 December 2017, the Tribunal issued Procedural Order No. 1 on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable

Arbitration Rules would be the ICSID Arbitration Rules in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C., USA. Annex A to Procedural Order No. 1 sets out a schedule for the proceeding and includes a briefing schedule, including a schedule for submissions on the Respondent's request for bifurcation.

C. Written Submissions and Bifurcation Request

27. On 19 March 2018, the Claimants submitted their Memorial on the Merits ("CM"), together with exhibits C-1 through C-49, legal authorities CL-1 through CL-41, as well as the witness statements of Messrs. Claudio Guerra, Fulvio Boiani, Nerio Gridella, Simon Palmer, and Enrico Alicandri.
28. From March to May 2018, the Parties exchanged requests for documents.
29. On 2 May 2018, the Respondent submitted to the Tribunal a Redfern Schedule setting forth the Parties' positions, agreements, and disagreements concerning 121 requests for documents made to the Claimants by the Respondent.
30. On 22 May 2018, the Tribunal issued Procedural Order No. 2, containing its rulings as to each request submitted to it.
31. On 20 July 2018, the Respondent submitted its Request for Bifurcation ("RRB"), and Objections to Jurisdiction and Memorial in Support Thereof ("ROJ"), together with exhibits R-1 through R-8, legal authorities RL-1 through RL-29, as well as the witness statement of Mr. Fernando Manhica.
32. On 1 August 2018, the Tribunal made a proposal to appoint Mr. Stijn Winters as an Assistant to the President and invited the Parties to be prepared to discuss the proposal at the hearing on bifurcation scheduled for 10 August 2018.
33. On 3 August 2018, the Claimants submitted their Response to Bifurcation ("CRB"), together with legal authorities CL-42 through CL-48.

34. 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 persons attended the hearing:

Members of the Tribunal:

Mr. John M. Townsend	President
Mr. J. Brian Casey	Arbitrator
Mr. Peter Rees QC	Arbitrator

ICSID Secretariat:

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

For the Claimants:

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

For the Respondent:

Mr. Juan Basombrio	Dorsey & Whitney LLP
Ms. Erica Chen	Dorsey & Whitney LLP

Court Reporter:

Mr. David Kasdan	Worldwide Reporting LLP
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35. At the hearing on bifurcation, with the agreement of the Parties, Mr. Stijn Winters was designated to serve as Assistant to the President of the Tribunal.
36. After hearing oral arguments from both Parties, the Tribunal deliberated and informed the Parties that it had decided not to bifurcate the proceeding. The Tribunal put a short statement of its reasons on the record of the hearing.
37. After having heard the Tribunal's decision on bifurcation, the Respondent requested that the Tribunal bifurcate only the jurisdictional objection based on the Cotonou Convention. The Claimants opposed the Respondent's request. After deliberating, the Tribunal denied the Respondent's request.
38. On 15 August 2018, the Tribunal issued Procedural Order No. 3, confirming its decision to deny the application for bifurcation as originally made and as modified by the Respondent at the hearing.

D. Further Written Submissions and Pre-Hearing Conferences

39. On 2 November 2018, the Respondent submitted its Counter-Memorial on the Merits (“RCM”), together with exhibits R-9 through R-11 and legal authorities RL-30 through RL-35, as well as the witness statements of Ms. Teresa Filomena Muenda and Mr. Cecilio Maria da Conceição Grachane.
40. On 6 and 7 December 2018, both Parties submitted Redfern Schedules setting forth their positions, agreements and disagreements concerning their respective requests for documents related to the merits.
41. On 19 December 2018, the Tribunal issued Procedural Order No. 4 containing the Tribunal’s rulings as to the Parties’ respective document requests on the merits.
42. On 31 January 2019, the Respondent submitted its Observations Regarding the European Court of Justice’s *Achmea* Decision (“ROA”), together with exhibits R-12 through R-14 and legal authorities RL-36 through RL-42, raising an additional objection to the Tribunal’s jurisdiction. The Respondent requested that this submission be accepted into the record and proposed a schedule for the Parties to submit briefs on the issue.
43. On 3 February 2019, the Tribunal invited the Claimants to submit their views on the Respondent’s proposed briefing schedule by 6 February 2019 and informed the Parties that this issue would be discussed during the previously scheduled 8 February 2019 pre-hearing telephone conference.
44. On 4 February 2019, the Claimants submitted their Reply on the Merits and Counter-Memorial on Jurisdiction (“CRMJ”), together with exhibits C-50 through C-56 and legal authorities CL-49 through CL-60, as well as the legal opinion of Mr. Tomás Timbane.
45. By a letter of 6 February 2019, the Claimants objected to the Respondent’s *Achmea* Observations, arguing that (i) introducing new allegations on issues of jurisdiction/admissibility seven months after the Memorial on Jurisdiction constitutes an abuse of process; (ii) the Respondent must have been aware of the *Achmea* Decision at the

time of the filing of its Memorial on Jurisdiction; and (iii) the *Achmea* issue has no relevance to the jurisdiction of the Tribunal.

46. On 8 February 2019, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference. It was agreed during the call that a second pre-hearing telephone conference would be held on 11 April 2019.
47. On 15 February 2019, the Tribunal issued Procedural Order No. 5 concerning the organization of the hearing and addressing Respondent's *Achmea* Observations. The Tribunal ruled that the Respondent's *Achmea* Observations should be admitted into the record. It invited the Claimants to respond to these Observations by 18 March 2019, and informed the Respondent that it could reply to the Claimants' response in its previously scheduled 1 April 2019 submission.
48. On 18 March 2019, the Claimants submitted their Comments to the Respondent's Observations Concerning the *Achmea* Decision ("COA"), together with legal authorities CL-61 through CL-65.
49. On 1 April 2019, the Respondent submitted its Rejoinder on the Merits, Reply on Jurisdiction and Reply on *Achmea* Observations ("RRM," "RRJ," "RRA"), together with legal authorities RL-43 through RL-45, as well as the second witness statements of Ms. Muenda and Mr. Grachane.
50. On 9 April 2019, the Claimants requested leave to introduce a copy of the award on the merits in *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30 ("Award on the Merits in *RREEF v. Spain*"). On the same date, the Tribunal invited the Respondent to indicate whether it intended to oppose this request by 10 April 2019, and informed the Parties that, if the Respondent objected to this request, both Parties should be prepared to address the matter during the second pre-hearing telephone conference on 11 April 2019.
51. By email of 10 April 2019, the Respondent (i) opposed the introduction of the Award on the Merits in *RREEF v. Spain* into the record; and (ii) requested leave to introduce the Amicus Brief filed by the European Commission in the *Micula v. The Government of*

Romania, U.S. District Court, District of Columbia, Case No. 1:17-cv-02332-APM pending before the United States District Court of Columbia (“Amicus Brief of the European Union in *Micula v. Romania*”).

52. Later on 10 April 2019, the Tribunal informed the Parties that both applications to submit additional documents would be discussed during the second pre-hearing conference call.
53. On 11 April 2019, the Claimants submitted fourteen amended translations. The Respondent objected to Claimants’ submission of the amended translations on the same date.
54. Also on 11 April 2019, the Tribunal held a second pre-hearing organizational meeting with the Parties by telephone conference.
55. During the conference call, the Tribunal granted the Claimants’ request for leave to submit into the record a copy of the Award on the Merits in *RREEF v. Spain*, and the Respondent’s request to submit the Amicus Brief of the European Union in *Micula v. Romania*.
56. Also during the conference call, the Claimants informed the Tribunal and the Respondent that Mr. Gridella might not be able to appear at the hearing because he had commenced employment with a new employer after giving his witness statement, and had so far been unable to obtain permission from his new employer to attend the hearing. In response to this, the Respondent stated that if Mr. Gridella did not appear, it might apply to strike Mr. Gridella’s witness statement. After some discussions, and an inquiry from the Tribunal as to whether the Respondent would be willing to help resolve the difficulty, the Tribunal stated that it would issue further instructions following the conference call.
57. Also on 11 April 2019, after the conference call, the Claimants sought leave to introduce two new documents into the record: the Declaration of the Representative of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union and a similar declaration by five other EU member states. The Respondent requested until 15 April 2019 to provide its observations on the Claimants’ request.

58. On 12 April 2019, the Tribunal issued Procedural Order No. 6, concerning the organization of the hearing. The Tribunal (i) ordered the Claimants to provide the Respondent with red-lined or similar versions of the new translations, showing how they differ from the translations previously submitted; and (ii) granted the Respondent's request to respond to the Claimants' application to submit two additional documents into the record.

59. On the issue of Mr. Gridella's attendance as a witness at the hearing, the Tribunal directed as follows in Procedural Order No. 6:

a) The Claimants shall inform the Tribunal and the Respondent, no later than April 22, 2019, whether they have been able to arrange for Mr. Gridella to attend the hearing.

b) If Mr. Gridella does not attend the hearing, the Respondent may make an application to the Tribunal concerning what consequence, if any, should follow from Mr. Gridella's failure to attend. Such application is to be made orally, during the time period reserved for Mr. Gridella's testimony in paragraph 7 below, and the Claimants will be given an opportunity to respond to such application at that time. Both parties should expect questions from the Tribunal in this connection.

60. On 14 April 2019, the Claimants requested permission to add Mr. Enrico Alicandri to its witness list in view of the uncertainty surrounding the attendance of Mr. Gridella at the hearing. By email of the same date the Respondent objected to the Claimants' request.

61. In a second email of the same date, the Respondent wrote to the Tribunal:

What we have here is an obvious prior failure by the Claimants' counsel to secure Mr. Gridella's commitment to appear at the hearing, not any allegedly "new" concern by Mr. Gridella. [...] If Mr. Gridella does not appear to testify at the hearing, both of Mr. Gridella's witness statements, and all references in the memorials to him, must be stricken from the record.

Second, Respondent strongly objects to the request by the Claimants to now call their own witness. The Tribunal will recall that, during the first pre-hearing conference, the Claimants objected when the Respondent sought to call its own witness to testify at the hearing. Claimants said that this was not allowed under the Procedural Orders – that a party cannot call its own witness to testify. As a result, the Respondent did not call its own witness and this

agreement was reflected in the list of witnesses jointly provided by the parties. Respondent has not called Mr. Alicandri to testify, he was not included in the jointly-agreed list of witnesses for the hearing agenda, and therefore the Claimants cannot unilaterally call him as a witness because they have previously taken the position that a party cannot call its own witnesses and the Respondent accepted that position to its prejudice.

Mr. Alicandri also has not provided a witness statement on the new issues on which the Claimants now seek to call him, and therefore that also would render his testimony improper, because the Respondent would lack prior knowledge of his testimony which creates a Due Process problem. A witness cannot testify on new matters, and therefore there is nothing that he could say at the hearing, if the Respondent does not want to call him to testify. In addition, he clearly cannot testify about Mr. Gridella's alleged "concerns," because that is inadmissible hearsay.

Further, the Tribunal's most recent procedural order indicates that it will decide the motion to strike Mr. Gridella's witness statements after it hears argument on the motion at the hearing. Therefore, there will be uncertainty when the hearing starts as to whether Mr. Gridella's witness statements will even be considered. If Mr. Gridella's witness statements remain part of the record, that renders the Claimants' current request moot. This alone has introduced sufficient uncertainty into the opening statements – the Respondent does not believe that there can be any reference to Mr. Gridella's witness statements in the opening statement if he is not present to testify, but we will not have a ruling from the Tribunal when the hearing starts. It is very difficult to prepare for a merits hearing not knowing whether the testimony of a key witness like Mr. Gridella will be part of the record or not – this is a very serious problem caused by the Claimants. The preferred approach would have been that the witness statements of Mr. Gridella are stricken prior to the start of the hearing, as they should be.

The addition of Mr. Alicandri would create further difficulties, and forces the parties to have to argue in the alternative in a totally unworkable way. Again, these problems are all the creation of the Claimants' prior failure to secure Mr. Gridella's attendance at the hearing, and the addition of Mr. Alicandri would simply complicate things further. Any sympathy that the Tribunal may have initially had for the Claimants' own predicament, should be disregarded given the misrepresentations about Mr. Gridella's employment status. At this late stage in the proceedings, and certainly during the hearing, the Respondent cannot be left guessing which Claimants'

witness will be considered by the Tribunal. How can the Respondent prepare for a hearing under those circumstances?

Therefore, the Tribunal must stay the course with the decision it has made in the most recent procedural order – it will hear the motion to strike Mr. Gridella’s testimony at the hearing, and it must deny the Claimants’ request to unilaterally call Mr. Alicandri because that is not allowed as previously argued by the Claimants themselves and because the Respondent cannot be left guessing regarding what new testimony Mr. Alicandri will provide.

In the alternative, if the Tribunal is inclined to depart from the procedural orders and allow the Claimants to unilaterally call Mr. Alicandri (which the Tribunal should not do), then it must be on the strict condition that Mr. Gridella’s two witness statements, and all references in the memorials to them, are stricken from the record immediately – that is, now before the hearing. Respondent must have clarity as to what evidence is going to be part of the record at the hearing. Due process demands that.

62. On 16 April 2019, the Respondent objected to the Claimants’ introduction of two additional documents into the record.
63. On 17 April 2019, the Claimants (i) clarified Mr. Gridella’s employment status and explained that, at the time when Mr. Gridella signed his second witness statement, he had just begun his new employment and was not aware of the new employer’s concerns; (ii) argued that Mr. Alicandri would only testify on new issues and that there was no suggestion that he would provide testimony on matters already on the record; and (iii) submitted the red-lined versions of the amended translations they had previously submitted.
64. On 17 April 2019, the Respondent submitted the following response to the Claimants’ message of 17 April 2019:

Respondent objects to the entire content of Mr. Del Rio’s email referring to Mr. Gridella’s asserted reasons for not appearing at the hearing, except for the admission by Claimants’ counsel that they misrepresented to the Tribunal during the prehearing conference that Mr. Gridella was unemployed when he signed the two witness statements. The rest of the details are entirely “hearsay.” Mr. Gridella has not testified to any of those assertions, including his purported reasons for refusing to testify at the hearing. The hearsay evidence is improperly being presented by the Claimant’s counsel.

Respondent will not have an opportunity to cross-examine Mr. Gridella about said hearsay evidence, and therefore it is inadmissible and cannot be included in the record.

With respect to Mr. Alicandri, he would be providing new testimony at the hearing that the Respondent and this Tribunal have never seen in a witness statement. In his initial email, Mr. Del Rio stated that Mr. Alicandri would “speak about the non-attendance of Mr. Gridella.” That is new evidence and is also hearsay evidence. Mr. Alicandri also cannot speak to substantive issues that he has not testified about before. He cannot testify about what Mr. Gridella has testified. Claimants’ cannot substitute witnesses to cover Mr. Gridella’s absence – that is exactly what they want to do with Mr. Alicandri and it would be highly improper. Allowing Mr. Alicandri to testify as to new matters would be a serious violation of the Respondent’s due process rights, because the Respondent does not know what he is going to say. There are no surprise witnesses in international arbitration. Claimants’ counsel also fails completely to address the point that they are contradicting themselves. Claimants do not dispute that they had previously taken the position that a party cannot call its own witness to testify under the procedural orders. Respondent therefore also did not do so, when the parties agreed on the list of witnesses. Claimants are now estopped from taking a contrary position. Therefore, Mr. Alicandri cannot be called by the Claimants.

Mr. Gridella is the only witness of the Claimants who has asserted that there was a settlement agreement. Therefore, it is critical that the Respondent have the right to cross-examine him. If Mr. Gridella does not appear at the hearing, and his witness statements are stricken as they must be, the Claimants have no witness to dispute the Respondent’s position that there was no settlement agreement. In sum, the Claimants cannot prove their case. Claimants should seriously consider whether they want to go forward with this hearing, which will result in significant expense. Claimants will not be the first party that had to abandon a case because it could not secure the cooperation of its key witness. Respondent reminds that Claimants that it has requested that, as part of the Tribunal’s award if it finds for the Respondent, that the Tribunal order reimbursement by the Claimants of all fees and costs incurred by the Respondent in these proceedings.

Mr. Gridella has not testified to any of those assertions, including his purported reasons for refusing to testify at the hearing. The hearsay evidence is improperly being presented by the Claimant’s counsel. Respondent will not have an opportunity to cross-examine

Mr. Gridella about said hearsay evidence, and therefore it is inadmissible and cannot be included in the record.

65. By email of 17 April 2019, the Claimants objected to the Respondent's allegations and requested leave to submit a second witness statement by Mr. Alicandri.
66. On the same date, the Respondent objected to the Claimants' request. The Respondent also requested that the new translations submitted by the Claimants be stricken from the record.
67. The Parties exchanged further observations on these matters by email on 18 April 2019.
68. On 18 April 2019, the Tribunal issued Procedural Order No. 7 which included the following rulings:

Witness Statement of Mr. Gridella

11) [...] Mr. Gridella's two witness statements will remain part of the record, and [...] may be discussed by both parties in their opening statements. However, the Tribunal reserves for determination in its award the question of what weight, if any, should be given to Mr. Gridella's witness statements, or any part of them. The parties are free to present their arguments on that subject in their opening statements at the hearing, in their closing arguments at the hearing, or in their post-hearing briefs, as each party may elect.

Testimony of Mr. Alicandri

14) No new witness statement of Mr. Alicandri is needed or will be accepted.

Additional Submissions

16) Upon consideration of the Respondent's objection, the two additional declarations made by E.U. member states are accepted into the record of this arbitration.

Amended Translations

18) The Tribunal prefers accurate translations to inaccurate translations. Based on the Claimants' representation in their email to the Secretary of April 11, 2019 that these are "small amendments," and in the absence of any showing by the Respondent that the amendments would result in the translations being inaccurate or in prejudice to the Respondent, the amended translations are accepted into the record.

69. On 22 April 2019, the Respondent submitted its Objections to Procedural Order No. 7 and Motion for Reconsideration (“Motion for Reconsideration”), together with exhibits R-15 and R-16 and legal authorities RL-47 through RL-60.
70. On 23 April 2019, the Claimants and the Respondent commented on the Respondent’s Motion for Reconsideration by exchange of emails. The Claimants stated that they would hold off on making comments on the Respondent’s Motion for Reconsideration until instructed to do so by the Tribunal. The Respondent noted that the deadline for the Claimants to confirm whether Mr. Gridella would appear to testify was 22 April 2019, and in the absence of such notification, assumed that Mr. Gridella would not appear.
71. By email of 23 April 2019, the Tribunal informed the Parties that:
1. Having heard nothing from the Claimants about the attendance of Mr. Gridella at the hearing by the April 22 deadline set in P.O. No. 6, the Tribunal assumes that he will not be attending the hearing.
 2. The Tribunal has received the Respondent’s Objections to P.O. No. 7 and Motion for Reconsideration dated April 22. The Tribunal would like to receive a response from the Claimants, but understands that it may be difficult for the Claimants to provide one before the Hearing commences. We would be grateful if the Claimants would advise us when they will be able to respond.²
72. On 24 April 2019, the Claimants informed the Tribunal that (i) despite the Claimants’ best efforts, Mr. Gridella would not be attending the hearing; (ii) the Claimants would not be in a position to prepare a detailed response to the Respondent’s Motion for Reconsideration before the hearing; and (iii) that the Respondent has had every opportunity and has extensively argued its motion to strike Mr. Gridella’s evidence. The Claimants requested that the Tribunal deny the Respondent’s motion to reconsider Procedural Order No. 7.
73. By email of the same day, the Respondent commented on the Claimants’ response.

² Tribunal’s email to the Parties dated 23 April 2019.

E. Ruling on Gridella's Witness Statement

74. At the outset of the Hearing, the Tribunal heard the Parties' arguments on the Respondent's Motion for Reconsideration of Procedural Order No. 7 and their views as to the consequences that should attach to Mr. Gridella's absence. After a short recess, the Tribunal rendered its decision on the motion orally, stating:

We have considered the arguments heard this morning and presented in writing in the motion itself and the subsequent e-mails. We conclude that we do not change Procedural Order 7. So we will be most interested in the Parties' thoughts as this hearing proceeds concerning what weight, from full weight to none, or any point in between, should be given to Mr. Gridella's witness statement.³

75. While Mr. Gridella's witness statements were admitted as part of the record, the Tribunal found in the course of deliberations that it was not necessary to rely on those statements as support for any ruling made by the Tribunal. Mr. Gridella's statements are cited as a source for some portions of the Factual Background section of this Award, but no substantive finding on a controverted matter is made solely on the basis of those statements.

F. Hearing on Jurisdiction and the Merits

76. A hearing on Jurisdiction and the Merits was held at the offices of the World Bank in Washington, D.C. from 29 April 2019 to 1 May 2019 (the "Hearing"). The following people were present at the Hearing:

Members of the Tribunal:

Mr. John M. Townsend	President
Mr. J. Brian Casey	Arbitrator
Mr. Peter Rees QC	Arbitrator

Assistant to the President

Mr. Stijn Winters	Assistant to the President
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ICSID Secretariat:

Ms. Ella Rosenberg	Secretary of the Tribunal
Ms. Maria-Rosa Rinne	Paralegal

³ Tr. 29 April 2019, p. 44, l. 12-20.

For the Claimants:

Counsel

Mr. Luis Gonzalez Garcia

Matrix Chambers

Mr. Alan Del Rio

LDR Consultants

Expert

Mr. Tomás Timbane

TTA Advogados

Witness

Mr. Enrico Alicandri

CMC

Party representative

Ms. Valentina Casasola

CMC

For the Respondent:

Counsel

Mr. Juan Basombrio

Dorsey & Whitney LLP

Ms. Erica Chen

Dorsey & Whitney LLP

Expert

Ms. Teresa Filomena Muenda

Attorney, Mozambique

Witness

Cecilio Maria da Conceição Grachane

Former General Director of the National
Road Administration (ANE), Mozambique

Party representatives

Angelo Vasco Matusse

Deputy Attorney General, Mozambique

Ismael Faruc Nurmahomed

National Road Administration (ANE),
Mozambique

Court Reporter:

Ms. Laurie Carlisle

Carlisle Reporting

77. The Parties presented opening statements, following which the following witnesses and experts were examined:

On behalf of the Claimants:

Mr. Enrico Alicandri

CMC

Mr. Tomás Timbane

TTA Advogados

On behalf of the Respondent:

Mr. Cecilio Maria da Conceição Grachane

Former General Director of National Road
Administration (ANE), Mozambique

Ms. Teresa Filomena Muenda

Attorney, Mozambique

G. Post-Hearing Submissions on Jurisdiction and Costs

78. The Parties agreed at the Hearing that no post-hearing submission on the merits would be needed.

79. 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 of the Court) ("Opinion 1/17")⁴ and the new decision of the arbitral tribunal in *Eskosol S.p.A. in Liquidazione v. the Italian Republic* (ICSID Case No. ARB/15/50) on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes dated 7 May 2019 ("Award in *Eskosol v. Italy*" or "*Eskosol*").⁵
80. On 22 May 2019, the Claimants submitted their Comments on Opinion 1/17 and the Award in *Eskosol v. Italy* and Respondent submitted its Observations on *Eskosol* and Opinion 1/17.
81. The Parties filed their submissions on costs on 29 May 2019. The Claimants submitted no comment to the Respondent's cost application.
82. On 7 June 2019, the Respondent submitted to the Secretary a document entitled "Respondent's Opposition to Claimants' Statement of Costs."
83. On 12 June 2019, the Claimants sent an email to the Secretary asking that the Respondent's Opposition "should not be admitted into the record, because it does not represent an opposition to the claimants' costs, but is instead an attempt by the Respondent to present a post-hearing submission to the Tribunal in relation to its arguments on jurisdiction and merits." On the same day, the Respondent sent a response to the Secretary. By e-mail of 13 June 2019, the Secretary informed the Parties that the Tribunal would consider these objections to the costs submissions in the Award, and that no further submissions concerning costs would be accepted.

⁴ Opinion 1/17 of the Court of Justice of the European Union ("ECJ") of 30 April 2019 (RL-62).

⁵ *Eskosol S.p.A. in Liquidazione v. the Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes (7 May 2019) (RL-61).

H. Closing of the Proceeding

84. The proceeding was closed pursuant to ICSID Arbitration Rule 38(1) on 24 September 2019.

III. FACTUAL BACKGROUND OF THE DISPUTE

A. The Rehabilitation of Mozambique's Infrastructure

85. The responsibility for public works and infrastructure in Mozambique falls within the purview of Mozambique's Ministry of Public Works and Housing (the "Ministry"). The Ministry delegates responsibility for the development and maintenance of the road network to ANE. The Director General of ANE is appointed by the Minister of Public Works and Housing. The Claimants argue that, as "an instrumentality, emanation and/or representative of the State," ANE's conduct can be attributed to the Respondent for the purposes of the BIT.⁶
86. The Claimants quote a 1992 World Bank report as saying that Mozambique's road network had "deteriorated to the point where nearly 40% is in poor or bad condition, creating major obstacles to the movement of agricultural products to the ports, markets and processing centers."⁷ They also quote a 2006 European Union report that similarly found the country's transport infrastructure to be in dire need of improvement.⁸
87. Mozambique's main road is the *Estrada Nacional 1* or "N1," which runs from Maputo in the south to Pemba in the north. At some point before April 2004, the Government decided to rehabilitate the 374.85 km stretch of the N1 between Namacurra and Rio Ligonha, and began to refer to that effort as the "Namacurra – Rio Ligonha Project."⁹

⁶ RA, ¶11.

⁷ C-20, ¶4.

⁸ C-22, p. 17.

⁹ CM, ¶¶24-36.

88. To make the Namacurra – Rio Ligonha Project more manageable, Mozambique divided it into three “Lots,” as follows:¹⁰

Lot	Section		Extension
1	A	Namacurra – Malei	28.153 Km
	B	Malei – Mocuba	53.047 Km
	C	Mocuba – Nampevo	70.450 Km
		Total Lot 1	151.750 Km
2	D	Nampevo - Alto Molócuè	117.180 km
3	E	Alto Molócuè - Rio Ligonha	106.020 km
		Total Lot 3	374.85 km

89. This dispute arises primarily out of the rehabilitation of Lot 3, Section E, which consisted of a 106.020 km stretch of the N1 between Alto Molócuè and the Ligonha River (the “Lot 3 Project”).

B. The Lot 3 Project: Alto Molócuè - Rio Ligonha

90. The Respondent arranged to receive financing for the Lot 3 Project from the European Development Fund.¹¹ This financing had implications for the legal framework within which Mozambique entered into contracts for the Lot 3 Project, because of a treaty called the *Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part* (the “Cotonou Convention”), signed in Cotonou on 23 June 2000, and amended in 2005 and 2010. According to the Respondent, as will be developed in more detail below, “any disputes related to transnational contracts financed by the European

¹⁰ CM, ¶31.

¹¹ C-25, pp. 1-2.

Development Bank must be arbitrated under the Arbitration Rules of the Cotonou Convention.”¹²

91. ANE awarded the construction contracts for each of the Namacurra – Rio Ligonha Project Lots in a public tender process launched on 10 April 2004. The tendering parties had to submit a bid specifying how they would complete the project and who would be the key people involved in it. Each bid had to include a “Bill of Quantities, Method Statements and other forms setting out the experience of the [bidders], CVs of key personnel, an equipment list, forms showing that the [bidders] were not involved in litigation, their financial capacity, a bid bond and any other forms necessary for completing a compliant tender.”¹³
92. Several companies tendered for the Lot 3 Project. The tender evaluation committee recommended awarding Lot 3 to the Claimants even though it had received a lower bid from another company, because the lowest bidder was also the lowest bidder on Lot 1 and could not take on both projects. The Lot 3 Project was awarded to the Claimants in January 2005.¹⁴

C. The Lot 3 Contract

93. The contract for Lot 3 – Public Works Contract No 307/DEN/04 for Road Rehabilitation between Namacurra and the Ligonha River, Lot 3 (the “Lot 3 Contract”) – was signed on 16 March 2005. The signatories to the Lot 3 Contract are the Ministry, represented by ANE, and “C.M.C. A.A.,” a corporation with its address in Maputo, Mozambique. “C.M.C. A.A.” would appear to be the Claimant CMC Africa Austral. The Special Conditions of the Lot 3 Contract identify Claimant CMC Maputo as the “*Empreiteiro*” (“Contractor”), although CMC Maputo is not a signatory to the contract.¹⁵

¹² ROJ, ¶3; See Part IV.D of this Award.

¹³ Witness Statement of S. Palmer, ¶18.

¹⁴ First Witness Statement of C. Grachane, ¶7; Witness Statement of S. Palmer, ¶20.

¹⁵ C-25.

94. CMC Africa Austral had been formed in 2000 or 2001.¹⁶ The Claimants explain that CMC Maputo was often used as a cosigner or backer in order to supplement a bid by CMC Africa Austral, because CMC Africa Austral did not have the experience required to bid for large public works projects on its own.¹⁷ This may have been the case with the Lot 3 Project, because the EDF requires bidders to meet certain experience requirements, although only CMC Africa Austral appears as a signatory on the Lot 3 Contract. According to Mr. Gridella, the invoices for the Lot 3 Contract were issued by CMC Africa Austral, but the CMC tenders had been prepared by CMC Maputo.¹⁸
95. The original value of the Lot 3 Contract was EUR 26,201,593.79, including VAT.¹⁹ The Lot 3 Contract was “[e]ndorsed for financing by the Chief of the Delegation of the European Commission to Mozambique” on 14 March 2005, two days before the Lot 3 Contract was signed.²⁰
96. The Lot 3 Contract comprised the contract itself, the “General Conditions for Projects Financed by the EDF (‘General Conditions’),” and the Special Conditions.²¹ Article 2 of the Special Conditions provides that the Lot 3 Contract is governed by Mozambique law. The language of the contract is Portuguese.
97. Article 48.1 of the General Conditions specifies that, “[u]nless otherwise stipulated in the Special Conditions, and except as provided in Article 48.4, the Contract shall be at fixed prices which shall not be revised.” Article 49.1 of the Special Conditions states that “[t]he Contract is a unit price contract.” Article 49.1(b)(i) of the General Conditions specifies that “the amount due under the Contract shall be calculated by applying the unit rates to the quantities actually executed for the respective items, in accordance with the Contract.”

¹⁶ Witness Statement of S. Palmer, ¶25 states 2001; Witness Statement of N. Gridella, ¶20 states 2000.

¹⁷ Witness Statement of S. Palmer, ¶25; Witness Statement of N. Gridella, ¶20.

¹⁸ Witness Statement of N. Gridella, ¶20-21. *See* para. 75, above.

¹⁹ CM, ¶38.

²⁰ C-25.

²¹ C-25, Article 2.

The Respondent asserts that, by agreeing to a “unit price contract,” the Parties expressly chose not to enter into a “cost-plus contract.”²²

98. Article 1 of the Special Conditions provides that the Engineer/Supervisor on the project would be *Direcção de Estradas Nacionais* (“DEN” or the “Engineer”). DEN was represented on the Lot 3 Project by Mr. Nicholas O. Dwyer.²³ Article 5.1 of the General Conditions states that, “[t]he Supervisor shall carry out the duties specified in the Contract. Except as expressly stated in the Contract, the Supervisor shall not have authority to relieve the Contractor of any of his obligations under the Contract.”

99. Article 55 of the General Conditions, “Claims for Additional Payment,” provides that the Contractor shall give the Engineer notice of any claim for additional payment. Article 55.2 provides that:

55.2 When the Supervisor has received the full and detailed particulars of the Contractor’s claim that he requires, he shall, without prejudice to Article 21.4 after due consultation with the Contracting Authority and, where appropriate, the Contractor, determine whether the Contractor is entitled to additional payment and notify the parties accordingly.

100. Article 68 of the General Conditions provides for the “Settlement of Disputes.” Article 68.1 requires the Contracting Authority (the Ministry, represented by ANE) and the Contractor (CMC Africa Austral according to the Contract, CMC Maputo according to the Special Conditions) to make an effort to settle amicably “disputes relating to the Contract which may arise between them.” Article 68.2 provides that “[t]he Special Conditions shall prescribe: a) the procedure for the amicable settlement of disputes; [...]” Article 68.5 then provides that:

²² RCM, ¶16; Article 49.1(c) of the General Conditions states that, “[f]or cost-plus contracts, the amount due under the Contract shall be determined on the basis of actual costs with an agreed addition for overheads and profit.” (C-25).

²³ CM, ¶38.

68.5 In the absence of an amicable settlement or settlement by conciliation within the maximum Time Limits specified, the dispute shall:

a) in the case of a **national contract**, be settled in accordance with the national legislation of the State of the Contracting Authority; and

b) in the case of a **transnational Contract**, be settled, either:

i) if the Parties to the Contract so agree, in accordance with the national legislation of the State of the Contracting Authority or its established international practices; or

ii) by arbitration in accordance with the procedural rules adopted in accordance with the [Cotonou] Convention.²⁴

101. Article 68 of the Special Conditions elaborates on the procedures for the “Settlement of Disputes.” That Article first addresses amicable settlement procedures, and then provides in Article 68.3 that:

68.3 The parties may agree that the procedures for the conciliation referred by article 68.3 of General Conditions of Contract are the same of [sic] the Sub clause 5 of “Procedural Rules on Conciliation and Arbitration of contracts financed by European development Found” [sic] adopted by Decision No 3/90 ACP-CEE Council of Ministers dated 29 March 1990 (Official Journal No L 382/95 on 31.12.90).

[...]

The intervention of the European Communities agency in the amicable settlement may be made by the delegation of the European agency in Mozambique or by the Departments of the Head offices of the European Communities agency, in accordance with the agreements made by the parties and the agency.

102. Article 68.5 of the Special Conditions then provides that arbitration of a “transnational Contract” pursuant to Article 68.5(b)(ii) of General Conditions will be conducted pursuant

²⁴ C-25 (emphasis added).

to “the abovementioned Procedural Rules on Conciliation and Arbitration.”²⁵ Those “Procedural Rules” are the Cotonou Arbitration Rules.

103. On 1 November 2005, Addendum No. 1 to the Lot 3 Contract was signed to include the construction of a bridge over the Ligonha River. This Addendum was worth EUR 1,603,637.44, including VAT.²⁶
104. On 23 November 2007, Addendum No. 2 was signed to include changes to the total price of the Lot 3 Contract as a result of variations ordered by the Engineer, additional works, and an extension of the time within which the Lot 3 Contract was to be performed until 8 August 2007. The revised total price of the Lot 3 Contract was EUR 29,769,760.53 including VAT.²⁷

D. Performance of the Lot 3 Contract

105. The Claimants started work on the Lot 3 Project on 1 May 2005.²⁸ The Claimants state that they invested heavily in the Project.²⁹
106. On 30 April 2007, the Claimants concluded their original works.³⁰ The additional work on the Lot 3 Project was substantially completed in or around November 2007.³¹ Some “snags and additional repairs” were completed in 2008.³²

²⁵ C-25.

²⁶ CM, ¶41.

²⁷ CM, ¶42.

²⁸ CM, ¶40.

²⁹ Witness Statement of N. Gridella, ¶22.

³⁰ CM, ¶42.

³¹ CM, ¶48; Witness Statement of N. Gridella, ¶31; *See* Witness Statement of F. Boiani, ¶¶19-20 (“at the time of my departure from the Site in September 2007, the works were all but complete. [...] A large portion of the road was open to traffic when I left the Site in September 2007.”).

³² Witness Statement of N. Gridella, ¶31.

107. On 25 March 2009, CMC Maputo accepted as an additional assignment responsibility for the completion of the Lot 2 Project, undertaking to perform the remaining obligations of the prior contractor. The Claimants state that the Lot 2 Project was transferred to them because they had performed excellently on the Lot 3 Project.³³ The Respondent asserts that nothing indicates that the Claimants' performance on the Lot 2 Project was in any way contingent on a particular outcome of disputes about Lot 3 claims.³⁴
108. On 14 July 2011, ANE issued a Final Acceptance Certificate for Lot 3, in accordance with Article 62 of the General Conditions.³⁵ Article 62 provides that:

62.1 Upon the expiration of the Maintenance Period, or where there is more than one such period, upon the expiration of the latest period, and when all defects or damage have been rectified, the Supervisor shall issue to the Contractor a Final Acceptance Certificate and a copy thereof to the Contracting Authority stating the date on which the Contractor completed his obligations under the Contract to the Supervisor's satisfaction. The Final Acceptance Certificate shall be given by the Supervisor within 30 days after the expiration of the above stated period, or as soon thereafter as any Works as instructed, pursuant to Article 61, have been completed to the satisfaction of the Supervisor.

62.2 The Works shall not be considered as completed until a Final Acceptance Certificate shall have been signed by the Supervisor and delivered to the Contracting Authority, with a copy to the Contractor.

62.3 Notwithstanding the issue of the Final Acceptance Certificate, the Contractor and the Contracting Authority shall remain liable for the fulfillment of any obligation incurred under the Contract prior to the issue of the Final Acceptance Certificate, which remains unperformed at the time such Final Acceptance Certificate is issued. The nature and extent of any such obligation shall be determined by reference to the provisions of the Contract.³⁶

³³ CM, ¶50; C-7; Witness Statement of S. Palmer, ¶22.

³⁴ RCM, ¶26; First Witness Statement of C. Grachane, ¶14.

³⁵ C-5.

³⁶ C-25.

The Final Acceptance Certificate states that “the Engineer certifies that the Contractor, CMC di Ravenna Soc. Coop. Arl, completed his obligations under the Contract, with effect from 24 March 2011.”³⁷

109. Claimants allege that they have a number of claims against ANE that arose out of problems with the Lot 3 Project, involving additional works, delays, and disruption of the work process,³⁸ but they have not quantified those claims except as described below. The Respondent argues that the Claimants have submitted no documentation of these claims, which allegedly arose between 2005 and 2009. In addition, it points out that the Claimants do not seek to establish their entitlement to relief for these alleged contract claims under the Lot 3 Contract.³⁹

E. Compensation negotiations before 2010

1. The Engineer’s Determination & IPC 27

110. On 11 May 2009, ANE sent the Claimants the “Final Decision of the Engineer” pursuant to Article 55.2 of the General Conditions on twenty claims that the Claimants had asserted with regard to Lot 3.⁴⁰ The Claimants valued those claims at EUR 12,759,498.18.⁴¹ The Engineer determined that CMC was entitled to EUR 2,440,925.00.⁴²
111. In the table attached to his Final Decision as Annex II, the Engineer lists the twenty claims asserted by the Contractor, the amount claimed for each, and the amounts awarded by the Engineer. The table below excerpts from Annex II relevant entries concerning the four

³⁷ C-5.

³⁸ CM, ¶¶44-50.

³⁹ RCM, ¶27.

⁴⁰ C-28.

⁴¹ *Id.*, Annex II.

⁴² *Id.*

claims for which the Engineer awarded an amount, plus a fifth amount accompanied by the “Observation” “CMC/NOD agree.”⁴³

Claim No.	Subject of Claim	Amount Claimed by the Contractor	Revision/Recommendation of the Engineer
2	Delayed access for diversion construction	470,512.79	65,295
5	Increase of quantity of cut to spoil	6,783,895.86 ⁴⁴	1,432,983
10	Unforeseen days off	45,725.85 ⁴⁵	18,033
Unnumbered	Unforeseen days off / “CMC/NO D agree”		9,017
14	Additional borrow pits	1,750,570.08	915,597
Totals (all claims)		12,759,498.18	2,440,925

The Engineer awarded nothing for the remaining 16 claims of the Contractor.

112. The Respondent describes the Engineer’s decision as “appropriate.”⁴⁶ The Claimants were not pleased with that decision, however, and on 15 May 2009 sent ANE a letter taking issue with the Engineer’s decision. The letter stated:

After a careful analysis of the contents attached to your letter, we regret to inform you that the sponsors offered do not cover the

⁴³ C-28 (Claimants’ amended translation). The original Portuguese version of C-28, Annex II, gives the same description for this item as for line 10 directly above it (“Tolerancia de ponto nao prevista”). “NOD” appears to be the initials of the Engineer’s representative Nicholas O. Dwyer.

⁴⁴ The Claimants’ Amended Translation of C-28 mistakenly typed ‘6,783,895.66,’ which differs from the original document in Portuguese; the Tribunal has conformed this table to the figures in the Portuguese original.

⁴⁵ The Claimants’ Amended Translation of C-28 mistakenly typed ‘45,725.65,’ which differs from the original document in Portuguese; the Tribunal has conformed this table to the figures in the Portuguese original.

⁴⁶ RCM, ¶¶32-34.

additional costs actually incurred at the time for the execution of the Contract.

We request that your position be reviewed and that the costs and financial charges actually incurred by us be recognized.

We reiterate that it is our firm intention to reach a friendly agreement, but we emphasize that if such agreement is not reached, we intend to initiate the legal procedures established in the Contract and in the law governing it.

We also pointed out that in the negotiations related to the assignment of Lot 2, our Company was always very clear that our availability to complete the work was strictly linked to the satisfactory resolution about Lot 3[...]⁴⁷

113. ANE responded on 7 July 2009, stating:

With reference to your above letter.

We draw your attention to the fact that this is a “unit price” contract, not a “cost plus fee” contract. We consider that the amounts included in Engineer’s determination represent a correct evaluation of extension of time and additional payments in relation to your claims.

We take note that you reserved your rights in relation with the Engineer’s determination; however, we invite you to submit a request of payment for the amounts included in this determination.⁴⁸

114. On 24 July 2009, the Claimants replied to the 7 July 2009 letter by sending ANE an interim payment certificate (“IPC 27”) for the sum awarded by the Engineer. In their letter, the Claimants stated that:

We herein enclose the interim payment application No.27 of 23 July 2009 according to your letter with Ref:203/DAC/DIPRO/09 of 07.07.09, for your appreciation and approval.

Once again we reiterate that it is our intention to reach a friendly agreement to recognize the costs and financial fees actually borne

⁴⁷ C-29 (Claimants’ amended translation). “Sponsors” appears to be a mistranslation of the Portuguese “montantes,” which the Tribunal translates as “amounts.”

⁴⁸ C-30 (Claimants’ amended translation); First Witness Statement of C. Grachane, ¶11.

by us for the execution of the construction Works and, if that does not happen, activate the legal proceedings indicated in the Contract and in the law governing it.⁴⁹

115. On 10 August 2009, the Claimants sent ANE an invoice for the “costs of extra work” in the amount of EUR 2,440,925.00 plus VAT, the same amount recommended in the Engineer’s decision and requested in IPC 27.⁵⁰ ANE authorized payment of that amount on 15 October 2009.⁵¹
116. In September of 2009, ANE issued a Final Project Report on Lot 3.⁵² The Engineer’s representative’s name, as well as ANE’s, appears on the cover page. That report states:

3.7 Claims

The contractor filed claims and measurement items in the amount of 12,498.18 [sic] Euros (that means 53% of the original contract value).

The Engineer found that the contractor was entitled to 2,440,925 Euros for claims and 105,524.09 Euros for measurements (see chapter 6.3 below).⁵³

Sections 6.3.1-6.3.22 of the Final Project Report describe the Claimants’ claims and the Engineer’s decision on each claim.⁵⁴

2. CMC’s Efforts to Increase the Amount Awarded by the Engineer

117. Notwithstanding the issuance of IPC 27, the Claimants remained dissatisfied with the Engineer’s decision on their claims. At the same time that the Claimants considered themselves undercompensated for their work on Lot 3, ANE had asked the Claimants to

⁴⁹ C-31 (Claimants’ amended translation).

⁵⁰ C-32; RCM, ¶39.

⁵¹ C-4, Annex 2; Tr. 1 May 2019, pp. 459-60.

⁵² R-10. The Respondent introduced only a partial English translation of Exhibit R-10, which is Exhibit R-10b. The Portuguese original is Exhibit R-10a.

⁵³ RCM, ¶40; R-10b.

⁵⁴ *Id.*

undertake the completion of work on Lot 2, on which the original contractor's performance had been unsatisfactory.

118. On 6 October 2009, the Claimants sent a letter to ANE reiterating their disagreement with the Expert's determination and reminding ANE that the Claimants had agreed to complete Lot 2 on the understanding that their Lot 3 claims would be addressed. The letter stated that "[t]his 'impass' situation in which we are faced with at the moment, rises doubts on the opportunity to continue the works on Lot 2, due to the clear disadvantageous condition linked to the prolonged absence of resolution to the problems referring to Lot 3." The Claimants also asked that "we hereby request that our claim for compensation be assessed in the moulds of our relationship, which for the last 20 years has guaranteed very high levels of mutual loyalty, respect, esteem and consideration."⁵⁵
119. Two Annexes were attached to the Claimants' 6 October 2009 letter: Annex 1 was a chronology of preceding events; while Annex 2 (reproduced at the end of this paragraph) contained a summary of six claims for a total amount (including EUR 1,500,000.00 of interest) of EUR 13,315,000.00. Annex 2 (which is not numbered to correspond to the numbering of Annex II to the Engineer's Final Decision) included two items, numbers 2 and 4 (numbers 2 and 5 respectively in the Engineer's decision), for which the Engineer's Final Decision had awarded partial compensation (although the amount requested for an increase in "cut to spoil" was increased on 6 October), and four items, numbers 1, 3, 5 and 6 (numbers 3, 9, 6 and 8 respectively in the Engineer's decision), for which the Engineer had awarded nothing.⁵⁶ The letter contains no explanation for why the 6 October 2009 letter addressed only six of the 20 claims listed in the Engineer's Final Determination.⁵⁷

⁵⁵ C-33.

⁵⁶ C-33 (Claimants' amended translation).

⁵⁷ Compare C-28 (Claimants' amended translation) with C-33 (Claimants' amended translation).

	Description	Claimed	Letter CMC no.
1	Borrow pits demining - increase of borrow pit quantity due to technical reasons	167,000	117L/CMCRL/FB/rl 221L/CMCRL/FB/rl
2	Delay of payment by the Contracting Authority of compensations	470,000	144L/CMCRL/FB/rl
3	Late issuance of documentation required for the importation of materials and parts by the Contracting Authority	1,400,000	210L/CMCRL/FB/rl 318L/CMCRL/FB/rl
4	Exaggerate increase of cut to spoil	9,500,000	267L/CMCRL/FB/rl 465L/CMCRL/FB/rl
5	Chipping rescreening	83,000	269L/CMCRL/FB/rl
6	Disruption due to lack of/ late payment	195,000	314L/CMCRL/FB/rl
7	Interests on the above mentioned amounts	1,500,000	(estimated)
	TOTAL	13,315,000	

120. According to the Respondent, the 6 October 2009 letter shows that the Claimants had not identified any substantive error in the Engineer's determination. Instead, the Respondent argues that the Claimants tried to pressure ANE into increasing the price for the completed Lot 3 Project by threatening to stop working on the ongoing Lot 2 Project. The Respondent points out that the Claimants requested that the dispute be resolved in 20 days, failing which they would "have no choice but to act on what has been previously been mentioned, and appeal to the Arbitration Court to solve the issue."⁵⁹
121. On 12 October 2009, ANE sent the Claimants "Final Certificate 27," corresponding to IPC 27.⁶⁰ On 14 October 2009, the Claimants responded, stating:

This letter serves as a confirmation that we are not in agreement with the amounts indicated in the Certificate #27 (Final Account) presented by the supervisor's representative, on the 20 July 2009 and only received by us – see email on the 12 October 2009. There is a discrepancy of approximately 8,257,785.96 € between our amounts and those of the Supervisor's Representative and this is

⁵⁸ C-33 (Claimants' amended translation).

⁵⁹ RCM, ¶¶44-46; C-33.

⁶⁰ CM, ¶59.

made up of the measured works as well as the claims that were already presented in November 2005.

[...]

Thus, our acceptance to payment for the indicated amount as being due according to the Certificate #27 shall in no manner be interpreted as an acceptance from our side.⁶¹

The Claimants' 14 October 2009 letter does not explain how they calculated the EUR 8,257,785.96 "discrepancy," nor did they do so during the hearing on the merits.⁶²

122. According to the Respondent, ANE processed IPC 27 for payment to CMC Africa Austral on or about 15 October 2009,⁶³ although payment does not appear to have actually been transmitted until sometime later.⁶⁴

3. ANE's 30 October 2009 Settlement Offer

123. The Respondent asserts that the "threats" in the Claimants' 6 October 2009 letter to discontinue work on the Lot 2 Project and their request to consider extra-contractual circumstances, such as the Parties' long working relationship, moved ANE General Director Mr. Nelson Nunes to reassess the Claimants' position.⁶⁵
124. On 20 October 2009, Mr. Nunes sent a letter to the Minister of Public Works, stating, in pertinent part:

1. CMC completed in November 2007, the rehabilitation of Lot III between Alto Molocue and Rio Ligonha having initiated in may [sic] 2005, integral part of of the Namacurra – Rio Ligonha project funded by the European Union.

10. After various correspondence exchanges, the Contractor with his last letter sent on the 16.10.09 reiterates the respective claims and

⁶¹ C-34.

⁶² Tr. 1 May 2019, pp. 474-476.

⁶³ RCM, ¶41.

⁶⁴ Tr. 1 May 2019, pp. 485-486.

⁶⁵ RCM, ¶47; *see* First Witness Statement of C. Grachane, ¶¶13-15.

threatens to lodge an appeal in the arbitration court to manage the resolution of the problem.⁶⁶

11. The Contractor does not demand immediate payment of the outstanding amounts but accepts that, once the debt is acknowledged by ANE, the disbursement shall be effected throughout the year of 2010.

12. The performance considered during the last 20 years, the revealed capacity to respond whenever it was requested and the quality of the Works executed make CMC one of the best Contractors that have operated (and operate) within the Country.

13. In view of the above and having considered the verifications that were effected in the claims presented, we hereby propose you, the following actions to permanently solve the problem:

- a. Negotiate with the contractor a reasonable compensation proposal considering the proposal put forward in annex 2;
- b. To advance with the schedule proposal in the payment of the amounts to be reached in the negotiations.⁶⁷

125. Annex 2 to Mr. Nunes' letter to the Minister is a table (reproduced following this paragraph) which lists eleven items "Requested by Builder,"⁶⁸ in addition to interest.

	DESCRIPTION	Amount (Euros) Requested by Builder	Amount assessed (Euros) Recommended by ANE	
		Work/Claims	Approved works	
1	Demining of borrow pits, increase of borrow pits due to technical reasons	167,133	167,133	0.00
2	Delay on payment compensations by the Employer	470,513	--	300,000
3	Employers delay in documentation issue necessary to import	1,393,193	--	550,000

⁶⁶ There is no letter in the record dated 16 October 2009. The reference appears to be to the Claimants' letter of 6 October 2009.

⁶⁷ C-12 (Claimants' amended translation).

⁶⁸ C-12, Annex 2 (Claimants' amended translation).

	materials and parts			
4	Unreasonable increase of cut to spoil	6,783,896	250,000	4,250,000
5	Unforeseen days off	45,726	--	
6	Disruption due to lack/ delay in payments	195,396	100,000	--
7	Increase in the number of quarries	1,750,570	700,000	--
8	Revision of price labour costs	584,429	300,000	150,000
9	Hard rock excavation	123,755	--	123,755
10	Additional cement for stabilization	81,286	--	--
11	Various works after provisional acceptance of Works not certified by the Engineer	2,456,157	1,480,000	--
	SUBTOTAL	14,052,053	2,997,133	5,373,755
12	Interest on amounts above indicated (approximate calculation)	1,750,000	0.00	
	TOTAL	15,802,053	2,997,133	5,373,755
	GENERAL TOTAL EVALUATED FOR THE NEGOTIATIONS		8,370,888	

126. Many of the items listed in Annex 2 to Mr. Nunes' letter to the Minister are the same as or similar to one or more of the twenty claims asserted by the Contractor listed in Annex II of the Final Decision of the Engineer (C-28). Indeed, the claim amounts are identical.⁶⁹ The items listed in Mr. Nunes' letter are also similar to one or more of the six items listed in Annex 2 to the Claimants' letter to ANE of 6 October 2009, as shown in the table below. There is no entry in the Engineer's Final Decision or in the letter of 6 October 2009 corresponding to item 11 in Mr. Nunes' table. This is perhaps understandable in view of

⁶⁹ Item 3 in Annex 2 to Mr. Nunes' letter (C-12) is the sum of items 4 and 9 in Annex II to the Engineer's Final Decision (C-28).

the wording of that item: “[v]arious works after provisional acceptance of Works not certified by the Engineer.”⁷⁰

Annex II to Engineer’s Final Decision of 11 May 2009 (C-28)		Claimants’ Letter of 6 October 2009 (C-33)	Annex 2 to Mr. Nunes’ letter to the Minister of 20 October 2009 (C-12)	
Item numbers and amounts claimed	Item numbers and amounts awarded	Item numbers and amounts claimed	Item numbers and amounts claimed	Item numbers and amounts recommended
1: 0	1: 0			
2: 470,512.79	2: 65,295	2: 470,000	2: 470,513	2: 300,000
3: 167,133	3: 0	1: 167,000	1: 167,133	1: 167,133
4: 21,417.60	4: 0		(See no. 3)	(See no. 3)
5: 6,783,895.66	5: 1,432,983	4: 9,500,000	4: 6,783,896	4: 4,500,000
6: 83,366.46	6: 0	5: 83,000		
7: 57,311.13	7: 0			
8: 195,396	8: 0	6: 195,000	6: 195,396	6: 100,000
9: 1,371,775.50	9: 0	3: 1,400,000	3: 1,393,193 ⁷¹	3: 550,000
10: 45,725.85	10: 18,033		5: 45,726	5: 0
	Unnumbered: 9,017			
11: 161,408.62	11: 0			
12: 190,795.82	12: 0			
13: 54,701.3	13: 0			
14: 1,750,570.08	14: 915,597		7: 1,750,570	7: 700,000
15: 584,428.95	15: 0		8: 584,429	8: 450,000
16: 123,754.95	16: 0		9: 123,755	9: 123,755
17: 81,285.59	17: 0		10: 81,286	10: 0
18: 19,628.51	18: 0			
19: 84,266.92	19: 0			

⁷⁰ C-12, Annex 2.

⁷¹ Item 3 in Annex 2 to Mr. Nunes’ letter (C-12) is the sum of items 4 and 9 in Annex II to the Engineer’s Final Decision (C-28).

20: 512,123.25	20: 0			
			11: 2,456,157	11: 1,480,000
Total: 12,759,498.18	Total: 2,440,925	Total: 11,815,000 (without interest)	Total: 14,052,053 (without interest)	Total: 8,370,888

127. The last line of Annex 2 to Mr. Nunes' letter to the Minister reads, "general total evaluated for the negotiations 8,370,888."⁷²
128. The Minister of Public Works made a handwritten endorsement, dated 29 October 2009, on Mr. Nunes' letter of 20 October 2009. That endorsement reads: "dispatch seen I agree with the proposed actions."⁷³ The endorsement was sent back to Mr. Nunes on 2 November 2009 under cover of a letter from the Minister's Head of Office,⁷⁴ but it must have been communicated informally before that, in view of the offer made by Mr. Nunes to CMC Ravenna on 30 October 2009.⁷⁵
129. On 30 October 2009, Mr. Nunes, on behalf of ANE, sent CMC Ravenna a letter making the following offer:

On the basis of what above mentioned, ANE hereby proposes to CMC Ravenna the agreement on Euro 8,220,888 against Euro 15.802.053, covering all the additional costs and financial charges incurred during the execution of the Construction Contract, according to the enclosed table.

In accordance with what agreed and negotiated, the payments of the amount subject of the agreement may be made in installations during the year 2010.

We request to the Contractor CMC Ravenna, in case of agreement on what above mentioned, to provide a written confirmation of the

⁷² C-12, Annex 2.

⁷³ C-12.

⁷⁴ *Id.*

⁷⁵ C-2.

acceptance of the above described conditions within the maximum time limit of 7 days from the receipt of the present letter.⁷⁶

130. The table attached to ANE's letter of 30 October 2009 broke down the offer of EUR 8,220,888 as shown in the reproduction of that table following this paragraph. The amounts offered, listed as requested and line by line, are identical to the Annex 2 submitted by Mr. Nunes to the Minister on 20 October 2009 (C-12) except that the 30 October 2009 offer letter omits the EUR 150,000 shown on line 8 of the 20 October 2009 table as one of the figures for "revision of price labour costs" and on line 8 of the 30 October 2009 table as "ROP cost of labour."⁷⁷

**ROAD REHABILITATION NAMACURRA- RIO LIGONHA
LOT 3: ALTO MOLOCUE – RIO LIGONHA
SUMMARY OF SUBMITTED CLAIMS**

	Description	Amount (Euros) requested by the Contractor	Evaluated amount (Euros) Recommended by ANE	
			approved work	approved
1	Demining of borrow pits. Increase of borrow pits due to technical reason	167,133.00	167,133.00	0.00
2	Delay on payment of compensation to local people by Contracting Authority	470,512.79	0.00	300,000.00
3	Delay on submission of the required documentation by the Contracting Authority for custom clearance material	1,393,193	0.00	550,000.00
4	Increase of quantities of cut to spoil	6,783,895.86	250,000.00	4,250,000.00
5	Unexpected Additional holidays	45,725.85	0.00	0.00
6	Disruption due to delay on payments	195,396.00	100,000.00	0.00
7	Increase of borrow pits	1,750,570.08	700,000.00	0.00
8	ROP cost of labour	584,428.95	300,000.00	0.00

⁷⁶ C-2 (Claimants' amended translation).

⁷⁷ Compare C-12 with C-2. *See* para. 126 above. As explained at para.119 above, the amounts claimed do not correspond precisely with the amounts claimed in Claimants' 6 October 2009 letter (C-33).

9	Hard excavation	123,754.95	0.00	123,755.00
10	Increase of cement for stabilization	81,285.59	0.00	0.00
11	Extra works post TOC	2,456,157	1,480,000.00	
	SUB TOTAL	14,052,053	2,997,133.00	5,223,755.00
12	Interest on above amounts (rough calculation)	1,750,000	0.00	0.00
	TOTAL	15,802,053 ⁷⁸	2,997,133.00	5,223,755.00
RECOMMENDED TOTAL AMOUNT			8,220,888.00	

131. On 2 November 2009, Claimants responded to the 30 October offer, stating:

We acknowledge receipt of your letter Ref. 036/DG/2009, that we appreciate.

We agree with your proposal to set the amount of Euro 8,220.888 clarifying that is additional to the amount already certified and processed for the payment with IPC no. 27.⁷⁹

132. It is common ground between the Parties that Mr. Nunes' letter of 30 October 2009 constituted an offer of settlement, and both Parties' experts on the law of Mozambique treated it as such.⁸⁰ The Parties differ vigorously about the nature and effect of the Claimants' 2 November 2009 response to that letter. The Parties' disagreement focuses on whether the phrase "additional to the amount already certified and processed for the payment with IPC no. 27" clarifies the offer or proposes a change to the terms of the offer.

133. The Claimants argue that the letter of 2 November 2009 accepted the Respondent's settlement offer of 30 October 2009, and thus created a valid and binding contract under Mozambican law.⁸¹

⁷⁸ The Claimants' Amended Translation of C-2 mistakenly put the figure "15,802,053" in the cell above that which it occupies in the original document in Portuguese. The Tribunal has conformed this table to the original document.

⁷⁹ C-3 (Claimants' amended translation) (emphasis added).

⁸⁰ RCM, ¶¶50-51; CM, ¶63; Second Witness Statement of Ms. Muenda, ¶1; Legal Opinion of Mr. Timbane, ¶31.

⁸¹ CM, ¶71.

134. The Respondent argues that the Claimants' 2 November 2009 letter varied the terms offered and thus constituted a counteroffer, rather than an acceptance of the offer.⁸² The Respondent further states that it never agreed to that counteroffer, and thus that no agreement was reached.⁸³ The Respondent also points out that it entered into the Lot 3 Contract with CMC Africa Austral, but that CMC Africa Austral was not a party to the alleged settlement agreement.⁸⁴

4. Political Developments in Mozambique

135. On 28 October 2009, presidential, legislative, and provincial assembly elections took place in Mozambique.⁸⁵ The Claimants assert that the Respondent's conduct towards them changed, especially as regards the dispute over compensation for the Lot 3 Project, as a result of political appointments made following the presidential election.⁸⁶

136. In the election, the incumbent President Armando Emílio Guebuza of the FRELIMO party won with more than 75% of the votes. In January 2010, Felicio Zacarias, the Minister of Public Works who on 29 October 2009 had approved the proposal to make a settlement offer to CMC,⁸⁷ was replaced by Cadmiel Muthemba.⁸⁸ In March 2010, Mr. Muthemba appointed Elias Paulo to replace Nelson Nunes as the General Director of ANE. Cecilio Grachane succeeded Mr. Paulo as General Director of ANE in 2011.⁸⁹

⁸² RCM, ¶¶52-54.

⁸³ RCM, ¶¶56-57.

⁸⁴ RCM, ¶58.

⁸⁵ CM, ¶68.

⁸⁶ CM, ¶¶67-70, 241.

⁸⁷ C-35.

⁸⁸ CM, ¶69.

⁸⁹ CM, ¶70.

F. Compensation negotiations from 2010 to 2016

137. On 13 January 2010, shortly after the new Minister of Public Works was appointed, the Claimants sent ANE a letter enclosing two invoices for “Approved Additional Works.”⁹⁰ These invoices were expressed in Mozambican Meticaís (MT), but each included, under “description,” a statement of the amount in euros to which the amount invoiced in MT corresponded. The euro amounts on the two invoices corresponded to the subtotals for “approved work” and “approved claims” shown on the table attached to the letter of 30 October 2009, with EUR 2,997,133.00 shown as the “[a]mount of additional work approved” on Invoice No. E0105-28 and EUR 5,223,755.00⁹¹ shown as the “[a]mount of approved claims” on Invoice No. E0105-29. The two sums totaled EUR 8,220,888.⁹²
138. Mr. Gridella’s first witness statement contains the following statements about these invoices:

48. I submitted two invoices to ANE in January 2010. To the best of my recollection invoicing would have been delayed to have it brought into the 2010 financial year.

49. As the Claimant was not in receipt of the agreed settlement monies I requested a meeting with Nelson Nunes [General Director ANE] in the intervening three months. He had by now left ANE and was no longer in a position to help in the matter.

50. I believe Nunes left ANE in approximately March 2010. I was then informed that monies were not available at the moment and that monies were more readily available at the start or end of each year.⁹³

139. ANE does not appear to have responded to or commented on these two invoices until the summer of 2011. As explained in paragraph 144 below, ANE had obtained an “Opinion” about these invoices from a consultant in June 2011, but did not provide CMC with a copy

⁹⁰ C-36.

⁹¹ The Claimants’ Translation of C-36 typed this figure as “5,223,775.00” which differs from the original document in Portuguese. The Tribunal has conformed this quotation to the original document.

⁹² CM, ¶73.

⁹³ Witness Statement of N. Gridella, ¶¶48-50. *See* para. 75 above.

of that Opinion until November 2011. In the meantime, on 14 July 2011, ANE sent the Claimants a Final Acceptance Certificate in accordance with Article 62 of the General Conditions, stating that CMC Ravenna had “completed his obligations under the Contract, with effect from 24 March 2011,” but made no reference to the invoices.⁹⁴

140. On 26 July 2011, the Claimants sent a letter to ANE, stating that they had received neither a “formal notification” nor payment of the invoiced amounts, noting that ANE had stated in its letter of 30 October 2009 that payments would be made during the year 2010.⁹⁵ Claimants further took “the opportunity to inform formally that in case we do not receive the relevant payments within the 20/08/2011, we will be forced to take the proper actions to ensure the regularization of the credits on subject.”⁹⁶

141. On 8 August 2011, ANE replied in a letter to the Claimants stating:

We acknowledge receipt of your letter on subject - by which you request the payment of an amount equal to **Euro eight millions and seven hundred and seventy nine thousand, nine hundred and eight and thirty eight cents (Euro 8.779.908,38)**, related to the project, and **Euro five hundred and thirty thousand (Euro 530.000)** for interest due to the overdue payment – which induces us to provide the following considerations:

1) with reference to our letter no. 036 dated 30/10/2009 - which is the ground of your requests and by which we were able to reanalyse the disputed matter - we determine that there are not any grounds to comply with it as far as:

a) our records show that the financial execution of the contract is [quiet], and there is not a balance to paid to you

b) the referred amounts mentioned in your letter could be paid only if you present the reasons and the relevant connections with the contract

⁹⁴ C-5.

⁹⁵ C-37 (Claimants’ amended translation).

⁹⁶ *Id.*

c) considering the public administration principles, in particular the legality, the transparency and the justice, the payments without any basis are illegal. [initialed]

Therefore, whatever decision shall comply with the abovementioned principles.

2) It shall be mentioned that on your claim, in the amount of **Euro 11.242.898.04**, was approved the payment of **Euro 2.440.925**, as per Engineer's determination (annex 1), which was duly made.

3) We remind you that the amount of **Euro 2.440.925** was determined on the basis of the above mentioned determination, as final amount to be paid for your claims (cfr pg. 8/9 and 9/9 of the annex 1) This fact was duly communicated and accepted, as demonstrated by the proofs of payments (annex 2).

In these terms, we transmit the issue to your consideration with the aim to clarify our position; however we are available to provide the required collaboration.⁹⁷

142. On 9 August 2011, the Claimants replied to ANE's letter, stating:

We acknowledge receipt of your letter ref. 54/AJ/DG/2001, and we comment as follows.

We agree on the fact that no payment shall be made to the Contractor if no records are present in your register and accounts.

We agree on the principles of legality, transparency and justice, which are not just an obligation in our modus operandi, but they are part of Ethics Code of our company in the development of its activities.

However, it seems that there are some missing documents mentioned by ANE in the above letter, meaning correspondence, minutes of meetings and other documents during 2009, which were the basis of the issuance of your letter 036/DG/2009 on 30/10/2009.

Such letter represents the final decision resulting from a process, which at that stage had a different evaluation by ANE.

It does not correspond to the truth that the Engineer's evaluation, NOD (before leaving the Project) can be considered a final determination accepted by us, because the Contract was completed

⁹⁷ C-4 (Claimants' amended translation) (emphasis in original).

in 2011 (Final acceptance of the Work), therefore the final account can be issued only now.

Together with the issuance of the invoice related to the amounts approved by the Engineer representative and by the Engineer on April 2009, CMC stated clearly its disagreement in relation to such amounts, reserving the right to claim the payment of the residual amounts. This invoice was also used to utilize the outstanding EU funds while awaiting an amicable settlement of the dispute.

We highlight that, on middle 2009, CMC was requested by ANE to complete the Lot 2 Works and our position was duly recorded: we accepted such task only against ANE availability to settle (or attempt to settle) amicably the situation of Lot 3. On the second half of 2009, various meetings took place between CMC (nerio gridella), the general director of ANE, Eng. Nelson Nunes, with the aim to achieve an agreement after a reevaluation of our claim.

We are confident that a further analysis of our documentation used for the transaction will achieve the same result of 2009. For these purposes:

1) we will sent copies of all proper documentation, which can clarify any doubts in relation to the subject, and

2) we request an urgent meeting with ANE, to be held before the 20/08/2011, date mentioned in our letter 14/DAFO/MC/JC dated 26/07/2011, to analyse and discuss the subject.⁹⁸

143. By letter of 11 August 2011, the Claimants transmitted to ANE the documentation referred to in their letter of 9 August 2011 and again requested a meeting.⁹⁹
144. On 8 November 2011, ANE sent the Claimants a letter stating that, “[w]ith reference to the disputes related to the above subject [Lot 3 Contract – Request of Payment], we hereby transmit the opinion of an independent consultant, showing their position in relation to the said disputes, which remain in respect to the contract.”¹⁰⁰ Enclosed with that letter was an “Opinion” prepared by the engineering consultancy firm *Consultec Consultores*

⁹⁸ C-38 (Claimants’ amended translation).

⁹⁹ C-39.

¹⁰⁰ C-40 (Claimants’ amended translation).

Associados LDA (“Consultec”). Consultec’s Opinion is dated June 2011. While ANE’s letter of 8 August 2011 appears to have been based largely on the Consultec Opinion, the Respondent offered no explanation of why ANE had obtained the Opinion as early as June 2011 or of why it had not shared the Opinion earlier than November 2011.¹⁰¹

145. The “Conclusion” of Consultec’s Opinion reads as follows:

V – CONCLUSION

40. The present Contract concluded by a public entity for the execution of a public work is an **administrative contract** (see art. 38 of decree 54/2005 dated 13.12)

41. The contractual principles of **stability** of contracts and **financial equilibrium** expressed in the idea of an “honest equivalence of performance” apply to the administrative contracts.

42. These principles are established, in the case *sub judice*, by various contractual provisions, in GCC and Particular Conditions (see art. 21, 48, 53 and 55). [initialed]

43. On this basis, the reimbursement to the **Contractor** for additional cost due to extra works, exceptional risk, inter alia, is expression of these principles.

44. However the **costs due to extra work**, in this case, were considered on the basis of the unit prices without any right of adjustment because such unit prices did not achieve the 15% of the Contract price to allow the right of adjustment of those unit prices.

45. On the other hand, the **exceptional risks alleged by the Contractor** do not cover neither the errors made by him during the preparation of the tender, which are foreseeable errors, nor the risks due to climatic conditions.

46. The right of compensation of the **Contractor**, based on the claims submitted to the **Engineer**, shall have **contractual grounds** and not vague considerations for compensation due to good business relations.

¹⁰¹ *Id.*

47. As a matter of fact, the last argumentation provided by the **Contractor** in his “Request to resolution of pending contractual issues” is based on the follow:

According to what above mentioned and considering the last correspondence received on matter, which we appreciate but disagree, we hereby request that our proposal of compensation will be evaluated according to our relation, which during 20 years ensured high standard of reciprocal trustworthiness, respect, esteem and consideration.

48. These arguments have extra contractual grounds, uncertain and subjective basis, and they can be enforced only on the basis of a *superior public interest*, which we do not know.

49. If **ANE** wishes express now his doubts about an amount signed to be paid for the claims, from our point of view, ANE can be always do that, because the main issue is the public interest involved.

50. The powers of **ANE** in this subject, related to public interest, debilitate strongly the **resoluteness** of his offer according to the principles regulating the relations between privates. [initialed]

51. However ANE could do that only if he pleads the existence of defect or arising errors or a contractual interpretation but the concept of **exceptional risks**.

52. It is up to **ANE**, then, the demonstration that such arising defects or such errors of interpretation, which determined the offer of **8.220.888,00 Euros**, will represent an economical advantage of the **Contractor**, absolutely undue under the Contract, an actual **unjust enrichment**, with prejudice of a public interest, which should be restored.¹⁰²

146. On 14 November 2011, Claimants responded to the Consultec report with a letter stating that “[w]e maintain our position related to the due payment of 8.2 millions of Euros, resulting from the settlement of October 2009,” and reiterating their availability to negotiate.¹⁰³

¹⁰² C-40 (Claimants’ amended translation) (emphasis in original).

¹⁰³ C-41 (Claimants’ amended translation).

147. Several months later – the record contains no explanation of the delay – on 9 May 2012, the Claimants sent another letter to ANE, this time sending copies to the Minister and Vice Minister of Public Works. The letter stated:

We make reference to your letter 036/DG/09 dated 30/10/2009, to our letter 2179/09/CMC/NG dated 2/11/2009 and to our invoices no.E0105-28 and E0105-29.

After about 2 years and half and following several approach to your institution regarding the payment of the due amount of 8.220.888 Euro, we continue to record an incomprehensible position from your side, despite the opinion provided by the independent consultant appointed by you (Consultec LDA), which states “It is up to ANE, then, the demonstration that such arising defects or such errors of interpretation, which determined the offer of 8.220.888, will represent an economical advantage of the **Contractor**, absolutely undue under the Contract, an actual **unjust enrichment**, with prejudice of a public interest, which should be restored.

The opinion gives to ANE the onus to proof that such payment is not due and constitutes an unjust enrichment.

Therefore, on the basis that until now there has not been such evidence of arising defects or errors of interpretation which substantiate the lack of payment, and considering that there is no any other possible process to follow in order to solve this dispute, we hereby request the payment of the disputed amount within 30 days from the date of reception of this letter, otherwise we will apply to the competent authorities to be indemnified.¹⁰⁴

The Claimants received no formal response to this letter.¹⁰⁵ Indeed, nothing more appears to have been communicated between the Claimants and ANE on this subject for more than two years.

148. In October 2014, Mr. Flípe Nyusi of the FRELIMO party was elected President of Mozambique. Mr. Carlos Bonete became Minister of Public Works early in 2015, and Mr. Marco Alexandre Vaz was appointed Director General of ANE in July 2016.¹⁰⁶ The

¹⁰⁴ C-42 (Claimants’ amended translation) (emphasis in original).

¹⁰⁵ CM, ¶88.

¹⁰⁶ CM, ¶90.

Claimants appear to have seen these changes as offering an opportunity to re-open discussion of the Lot 3 Contract. Mr. Alicandri, who is a member of the Board of Directors of CMC Africa Austral, states in his Witness Statement:

27. I say that every meeting I was involved in with ANE between 2014 to 2016 incorporated negotiations around the three project disputes Lichinga -Litunde and Montepuez -Ruaça road projects as well as the Lot 3 Project. There was never a meeting solely about the Lot 3 Project and it was only discussed as part of a global settlement and never at length.

28. It is my understanding that the Lot 3 Project dispute is quite a sensitive issue to the Government of Mozambique due to the fact that the matter was not resolved under the stewardship of the Director of ANE nor under the stewardship of the Minister of Public Works. This caused the Prime Minister to decide to intervene in an attempt to facilitate the process and lead it to an amicable settlement.

29. There was constant reluctance from ANE to entertain any settlement against the Lot 3 Project. The Claimant was specifically instructed during negotiations to mark the Lot 3 project as zero. ANE also stated to me during meetings that the settlement offer letter for the figure of approximately €8.2 Million was never registered in their offices and related to an already used protocol number. I asked to see the letter to which this protocol number related. This was never shown to me.

30. Sometime in 2015 the President of Mozambique became involved in trying to settle the Claimants' issues. This occurred due to the Claimants' position in Mozambique, which it had acquired from working in the country for such a long period of time.

149. Mr. Alicandri recalls attending the following meetings concerning the three projects that were the subjects of disputes between CMC and the Government in 2015:

- 18 August 2015: meeting between CMC and “the President of Mozambique at his office. This meeting lasted for approximately 20 minutes. [Claimants] explained to him the difficult position that the Claimants now found themselves in and explained to him about the fifty million euro outstanding to its account.”¹⁰⁷ Mr. Alicandri further states

¹⁰⁷ Witness Statement of E. Alicandri, ¶31.

that “[t]o my surprise, during our meeting the President of Mozambique immediately phoned the Minister of Public Works and tasked him to sort out the issues urgently to allow the Lichinga and Montepuez Projects to proceed. The President told the Minister that all the South African, Portuguese and Italian companies were leaving Mozambique because they were unable to deal with the current Government. The Minister of Public Works was further told that he had better find a solution, unless his intention was to work with Chinese contractors only. No action was required from Claimant's representatives on foot of the meeting.”¹⁰⁸

- 20 August 2015: meeting between the Claimants and “the Minister for Public Works, Mr. Atanásio Mugunhe, the Director General of ANE, and Mr. Cecilio Grachane, of the Road Fund. All three projects in dispute (Lichinga, Montepuez, and Lot 3) were discussed without any exact amounts been given. The Claimants' representatives explained its proposal but there was no response from the Government. I recall that while waiting to be received by the Minister for that meeting, there was a tense exchange between Mr. Cecilio Grachane and myself. He informed me that CMC was just a problem, that I was a guest in his country and he could chase me out of Mozambique whenever he wanted.”¹⁰⁹
- 21 August 2015: meeting between the Claimants and “ANE's Director General's assistant Mr. Mahave; ANE's Contract Manager, Mrs. Tânia Comiche; CMC AA's Contract Manager, and Mr. Francisco Pereira.”¹¹⁰
- 1 September 2015: meeting between the Claimants and “ANE's Director General, Mr. A. Mugunhe; ANE's Contract Manager, Mrs. Tânia Comiche, ANE's Technical Director, Mr. Adérito Guilamba, Mr. Paolo Porcelli and CMC AA's Contract Manager Mr. Pereira. The subject of this meeting was again to discuss settlement of the Claimants' outstanding issues on its projects in Mozambique. The Lot 3, Montepuez

¹⁰⁸ *Id.* at ¶34.

¹⁰⁹ *Id.* at ¶35.

¹¹⁰ *Id.* at ¶36.

and Lichinga projects were discussed, but no exact amounts were discussed. The Claimants explained their settlement proposal. No response was received from those present at the meeting.”¹¹¹

- 22 September 2015: meeting among “ANE's Director General Mr. A. Mugunhe, ANE's Contract Manager Mrs. Tânia Comiche, ANE's Technical Director, Mr. Adérito Guilamba, ANE's Director General's assistant Mr. Mahave, CMC AA's Contract Manager Mr. Pereira and [Mr. Alicandri].”¹¹²
- 26 October 2015: “Mr. Paolo Porcelli and [Mr. Alicandri] met with the Minister of Public Works in Mozambique, Mr. Carlos Bonnete; ANE's Director General, Mr. Atanásio Mugunhe; the Road Funds Chairman, Cecilio Grachane, and ANE's Technical Director Adérito Guilamba. The Minister of Public Works. Mr. Bonnete, tasked Mr. Atanásio Mugunhe with reaching settlement on the outstanding issues on the Claimants' projects in Mozambique. After this meeting the Prime Minister got involved as the Minister of Public Works didn't help to solve the Claimants' issues.”¹¹³
- 17 December 2015: Mr. Alicandri attended a “meeting to discuss settlement of issues on a number of projects. This meeting was held at the Prime Minister's Cabinet. The persons present at this meeting were the Prime Minister of Mozambique, Mr. Carlos do Rosario; the Minister of Public Works of Mozambique, Mr. Carlos Bonnete; the Director General of ANE, Mr. Atanásio Mugunhe; the Roads Fund Chairman, Cecilio Grachane; ANE's Technical Director Mr. Adérito Guilamba; CMC AA's Contract Manager, Mr. Francisco Pereira and [Mr. Alicandri].”¹¹⁴ About this meeting, Mr. Alicandri stated that “I view this meeting as one of the most important meetings which I attended. The aforementioned meeting was important as not only was it agreed that it was mutually beneficial to find an amicable settlement on the outstanding issues but

¹¹¹ *Id.* at ¶37.

¹¹² *Id.* at ¶38.

¹¹³ *Id.* at ¶39.

¹¹⁴ *Id.* at ¶40.

also because a settlement proposal was requested by the Prime Minister of Mozambique to be provided to the Claimants by ANE and the Minister for Public Works.”¹¹⁵

- December 2015 – February 2016: Mr. Alicandri recalls that a number of other meetings occurred after the 17 December 2015 meeting. He states that “[d]uring these meetings the Claimants and ANE were encouraged to reconcile their settlement offers to arrive at a possible joint submission of a settlement amount. I perceived there was constant resistance on behalf of ANE to any settlement of the issues on its projects.”¹¹⁶
- February 2016: Mr. Alicandri “attended a meeting in ANE's office. This meeting was also attended by Mr. Adérito Guilamba and Mr. Atanásio Mugunhe. The Government never came back with a counter-proposal.” Mr. Alicandri further recalls that from this meeting onwards, “it was my firm opinion that no settlement could be reached in relation to the Lot 3 Project or any other projects involving the Claimants.”¹¹⁷
- September/November 2016: Mr. Alicandri recalls that “Mr. Paolo Porcelli and Mr. Roberto Macri, the CEO of CMC Muratori Cementisti CMC Di Ravenna Soc. CMC Coop. had a further meeting with the President of Mozambique. I understand that during this meeting the Claimants’ issues on its projects in Mozambique were discussed at a high level, but nothing detailed was discussed.”¹¹⁸

150. On 12 August 2016, the Claimants sent a letter to Mr. Martinho, the Minister of Public Works, in which they asked that discussions be resumed with “a view to a global agreement, as agreed on December 2015.”¹¹⁹ The Respondent notes that the Claimants

¹¹⁵ *Id.* at ¶41.

¹¹⁶ *Id.* at ¶43; CM, ¶99.

¹¹⁷ Witness Statement of E. Alicandri, ¶¶44-45.

¹¹⁸ *Id.* at ¶46.

¹¹⁹ C-47 (Claimants’ amended translation); CM, ¶101.

have identified no correspondence between their letter of 9 May 2012 and their letter of 12 August 2016.¹²⁰

151. The Claimants offered as evidence of “an acknowledgement of a debt” by ANE a document headed “Subject Bill Book” and marked as Exhibit C-49.¹²¹ Exhibit C-49 appears to be a sheet from an electronic ledger with a “run date” of 25 January 2018 listing four invoices by date, number, and amount. Two of the invoices listed are the invoices sent by CMC to ANE on 13 January 2010: Invoice No. E0105-28 for EUR 2,997,133.00 and Invoice No. E0105-29 for EUR 5,223,755.00.¹²² Across the bottom of the ledger page, the original of which appears to be in Italian, is a handwritten note in Portuguese that reads, in translation: “It is consistent with our balance as of 31/12/17.” Under that note is an illegible signature, the date “13/02/18,” and the imprint of an equally illegible circular stamp.¹²³
152. Counsel for the Respondent criticized Exhibit C-49 at the hearing in the following terms:

There are some serious issues with this exhibit, C49. Number 1, there's absolutely no authentication for this exhibit anywhere in the file. [...]

There's no witness that authenticates C49. There's no authentication of any kind. The only thing there is is there's a reference in a sentence in the Claimants' Memorial.

[...]

[T]his document was created on January 25, 2018. This document was created by CMC after this arbitration began.

[...]

¹²⁰ RCM, ¶75.

¹²¹ Tr. 1 May 2019, p. 463, l. 25 – p. 464, l. 2; CM ¶222. When asked at the Hearing “What evidence in the record, and specifically what documentary evidence in the record, either establishes or sheds light on whether ANE intended, when it made its settlement offer in the October 30 letter, to offer 8.2 million including the 2.4 established by the engineer as due to CMC or in addition to that 8.2 million, counsel for the Claimants referred to Exhibit C-49 and said “this is the evidence.” Tr. 1 May 2019, p. 464, l. 7.

¹²² C-36.

¹²³ C-49 (Claimants’ amended translation).

This document is in Italian. The Government of Mozambique cannot confirm a debt in a foreign language.

[...]

You cannot even read the seal. There's no authentication to who signed it.¹²⁴

G. CMC's Letter Pursuant to Article 9(3) of the BIT

153. On 18 August 2016, the Claimants sent ANE a letter which they characterize as putting the Government on notice of a dispute under Article 9(3) of the BIT.¹²⁵ That letter stated:

We refer to letter Ref. 1, by means of which you have submitted the proposal for the amount of Euro 8,220,888.00 to resolve amicably the pending claims, and our letter Ref. 2, by means of which we accept such proposal.

The payment of the amount indicated above should have been done next, but V Excias never complied with the agreement, which gave rise to a dispute.¹²⁶

Since the year 2009 we have tried several times to contact V Excias to resolve the matter without any result, and we intend now to make one more attempt to assert our rights, for which we notify you that we are our desire to initiate a friendly resolution period of 6 months from the receipt of this letter, and this will be the last attempt before advancing with arbitration in the most appropriate forms and terms.

We make the dispute for a purpose which, in the event that this attempt proves to be unsuccessful, we intend to submit the dispute for resolution by ICSID, considering that the Governments of Italy and Mozambique have signed the ICSID Convention and Bilateral Investment ICSID will have jurisdiction over the dispute.¹²⁷

154. ANE replied to CMC's letter on 22 August 2016, stating:

¹²⁴ Tr. 1 May 2019, p. 539, l. 8 – p. 540, l. 15.

¹²⁵ CM, ¶165; C-1; C-43.

¹²⁶ The Claimants do not explain, in introducing this letter, who or what “V Excias” was. *See* CM, ¶102.

¹²⁷ C-43 (Claimants' amended translation).

In accordance with the letter dated 18 August 2016 in epigraph, we have to mention the following:

1. We note that the issuer does not have the name of the person who represents it.
2. We note the insistence in claiming the value of 8.220.888,00 Euro.
3. According to points 4 and 5 of our letter No. 568 / DAC / DIPRO / 15 dated September 9, 2015, we must inform you that we have not received any additional information that might be subject to analysis.¹²⁸

155. The next correspondence in the record is the Claimants' initial Request for Arbitration dated 10 May 2017.

IV. JURISDICTION

156. The Respondent raises six objections to the jurisdiction of the Tribunal. Those objections are:
- a. That the Claimants are not "investors" as defined in the BIT;
 - b. That the Claimants do not have an "investment" in Mozambique as required by the BIT;
 - c. That the present dispute does not arise out of an "investment" made by a "National of another Contracting State" as required by Article 25 of the ICSID Convention;
 - d. That the Claimants' claims are purely contractual;
 - e. That, to the extent that the Claimants have a claim, that claim must be submitted to arbitration under the rules adopted pursuant to the Cotonou Convention, to the exclusion of an ICSID tribunal; and

¹²⁸ C-44 (Claimants' amended translation).

- f. That, to the extent that Mozambique may have consented to ICSID arbitration, that consent was nullified by the decision of the European Court of Justice in *Slovak Republic v. Achmea*.

The Tribunal takes up each of these objections in the paragraphs that follow, taking the first two objections together.

A. The Requirement of Article 1 of the BIT that the Claimants Be Investors with an Investment in Mozambique

1. The Respondent's Objections

a. The Claimants are not “investors”

157. Respondent preliminarily objects that the Claimants have failed to prove that each of them has made an investment, and thus that each of them is an “investor” as defined by the BIT.¹²⁹ It states that the Claimants, despite repeated document requests, have not produced evidence showing that each individual Claimant made an investment in Mozambique.¹³⁰

b. The Claimants have no “investment” in Mozambique

158. The Respondent asserts that the settlement agreement that the Claimants identify as their investment in Mozambique does not fall within any of the categories of “investment” listed in Article 1(1)(a-f) of the BIT.¹³¹ Article 1(1) of the BIT states:

The term ‘investment’ shall be construed to mean any investment effected by a legal or a natural person of a Contracting Party in the territory of the other Contracting Party, in conformity with the laws and regulations of the Contracting Parties.

The term “Investment” comprises in particular, but not exclusively:

¹²⁹ ROJ, ¶¶187-195.

¹³⁰ ROJ, ¶¶188-190.

¹³¹ ROJ, ¶¶176-179.

- a) movable and immovable property and the ownership rights *in rem*;
- b) shares, debentures, equity holdings or any other instruments of credit, as well as Government and public securities;
- c) credits for sums of money or any performance having economic value connected with an investment, as well as reinvested incomes and capital gains;
- d) copyrights, commercial trade marks, patents, industrial designs, intellectual and industrial property rights, know-how, trade names and goodwill connected with an investment;
- e) capital expenditures effectively made under licence and franchising in accordance with the law, including those expenditures connected with the right to search for, extract and exploit natural resources;
- f) any increases in value of the original investment.

Any modification in the form of the investment does not imply a change in the nature of the investment thereof.¹³²

The Respondent argues that the phrase “any investment” used in Article 1(1) is more restrictive than the more common “every kind of asset.”¹³³

159. The Respondent asserts that the Claimants did not “effect” the alleged settlement agreement, which – at most – merely memorializes the Parties’ agreement.¹³⁴ In response to the Claimants’ argument that the Italian “effettuato” should be translated as “made,” rather than “effected,”¹³⁵ the Respondent argues that, in case of a divergence between the authentic texts, the Treaty provides that the English text shall prevail.¹³⁶

¹³² C-1.

¹³³ ROJ, ¶173.

¹³⁴ ROJ, ¶174.

¹³⁵ CM, ¶111, n. 116.

¹³⁶ ROJ, ¶175; C-1, last page.

160. In response to the Claimants’ argument that the settlement agreement is connected to the Lot 3 Contract, which they claim is undoubtedly an “investment,” the Respondent points out that the Claimants have “*unequivocally waived the Contract as a basis for jurisdiction* in these proceedings.”¹³⁷ The Respondent refers to the statement in the Claimants’ Memorial that “[t]he Claimants do not invoke a provision of the Contract to assert its treaty claims, is [sic] not asking the Tribunal to exercise jurisdiction based on the Contract and does [sic] not submit this claim based on questions of contract law under Mozambique law.”¹³⁸

2. The Claimants’ Response

a. All of the Claimants are “investors”

161. In response to the Respondent’s argument that the Claimants failed to prove that each of them has made an investment, the Claimants point out that the Respondent has not denied that either the Lot 3 Contract or the associated road construction works would qualify as a covered investment. They argue that both CMC Africa Austral and CMC Maputo invested in this project and are therefore investors. CMC Ravenna also made an investment, and is thus also an investor, because CMC Maputo is a branch of CMC Ravenna, and because CMC Ravenna owns 99.99% of the shares in CMC Africa Austral.¹³⁹

b. The Claimants had an “investment” in Mozambique

162. The Claimants argue that the term “any investment effected” in Article 1(1) of the BIT is very broad and includes rights and claims associated with road construction and rehabilitation works. They argue that legal rights connected with the underlying investment qualify as an investment even after the original investment has ceased to exist. The definition of “investment” is further expanded, in the Claimants’ view, by Article 1 of the

¹³⁷ RRJ, ¶106 (emphasis in original).

¹³⁸ RRJ, ¶106; CM, ¶169.

¹³⁹ CRMJ, ¶¶302-309; CM, ¶¶154-155.

Protocol to the BIT, which provides that the BIT applies equally to a wide range of “associated activities.”¹⁴⁰

163. The Claimants assert that the settlement agreement “cannot be viewed in isolation from the investment.”¹⁴¹ They argue that their investments consist of “[t]he Lot 3 Project construction works, the additional works, connected activities (such as know-how), the rights and claims associated with the works (including the settlement agreement) taken together as a whole.”¹⁴²
164. The Claimants argue that their investment falls into at least the categories (b) (“shares”), (c) (“credits for sums of money or any performance having economic value connected with an investment” and “invested incomes”), and (d) (“know-how, trade names and goodwill”) of Article 1(1) of the BIT.¹⁴³ The Claimants focus on Article 1(1)(c), arguing that “[t]here can be no question that ANE’s commitment to pay 8.22 million euros to CMC, which creates a claim to money, is *connected with* an ‘investment’ expressly covered by Article 1(c) of the Treaty and is an ‘associated activity’ under within [sic] the terms of Article 1 of the Protocol.”¹⁴⁴
165. The Claimants argue that they “effected” the settlement agreement within the meaning of Article 1(1) of the BIT because the word “effettuato” in the authentic Italian version of the BIT, should be translated as “made,” not “effected.”¹⁴⁵ In response to the Respondent’s argument that the BIT provides that, in case of divergence between the authentic texts, the English text must prevail, the Claimants argue that a dictionary definition of “effect” is “to

¹⁴⁰ CRMJ, ¶¶232-233.

¹⁴¹ CRMJ, ¶234.

¹⁴² CRMJ, ¶237.

¹⁴³ CM, ¶114.

¹⁴⁴ CRMJ, ¶235 (emphasis in original).

¹⁴⁵ CM, ¶111, n. 116.

cause to come into being,” and that they have clearly caused their investment—the Lot 3 Project—to come into being.¹⁴⁶

3. The Tribunal’s Decision

a. The Claimants were “investors” within the meaning of the BIT

166. Article 1(2) of the BIT defines an “investor” to mean:

any natural or legal person of a Contracting Party investing in the territory of the other Contracting Party as well as the foreign subsidiaries, affiliates and branches controlled by the above natural and legal persons.

167. Article 1(4) of the BIT specifies that the “term ‘legal person’, in reference to either Contracting Party, shall mean any entity having its head office in the territory of such Contracting Party and recognised by it, such as public institutions, corporations, partnerships, foundations and associations, regardless of whether their liability is limited or otherwise.”

168. It is not disputed that CMC Ravenna is a corporation incorporated under the laws of Italy, with its head office in Ravenna, Italy. CMC Ravenna is thus an Italian legal person within the meaning of Article 1(4) of the BIT, and qualifies as an investor if it is investing in Mozambique.

169. It is equally not disputed that CMC Maputo is a branch of CMC Ravenna with its place of business in Mozambique. It is accordingly a foreign branch of CMC Ravenna within the meaning of Article 1(2) of the BIT, controlled by and treated legally as part of the principal corporation.

170. CMC Africa Austral is a wholly owned subsidiary of CMC Ravenna incorporated under the laws of Mozambique. It is thus a foreign subsidiary of CMC Ravenna, controlled by that company, and is also an investor under Article 1(2) of the BIT.

¹⁴⁶ CRMJ, ¶299.

171. Since all of the Claimants qualify as “investors,” if they had an investment in Mozambique, we turn next to whether they had such an investment.

b. The Claimants had an “investment” within the meaning of the BIT

172. The Claimants argue (inter alia) that the settlement agreement was either itself an investment in Mozambique, or that it was at the least a “credit for sums of money or any performance having economic value connected with an investment,” within the meaning of Article 1(1)(c) of the BIT.
173. The Tribunal does not, for purposes of ruling on the Respondent’s objection to the Tribunal’s jurisdiction, need to decide whether the Claimants and the Respondent actually reached a binding agreement to settle the Claimants’ claims for compensation for their work on Lot 3. That question goes to the heart of the dispute between the Parties, and is addressed in the Tribunal’s discussion of the merits. For purposes of jurisdiction, it is sufficient that the Claimants have advanced a *prima facie* case that satisfies the jurisdictional requirements of the BIT and the ICSID Convention.¹⁴⁷ The Tribunal concludes that it has done so.
174. It is beyond dispute that the Claimants’ (and specifically CMC Ravenna’s) participation in the Lot 3 Project constituted an investment in Mozambique. The present dispute does not arise out of that investment, however, but out of the settlement agreement. The settlement agreement, if actually agreed to, would represent a “credit for sums of money [...] connected with an investment,” in that the settlement agreement purported to resolve the Claimants’ claims for additional payments for their work on the Lot 3 Project.

¹⁴⁷ See *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction (25 May 2006) at ¶53 (“In order to determine its jurisdiction, the Tribunal must consider whether the dispute, as presented by the Claimant, is *prima facie*, that is on a summary examination, a dispute that falls generally within the jurisdiction of ICSID and specifically within that of an ICSID tribunal established to decide a dispute between a Spanish investor and Argentina under the BIT”); see *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007 at ¶85 (the *prima facie* “test strikes a fair balance between a more demanding standard which would imply examining the merits at the jurisdictional stage, and a lighter standard which would rest entirely on the Claimant’s characterization of its claims.”); see also *Impregilo v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005) at ¶¶237-253.

175. The Claimants' claims for money allegedly due under the settlement agreement therefore come within the definition of "investment" in Article 1(1)(c) of the BIT. Having reached this conclusion, the Tribunal need not consider the Claimants' alternative arguments as to why they had an investment in Mozambique.

B. The requirements of Article 25 ICSID Convention

176. Article 25(1) of the ICSID Convention provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

1. The Respondent's Objections

177. The Respondent argues that the Tribunal does not have jurisdiction, because a settlement agreement is merely a "legal act" that cannot qualify as an "investment" within the meaning of Article 25 of the ICSID Convention.¹⁴⁸ Nor can the Claimants assert any claim based on an alleged investment in the underlying Lot 3 Contract, according to the Respondent, because such claims have ceased to exist by virtue of the alleged settlement agreement.¹⁴⁹
178. In other words, the Respondent argues that, if a settlement agreement was in fact concluded, then the Tribunal has no jurisdiction because (a) settlement agreements are not "investments," and (b) any claims based on the underlying Lot 3 Contract have been extinguished. If no settlement agreement was reached, then the Tribunal might have jurisdiction of a claim based on the Claimants' investment in the Lot 3 Contract, but that is not the claim the Claimants are making. The Claimants' entire case, according to the Respondent, rests on the alleged non-performance of the alleged settlement agreement.¹⁵⁰

¹⁴⁸ ROJ, ¶111.

¹⁴⁹ ROJ, ¶128.

¹⁵⁰ ROJ, ¶¶112-115.

179. In arguing that the weight of authority establishes that a settlement agreement cannot qualify as an “investment” under Article 25 of the ICSID Convention, the Respondent points in particular to the following decisions:

a. *GEA Group Aktiengesellschaft v. Ukraine*, in which the Tribunal stated:

The Tribunal agrees with Respondent that neither the Settlement Agreement nor the Repayment Agreement – in and of themselves – constitute ‘investments’ under Article 1 of the BIT or (if needed) Article 25 of the ICSID Convention. As legal acts they are not the same as the investment in Ukraine itself. In particular, (a) the Settlement Agreement merely established an inventory of undelivered goods and recorded the difference as a debt owed by Oriana to KCH; and (b) the Repayment Agreement merely establishes a means for the repayment by Oriana to KCH of Oriana’s debts.¹⁵¹

The Respondent argues that the *GEA Group* tribunal “further explained that the Settlement Agreement and the Repayment Agreement were not ‘investments’ because they involved ‘no contribution to, or relevant economic activity within, Ukraine.’ Id. at ¶ 162. [...] To paraphrase the *GEA Group* tribunal, this settlement agreement involved no contribution to, or relevant economic activity within, Mozambique.”¹⁵²

b. *Orascom TMT Investments S.à r.l. v. Algeria*, in which the tribunal stated:

In these circumstances, the Claimant cannot bring claims in this arbitration that OTH decided to settle, as the settlement clearly resolved the dispute that the Claimant has brought before this Tribunal.¹⁵³

The Respondent argues that: “[f]or the reasons discussed in *Orascom*, because the alleged settlement agreement herein also is allegedly binding, the Claimants can no

¹⁵¹ *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 March 2011) (RL-18) at ¶157; ROJ, ¶¶119-122.

¹⁵² ROJ, ¶¶121-122.

¹⁵³ *Orascom TMT Investments S.à r.l. v. Algeria*, ICSID Case No. ARB/12/35, Award (31 May 2017) (RL-19) at ¶524; ROJ, ¶124.

longer bring any investment treaty claims pursuant to the underlying Contract or project, because the settlement extinguished such claims. Thus, even if the Claimants had made investments in terms of the Contract or project, those claims have ceased to exist and are inadmissible.”¹⁵⁴

- c. *Azpetrol International Holdings B.V., et al. v. Republic of Azerbaijan*.¹⁵⁵ The Respondent argues, in reliance on *Azpetrol*, that “[b]ecause the parties concluded a binding settlement agreement through the exchange of emails, the tribunal held that there was no jurisdiction to hear the claim under the ECT and the ICSID Convention. *Id.* at ¶ 2. The tribunal reasoned that there was no ‘legal dispute’ between the claimants and the respondent as required by Article 25(1) of the ICSID Convention or ‘dispute’ as required by Article 26(1) of the ECT and, consequently, no jurisdiction to hear the claim. *Id.* at ¶ 105.”¹⁵⁶
180. The Respondent argues that the second reason that the Claimants do not have an “investment” within the meaning of Article 25 of the ICSID Convention is because the Claimants’ alleged investment does not meet the requirements of the *Salini* case and other similar tests.¹⁵⁷ The Respondent argues that merely fitting within one of the categories of investments in Article 1(1) of the BIT is insufficient for an asset to qualify as a protected “investment” for the purposes of Article 25 of the ICSID Convention.¹⁵⁸
181. The Respondent argues that the Claimants’ alleged investment falls short of the *Salini* criteria in the following respects:

¹⁵⁴ ROJ, ¶125.

¹⁵⁵ *Azpetrol International Holdings B.V., et al. v. Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award (8 September 2009) (RL-20); ROJ, ¶¶126-127.

¹⁵⁶ ROJ, ¶126.

¹⁵⁷ ROJ, ¶¶156-170; see *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 (“*Salini*”), Decision on Jurisdiction (23 July 2001) (CL-2) at ¶52.

¹⁵⁸ ROJ, ¶160.

- a. Contribution of money or other assets of economic value. The Respondent argues that the Claimants have not contributed anything. On the contrary, they are claiming approximately 8.2 million euros.¹⁵⁹
- b. Duration. The Respondent argues that, as nothing has been contributed, there has also not been a contribution with a certain duration.¹⁶⁰
- c. Risk. The Respondent argues that the type of risk associated with the alleged settlement agreement was purely commercial, citing: *Poštová Banka, a.s., ISTROKAPITÁL SE v. The Hellenic Republic* (“A commercial risk covers [...] the risk that one of the parties might default on its obligations, which risk exists in any economic relationship”);¹⁶¹ and *Romak S.A. v. The Republic of Uzbekistan*, (“All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of nonperformance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally”).¹⁶² The Respondent asserts that the risk of possible non-payment of a settlement agreement is an ordinary commercial risk, not an investment risk.¹⁶³
- d. Contribution to Mozambique’s economic development. The Respondent argues that the settlement agreement did not require the Claimants to perform any functions or construct any projects in Mozambique.¹⁶⁴

¹⁵⁹ ROJ, ¶161.

¹⁶⁰ ROJ, ¶162.

¹⁶¹ *Poštová Banka, a.s., ISTROKAPITÁL SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, (9 April 2015) (RL-27) at ¶369; ROJ, ¶165.

¹⁶² ROJ, ¶166; *see Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award (26 November 2009) (CL-9) at ¶229.

¹⁶³ ROJ, ¶167.

¹⁶⁴ ROJ, ¶169.

2. The Claimants' Response

182. In response to the Respondent's argument that settlement agreements cannot be "investments," the Claimants state that it is not their "position that the settlement agreement—in and of itself—constitutes a separate investment in Mozambique. It is connected to the Lot 3 Project under the Contract."¹⁶⁵ The settlement agreement is an "investment" according to the Claimants, because it is connected to and arises from the Lot 3 Project, making it both an "associated activity" under Article 1 of the Protocol of the BIT and also "any performance having economic value connected with an investment" under Article 1(1)(c) of the BIT.¹⁶⁶
183. The Claimants further argue that their claim is broader than "just non-payment under the settlement agreement; it also encompasses more than the conduct of ANE: it involves the unfair treatment by the highest authorities in the Government against CMC; it engages the international responsibility of Mozambique under the Treaty."¹⁶⁷
184. In response to the Respondent's argument that the settlement agreement, if actually concluded, would have extinguished any claims based on the underlying Lot 3 Contract, the Claimants argue that the settlement agreement did not extinguish the underlying claims, because Mozambique failed to honor and repudiated that agreement. Therefore, the *Orascom v. Algeria* and *Azpetrol v. Azerbaijan* awards cited by the Respondent are inapposite.¹⁶⁸
185. In response to the Respondent's argument that the Claimants do not have an "investment" within the meaning of Article 25 of the ICSID Convention, because the Claimants' alleged investment does not meet the requirements of *Salini* and other related tests, the Claimants argue that the *Salini* criteria do not apply and, alternatively, that they meet the *Salini* criteria. The Claimants further point out that the Respondent's argument in this regard is

¹⁶⁵ CRMJ, ¶229.

¹⁶⁶ CRMJ, ¶¶226-234.

¹⁶⁷ CRMJ, ¶222.

¹⁶⁸ CRMJ, ¶239.

only focused on the settlement agreement and that it does not dispute that the Lot 3 Project is an investment within the meaning of Article 25 of the ICSID Convention.¹⁶⁹ It is for the Claimants to categorize their claim, they say, and that claim extends far beyond the issue of mere non-payment by Mozambique.¹⁷⁰

186. The Claimants point out that the *Salini* criteria have been criticized in *Malaysian Historical Salvors v Malaysia* and *Inmaris Perestroika Sailing Maritime Services v Ukraine*.¹⁷¹ They also argue that the *Salini* criteria were derived from the first edition of Professor Schreuer's Commentary on the ICSID Convention, and that the second edition states:¹⁷²

The development in practice from a descriptive list of typical features towards a set of mandatory legal requirements is unfortunate. The First Edition of the Commentary cannot serve as authority for this development.

[...]

To the extent that the “*Salini* test” is applied to determine the existence of an investment, its criteria should not be seen as distinct jurisdictional requirements each of which must be met separately. In fact, tribunals have pointed out repeatedly that the criteria that they applied were interrelated and should be looked at not in isolation but in conjunction.¹⁷³

187. Alternatively, the Claimants argue that they meet the *Salini* criteria in the following respects:

¹⁶⁹ CRMJ, ¶¶292-295.

¹⁷⁰ CRMJ, ¶294.

¹⁷¹ CM, ¶129; see *Malaysian Historical Salvors v Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (28 February 2009) (CL-7) at ¶80; see also *Inmaris Perestroika Sailing Maritime Services v Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010) (CL-8) at ¶129.

¹⁷² CM, ¶¶127-128.

¹⁷³ C. Schreuer, *The ICSID Convention A Commentary*, Cambridge (Second edition) at 25.171 (CL-4).

- a. Contribution of money or other assets of economic value. The Claimants argue that they made contributions during the Lot 3 Project in the form of know-how, money, equipment and qualified personnel.¹⁷⁴
 - b. Duration. The Claimants point out that the Lot 3 Contract had a duration of 2 years and that the project was concluded in 2007.¹⁷⁵
 - c. Risk. The Claimants argue that an element of risk is inherent in construction projects like the Lot 3 Project, such as delays resulting from weather conditions, the expropriation of land, and customs barriers of imported materials.¹⁷⁶
 - d. Contribution to Mozambique's economic development. The Claimants argue that a contribution to the economy and development of the host country is inherent in public infrastructure works such as the Lot 3 Project. Because it substantially improving the Rio Ligonha road, the Lot 3 Project had a positive impact on the economy of Mozambique by, inter alia, improving the efficient transport of goods and persons.¹⁷⁷
188. As to the issue of whether CMC Maputo and CMC Africa Austral each qualify as a “National of another Contracting State” within the meaning of Article 25(2)(b) of the ICSID Convention (which the Respondent does not dispute), the Claimants argue that both companies are owned, managed, and controlled by the Italian company CMC Ravenna.¹⁷⁸ Furthermore, the General Director of CMC Africa Austral is an Italian national who was seconded from CMC Ravenna and the board of CMC Africa Austral is comprised of Italian nationals who are also directors of CMC Ravenna. CMC Maputo does not have a separate

¹⁷⁴ CM, ¶¶131-135.

¹⁷⁵ CM, ¶143.

¹⁷⁶ CM, ¶142.

¹⁷⁷ CM, ¶¶136-141.

¹⁷⁸ CM, ¶159.

board, but instead reports directly to the board of CMC Ravenna, and CMC Maputo and CMC Africa Austral share the same head office in Maputo.¹⁷⁹

3. The Tribunal's Decision

a. The Claimants had an “investment” within the meaning of the ICSID Convention

189. In order for the Tribunal to accept jurisdiction over the Claimants' claim, the burden is on the Claimants to satisfy the Tribunal, not only that each of them is an “investor” as determined in the preceding section of this Award, but also that they made an “investment,” both (a) within the meaning given to those terms in the BIT, which defines the framework of the consent given by the Respondent; and also (b) within the meaning given to those terms in the ICSID Convention.

190. Article 25 of the ICSID Convention makes the facilities of ICSID available only to resolve disputes arising out of a protected investment. As instructed by Article 31 of the VCLT, Article 25 is to be interpreted according to the “ordinary meaning” of the terms “in their context and in the light of its object and purpose.” Article 25(1) provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

The drafters of the ICSID Convention left the term “investment” undefined. One widely (but not universally) applied analysis of the term “investment” is derived from *Salini v. Morocco*, which identified a series of elements that constitute an investment:

The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction [...] In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

¹⁷⁹ Letter from CMC to ICSID dated 16 June 2017 (C-45.A).

In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.¹⁸⁰

191. The *Joy Mining* tribunal emphasized the pre-eminence of the ICSID Convention over the terms of the BIT in jurisdictional terms:

The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention.¹⁸¹

This so-called “double-keyhole” test, explicitly endorsed by other ICSID tribunals, requires a claimant to meet the requirements of both the Convention and the BIT in order for the Tribunal to have jurisdiction over its claim.

192. However, the approach taken by the tribunal in *Joy Mining* has not been universally accepted. Some tribunals have ruled that, as the ICSID Convention did not attempt to define “investment,” this task is left to the parties to delineate in their instruments of consent, including treaties. The *ad hoc* annulment committee in *Malaysia Historical Salvors* expounded the wisdom of looking primarily to the text of the relevant BIT:

It is those bilateral and multilateral treaties which today are the engine of ICSID’s effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term “investment” as found in Article 25(1) of the Convention, risks crippling the institution.¹⁸²

193. A middle ground between these two approaches has developed. While many tribunals have felt that “[i]t would go too far,” in the words of the tribunal in *SGS v. Paraguay*, “to suggest

¹⁸⁰ *Salini*, ¶52.

¹⁸¹ *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11 (“*Joy Mining*”) Award on Jurisdiction, (6 August 2004) (RL-17) at ¶50.

¹⁸² *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10 (“*Malaysian Historical Salvors*”) Decision on Annulment (16 April 2009) at ¶73.

that any definition of investment agreed by states in a BIT [...] must constitute an ‘investment’ for purposes of Article 25(1),”¹⁸³ many tribunals have adopted the approach of defining the relevant question as whether the definition of “investment” in the BIT “exceeds what is permissible” under the ICSID Convention.¹⁸⁴

194. In the opinion of the Tribunal, the definition of “investment” in the BIT does not exceed what is permissible under the ICSID Convention. The Claimants’ claims “for sums of money or any performance having an economic value” within the meaning of Article 1(c) of the BIT arise directly out of their investment in the Lot 3 Project. In the view of the Tribunal, that is sufficient to bring the Claimants’ claims within the jurisdiction of the Tribunal under both the BIT and the ICSID Convention.
195. Moreover, to the extent to which it may be necessary or useful to apply the *Salini* test, that contribution clearly exposed the Claimants, as foreign investors, to risks posed by the sovereign power and otherwise as described in *Salini* itself:

With regard to the risks incurred by the Italian companies, these flow from the nature of the contract at issue. The Claimants, in their reply memorial on jurisdiction, gave an exhaustive list of the risks taken in the performance of the said contract. Notably, among others, the risk associated with the prerogatives of the Owner permitting him to prematurely put an end to the contract, to impose variations within certain limits without changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law; any accident or damage caused to property during the performance of the works; those risks relating to problems of coordination possibly arising from the simultaneous performance of other projects; any unforeseeable incident that could not be considered as force majeure and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price. It does not matter in this respect that these risks were freely taken. It also does not matter that

¹⁸³ *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29 (“*SGS v. Paraguay*”) Decision on Jurisdiction (12 February 2010) (CL-15) at ¶93 (emphasis in original).

¹⁸⁴ *See Bureau Veritas v. Republic of Paraguay*, ICSID Case No. ARB/07/9 (“*Bureau Veritas*”) Decision on Jurisdiction (29 May 2009) (CL-60) at ¶94.

the remuneration of the Contractor was not linked to the exploitation of the completed work. A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor.¹⁸⁵

196. In summary, the Tribunal has no difficulty in concluding that the Claimants made an investment in Mozambique that qualified for protection under Article 25(1) of the ICSID Convention as well as under Article 1(1) of the BIT.

b. The Claimants were “Nationals of another Contracting State” within the meaning of the ICSID Convention

197. All of the Claimants qualify as a “National of another Contracting State” within the meaning of Article 25(2)(b) of the ICSID Convention.
198. Article 25(2)(b) of the ICSID Convention provides that the definition of “National of another Contracting State” includes:

[A]ny juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date **and which, because of foreign control,** the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention. (emphasis added)

199. As noted above (at para. 166), Italy and Mozambique agreed in Article 1(2) of the BIT that the term “investor” would include “any natural or legal person of a Contracting Party investing in the territory of the other Contracting Party as well as the foreign subsidiaries, affiliates and branches controlled by the above natural and legal persons.”
200. It is uncontested that CMC Ravenna is a “juridical person which had the nationality of a Contracting State other than the State party to the dispute,” namely Italy. It is equally

¹⁸⁵ *Salini*, ¶¶55-56. It was pointed out in *Toto Construzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12 (“*Toto Construzioni Generali*”) Decision on Jurisdiction (11 September 2009) (RL-21) at ¶78, that a construction contract in which the execution of the works extends over a substantial period of time involves by definition an element of risk.

uncontested that CMC Africa Austral is a Mozambique subsidiary of CMC Ravenna, and that CMC Maputo is a branch of CMC Ravenna entirely under its control.

201. The Tribunal accordingly concludes that CMC Africa Austral (as a subsidiary of CMC Ravenna) is a juridical person under foreign control (within the meaning of the ICSID Convention) and that it and CMC Maputo (as a branch of CMC Ravenna) are both entities that Mozambique and Italy agreed in Article 2 of the BIT should be treated as nationals of Italy. That condition was accepted by the Claimants when they asserted a claim under the BIT. All three Claimants are accordingly Italian investors in Mozambique within the meaning of both the ICSID Convention and the BIT.

C. Have the Claimants made treaty claims or purely contractual claims?

1. The Respondent's Objections

202. The Respondent argues that the Claimants' claim is purely contractual, and that purely contractual claims are outside ICSID jurisdiction.¹⁸⁶ It states that "at the core of this dispute is the purely contractual dispute of whether the Claimants (because the Contract was for unitary pricing), the EDF (as admitted by Mr. Guerra), or the Respondent must incur the cost of the alleged additional works."¹⁸⁷
203. The Respondent relies on the following authorities for the proposition that there can be no ICSID jurisdiction over contractual claims:
- a. *Toto Costruzioni Generali S.P.A. v. Republic of Lebanon* ("*Toto Costruzioni Generali*").¹⁸⁸ In this arbitration, the Respondent says, Toto "request[ed] the Tribunal to award US\$3,834,454.78 for damages suffered for extra works and charges due to wrong instructions, misleading information and erroneous design."¹⁸⁹ The tribunal held that: "Toto's claims appear to relate to the standard

¹⁸⁶ ROJ, ¶129.

¹⁸⁷ ROJ, ¶137.

¹⁸⁸ *Toto Costruzione Generali*, Decision on Jurisdiction (11 September 2009) (RL-21); ROJ, ¶¶139-140.

¹⁸⁹ ROJ, ¶139.

duties in a construction contract, i.e., an alleged failure by an employer to comply with his obligations towards the contractor. It does not involve the use of sovereign authority or ‘*puissance publique*.’ [...] Consequently, such a claim does not fall within the scope of Article 2, paragraph 3 of the Treaty.”¹⁹⁰

- b. *Abaclat and Others. v. Argentine Republic* (“*Abaclat v. Argentina*”),¹⁹¹ in which the tribunal stated:

[A]n arbitral tribunal has no jurisdiction where the claim at stake is a pure contract claim. [...] A claim is to be considered a pure contract claim where the Host State, party to a specific contract, breaches obligations arising by the sole virtue of such contract. This is not the case where the equilibrium of the contract and the provisions contained therein are unilaterally altered by a sovereign act of the Host State. This applies where the circumstances and/or the behaviour of the Host State appear to derive from its exercise of sovereign State power. Whilst the exercise of such power may have an impact on the contract and its equilibrium, its origin and nature are totally foreign to the contract.¹⁹²

- c. *Bureau Veritas, Inspection, Valuation, Assessment and Control BIVAC BV v. Republic of Paraguay*.¹⁹³ The Respondent asserts that this case is similar to the present dispute in that it concerned the nonpayment of an allegedly admitted debt. According to the Respondent, the *Bureau Veritas* tribunal “conclude[d] that the conduct that lies at the heart of the dispute, and which has been repeated over time [...] is the refusal on the part of Paraguay to pay an outstanding debt that is owed under the Contract.”¹⁹⁴ The *Bureau Veritas* tribunal also observed that: “It is important to recognize that beyond the refusal to pay there are no other acts that the

¹⁹⁰ ROJ, ¶139; *Toto Costruzioni Generali*, Decision on Jurisdiction (11 September 2009) (RL-21) at ¶¶121-122.

¹⁹¹ *Abaclat and Others. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) (RL-22); ROJ, ¶141.

¹⁹² *Id.* at ¶318.

¹⁹³ *Bureau Veritas, Inspection, Valuation, Assessment and Control BIVAC BV v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction (9 October 2012) (RL-23); ROJ, ¶¶141-150.

¹⁹⁴ *Id.* at ¶238.

Claimant really seeks to remedy. Whilst Paraguay has not paid a contractual debt that it has recognized [...] as being owed, the Claimant has not argued that it has interfered in any other way with the Claimant's rights under the Contract.”¹⁹⁵ The *Bureau Veritas* tribunal went on to say that:

There is nothing inherent in the fact that such conduct is undertaken by a State in its capacity as a contracting party that might as such endow them with the quality of sovereign acts such as to catalyse responsibility under an international treaty obligation relating to fair and equitable treatment. There has been no reliance by Paraguay on the powers of a public authority that might not - by analogous means - also be available to a private person or corporation. Attempts to mislead, distort, conceal or otherwise confuse a contractual partner are strategies open to and used by both public and private persons.¹⁹⁶

In the Tribunal's view the facts show ‘mere breach by a State of a contract with an alien (whose proper law is not international law)’ and that accordingly no violation of [...] the BIT arises.¹⁹⁷

The Respondent asserts that this case is similar to *Bureau Veritas*, in that the Respondent did not use its sovereign authority to alter the contractual relationship unilaterally. The Respondent acted as a private party and acted upon the determination of an independent consulting firm when it decided that there were no grounds for additional payments to the Claimants.¹⁹⁸

- d. *Tulip Real Estate B.V. v. Republic of Turkey*,¹⁹⁹ where the tribunal said that “the determination of whether a claim arises under a BIT involves an inquiry into the ‘essential basis’ or ‘normative source’ of that particular claim. In order to amount

¹⁹⁵ *Id.* at ¶240

¹⁹⁶ *Id.* at ¶241.

¹⁹⁷ *Id.* at ¶276

¹⁹⁸ ROJ, ¶¶149-150.

¹⁹⁹ *Tulip Real Estate B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014) (RL-24); ROJ, ¶150.

to a treaty claim, the conduct said to amount to a BIT violation must be capable of characterisation as sovereign conduct, involving the invocation of *puissance publique*. This principle has been affirmed by numerous previous investment tribunals.”²⁰⁰

204. The Respondent argues that “[w]hy’ the Respondent did not pay under the alleged settlement agreement is not an ‘act’ – instead, it is the ‘motive’ for the act of nonpayment. However, the motive must be distinguished from the act or behavior of the State.”²⁰¹
205. In response to the Claimants’ argument that *puissance publique* is present here as a result of the conduct of Mozambican officials in connection with the settlement negotiations, the Respondent argues that the “Claimants fail to identify what these sovereign acts are and what specific conduct of Respondent’s government officials amount to a breach of the BIT.”²⁰²
206. In response to the Claimants’ reliance on the decision of the *Vivendi* annulment committee to argue that their claims are investment treaty claims regardless of whether they also amount to contractual claims,²⁰³ the Respondent argues that *Vivendi* is distinguishable, because, in that case, the tribunal identified clear international law claims arising out of a series of allegations as to the conduct of the state. Since the state’s conduct allegedly involved measures taken in bad faith, the claims were not mere breach of contract claims. The Claimants in this case, Respondent says, did not point to sovereign acts that amount to violations of the BIT.²⁰⁴ Similarly, the Respondent argues that the *SGS v. Paraguay*

²⁰⁰ *Id.* at ¶354.

²⁰¹ ROJ, ¶153.

²⁰² RRJ, ¶123.

²⁰³ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (“*Vivendi*”) Decision of the Annulment Committee (3 July 2002) (CL-19) at ¶95; CRMJ, ¶247.

²⁰⁴ RRJ, ¶¶114-115.

arbitration is distinguishable, because unlike this case, that arbitration involved breaches of a treaty.²⁰⁵

207. In response to the Claimants' argument that this dispute cannot be purely contractual, because not all parties to this dispute are also parties to either the settlement agreement or the Lot 3 Contract, the Respondent argues:

Claimants have asserted that each of them has standing to bring the instant claims that seek to enforce the alleged payment obligations under the alleged settlement agreement. They cannot now argue that they do not have privity with the settlement agreement. And second, the Claimants assert that the case does not deal with the same matters because the Claimants' claims do not involve issues of performance under the Contract. [...] That argument is also incorrect. The claims overlap because the gravamen of the BIT claims and contract claims is exactly the same—the alleged nonpayment under the alleged settlement agreement.²⁰⁶

208. In response to the Claimants' argument that this dispute cannot have been extinguished by the settlement agreement because the Respondent failed to comply with that agreement, the Respondent points out that, if there was a settlement agreement, then it would have settled the underlying dispute, even if the Respondent had not complied with it. The Claimants would merely have a breach of contract claim.²⁰⁷

2. The Claimants' Response

209. The Claimants argue that none of their claims is purely contractual, but that each is a treaty claim which requires the Tribunal to consider and decide contractual issues.²⁰⁸ The Claimants argue that Mozambique has:

- breached the just and fair treatment standard under Article 2(3) of the Treaty;

²⁰⁵ *SGS v. Paraguay*, Decision on Jurisdiction (12 February 2010) (CL-15); RRJ, ¶116.

²⁰⁶ RRJ, ¶126.

²⁰⁷ RRJ, ¶138.

²⁰⁸ CRMJ, ¶244.

- violated its obligation under Article 2(3) of the Treaty not to impair investments by unjustified or discretionary [sic] measures;
- 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 clause in Article 3 of the Treaty.²⁰⁹

210. The Claimants assert that these claims fall within the scope of the BIT and are not limited to the mere issue of non-payment. They argue that “the violations asserted entail *inter alia* the inconsistent, contradictory; arbitrary; lack of transparency and bad faith; unjustified delays; coercion; a wilful disregard of due process; and unjustified conduct.”²¹⁰

211. The Claimants concede that a “mere breach of contract—without more—is not sufficient to trigger the jurisdiction of an international tribunal. The conduct of the host State in breaching the contract must amount to a violation of a Treaty provision, or in relation to a mere breach of contract, there must be an element of *puissance publique*.”²¹¹ The Claimants accepted that they “must show that the Respondent’s conduct was unjust or unfair in breach of Article 2(3) or 2(4) of the Treaty. A breach of either provision is not subject to showing a breach of contract and something more (according to the Respondent something ‘beyond the refusal to pay’). However, breaches of contract and even the mere refusal to pay may well constitute a breach of the Treaty.”²¹²

212. The Claimants rely on the decision of the *Vivendi* annulment committee, which held:

95. [...] A state may breach a treaty without breaching a contract, and *vice versa*, and this is certainly true of these provisions of the

²⁰⁹ CRMJ, ¶254.

²¹⁰ CRMJ, ¶255.

²¹¹ CRMJ, ¶261.

²¹² CRMJ, ¶247.

BIT. The point is made clear in Article 3 of the ILC Articles, which is entitled ‘Characterization of an act of a State as internationally wrongful’:

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

96. In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. [...] ²¹³

213. For a definition of a “purely contractual” claim, the Claimants rely on the same passage from *Abaclat v. Argentina* quoted by the Respondent. ²¹⁴

214. The Claimants also rely on the award in *SGS v. Paraguay*:

Of course, it is apparent that several of Claimants’ claims under the Treaty will stem from Respondent’s alleged failure to pay for SGS’s services under the Contract. That is an action that may (or may not) also constitute a contractual breach, but we are not called upon to decide that question as such. We are called upon to decide whether Respondent’s actions, such as its alleged non-payment, breach the aforementioned Articles of the Treaty. In doing so, we are in concert with the well-established jurisprudence regarding the distinction between contract claims and treaty claims. ²¹⁵

215. From these authorities, the Claimants distill the following three categories of events over which this Tribunal could exercise jurisdiction:

- An act/omission of the host State which in and of itself amounts to a violation of the Treaty.

²¹³ *Vivendi*, Decision of the Annulment Committee (3 July 2002) (CL-19) at ¶95; CRMJ, ¶246.

²¹⁴ See para. 203(b) above.

²¹⁵ *SGS v. Paraguay*, Decision on Jurisdiction (12 February 2010) (CL-15) at ¶130.

- An act/omission of the host State which arises out of a contract, which amounts to a breach of contract, and *in addition* amounts to a violation of the Treaty.
- An act/omission of the host State which is purely a breach of contract, but in breaching the contract the host State has unilaterally altered the equilibrium of the contract by way of a sovereign act (*puissance publique*).²¹⁶

216. The Claimants contend that all their claims fall within the scope of these three categories. As an example, they say that “Mozambique’s failure to comply with its undertaking to CMC—which became legally binding on 2 November 2009—amounts in and of itself to a breach of Article 2(4) of the BIT. While this conduct may amount to a breach of contract, in the Claimants’ view, it is also a violation of the Treaty. In addition, the Claimants assert that the Respondent has, by the conduct of its officials and government entities, unilaterally altered the equilibrium of the contract by way of sovereign acts.”²¹⁷

217. Alternatively, the Claimants argue that this cannot be a purely contractual dispute arising out of either the settlement agreement or the Lot 3 Contract, because not all of the parties to this dispute are named parties to those agreements. The Claimants cite the award in *Aguas del Tunari v. Bolivia*, where the tribunal held that “in order for the separate document raised by the Respondent to be in conflict with this Tribunal’s exercise of jurisdiction, that document *must both deal with the same matters and parties* and contain mandatory conflicting obligations.” The Claimants further assert that the fact that their claim relies on the conduct of several parties that are not signatory parties to the contract, such as the Prime Minister and the Minister of Public Works, clearly shows that their claim has extra-contractual elements to it.²¹⁸

218. The Claimants disagree that this case is similar to the *Bureau Veritas v. Paraguay* arbitration, arguing that the tribunal in that case did exercise jurisdiction over a purely

²¹⁶ CRMJ, ¶263.

²¹⁷ CRMJ, ¶264.

²¹⁸ CRMJ, ¶¶268-274; *Aguas del Tunari S.A. v. The Republic of Bolivia*, ICSID Case No. ARB/02/3 (“*Aguas del Tunari v. Bolivia*”) Decision on Respondent’s Objections to Jurisdiction (21 October 2005) (RL-13) at ¶94.

contractual claim at an early stage of the proceedings. That tribunal only found that Paraguay's failure to pay the investor was merely a breach of contract claim without the exercise of *puissance publique* by the host state after written and oral submissions on the merits were made. The Claimants state that the *Bureau Veritas* tribunal found that Paraguay's decision to discontinue a contract, which was the only basis for the investor's claim, "was not a repudiation of any rights under the [c]ontract."²¹⁹ The Claimants argue that the *Bureau Veritas* arbitration is distinguishable because, "there was no issue of contradictory, non-transparent, bad faith and inconsistent conduct by the host State."²²⁰

3. The Tribunal's Decision

219. The Tribunal agrees with the Respondent that the Tribunal's jurisdiction, which derives from the BIT, does not extend to purely contractual disputes. Article 9 of the BIT provides for arbitration of disputes "which may arise between either Contracting Party and the investors of the other Contracting Party on investments." The question presented by this objection is whether the claims asserted give rise to such a dispute.
220. If, on the other hand, as the Claimants argue, the Claimants' claims are for breaches of the BIT arising out of the Claimants' investment in Mozambique, this Tribunal has jurisdiction to hear them. The *Bayindir* tribunal observed that "treaty claims are juridically distinct from claims for breach of contract, even where they arise out of the same facts," and "when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty."²²¹
221. The Claimants have asserted multiple claims under the BIT. The Claimants assert claims for denial of fair and just treatment, for unjustified and discriminatory measures, for failure to observe specific undertakings in good faith, and for treatment of their investment that is

²¹⁹ CRMJ, ¶¶275-279.

²²⁰ CRMJ, ¶279.

²²¹ *Bayindir v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 ("Bayindir") Decision on Jurisdiction (14 November 2005) (CL-11) at ¶¶148, 167. The tribunal in *SGS v. Pakistan* noted that "the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders." *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 August 2003) at ¶147.

less favorable than that afforded by the Respondent to investments of nationals of third countries.²²² Whatever merit each of those claims may have, each is stated as a claim arising under the BIT, not under the settlement agreement or any other contract.

222. The Tribunal finds that the Claimants' claims all concern disputes "which may arise between either Contracting Party and the investors of the other Contracting Party on investments."²²³

D. Cotonou Convention Arbitration

223. Mozambique and Italy are both parties to the *Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part*, commonly known as the Cotonou Convention.²²⁴ The Cotonou Convention was signed in Cotonou, Benin on 24 June 2000 as the successor treaty to the earlier Fourth Lomé Convention, and entered into force on 1 April 2003.²²⁵ It was amended in 2005 and 2010.²²⁶ It is not disputed that the Cotonou Convention, as revised, is currently in force.²²⁷

1. The Respondent's Objections

224. The Respondent argues that the dispute resolution clause in the Lot 3 Contract, described below, requires that any dispute between the parties to that contract that is submitted to international arbitration be conducted pursuant to the arbitration rules referenced in the

²²² CRMJ, ¶254.

²²³ Article 9(1) BIT (C-1). As noted above, whether the Claimants had an investment within the meaning of the BIT is resolved, for purposes of jurisdiction, by the conclusion that the Claimants have advanced a prima facie case that satisfies the jurisdictional requirements of the BIT and the ICSID Convention. *See* para. 173 above.

²²⁴ RL-2.

²²⁵ EU press release IP/03/467, The Cotonou Agreement enters into force today (1 April 2003), europa.eu/rapid/press-release_IP-03-467_en.pdf (last visited 9 May 2019).

²²⁶ RL-2.

²²⁷ ROJ, ¶37. The Respondent has submitted two versions of the Cotonou Convention: the Original Cotonou Convention (R-1) and the Revised Cotonou Convention (R-2). It has taken no position as to which version applies in this case.

Cotonou Convention. Under the Cotonou Convention, according to the Respondent, both treaty claims and pure contract claims are arbitrable, but the use of other arbitration rules is excluded. According to the Respondent, the present dispute must therefore be arbitrated pursuant to the rules specified in the Cotonou Convention, to the exclusion of arbitration under the ICSID Convention and the ICSID Arbitration Rules.²²⁸

225. The Respondent also argues that the Cotonou Convention itself requires that the present dispute be submitted to arbitration under its rules. The Respondent relies on Article 30 of Annex IV of the Cotonou Convention, which states:

Any dispute arising between the authorities of an ACP State and a contractor, supplier or provider of services during the performance of a contract financed by the Fund shall:

a) in the case of a national contract, be settled in accordance with the national legislation of the ACP State concerned; and

b) in the case of a transnational contract be settled either:

i) if the Parties to the contract so agree, in accordance with the national legislation of the ACP State concerned or its established international practices; or

ii) by arbitration in accordance with the procedural rules which will be adopted by decision of the Council of Ministers at the first meeting following the signing of this Agreement, upon the recommendation of the ACP-EC Development Finance Cooperation Committee.²²⁹

226. The Respondent asserts furthermore that Article 91 of the Original Cotonou Convention explicitly provides that the Cotonou Convention supersedes the BIT.²³⁰ Article 91 states:

No treaty, convention, agreement or arrangement of any kind between one or more Member States of the Community and one or

²²⁸ ROJ, ¶¶2-6.

²²⁹ Original Cotonou Convention (C-1); ROJ, ¶42.

²³⁰ RRJ, ¶¶3-7.

more ACP States may impede the implementation of this Agreement.²³¹

227. The resolution of disputes specifically relating to the Lot 3 Contract is governed by Article 68 of the General Conditions. Article 68.1 of the General Conditions states:

The Contracting Authority and the Contractor shall make every effort to amicably settle disputes relating to the Contract which may arise between them, or between the Supervisor and the Contractor.²³²

228. The Respondent argues that the Claimants' claims "relate to" the Lot 3 Contract within the meaning of Article 68.1 of the General Conditions, because the Claimants are effectively seeking approximately 8.2 million Euros as compensation for additional work that they claim they were required to perform on the Lot 3 Project.²³³

229. The terms of Article 30 of Annex IV of the Cotonou Convention concerning the resolution of disputes between States and contractors working on projects governed by the Cotonou Convention are closely tracked by Article 68.5 of the General Conditions, which similarly provides for two alternative methods of resolving disputes relating to the Lot 3 Contract that cannot be amicably settled. One method applies to "national contracts" (68.5(a)) and the other to "transnational contracts" (68.5(b)), as follows:

68.5 In the absence of an amicable settlement or the settlement by conciliation within the maximum Time Limit specified, the dispute shall:

a) in the case of a **national contract**, be settled in accordance with the national legislation of the State of the Contracting Authority; and

b) in the case of a **transnational Contract**, be settled, either:

i) if the parties to the Contract so agree, in accordance with the national legislation of the State of the Contracting Authority or its established international practices; or

²³¹ RL-1.

²³² C-25.

²³³ RRJ, ¶14.

ii) by arbitration in accordance with the procedural rules adopted in accordance with the Convention.²³⁴

230. The procedural rules adopted in accordance with the Cotonou Convention are the Procedural Rules on Conciliation and Arbitration of contracts financed by the European Development Fund as adopted by Decision No L382/95 on 29 March 1990 (the “Cotonou Arbitration Rules”).²³⁵
231. The terms “national” and “transnational” are not defined in the Cotonou Convention or in the General Conditions. The Respondent argues that the Lot 3 Contract is a transnational contract, on the basis that “transnational” should be read to mean the same thing as “international.”²³⁶ The Respondent further asserts that the Claimants have acknowledged that the Lot 3 Contract is an international contract.²³⁷
232. Even if the Claimants were to allege that the Lot 3 Contract were a “national contract,” the Respondent argues, the Tribunal would not have jurisdiction, because disputes about “national contracts” must be settled “in accordance with the national legislation of the State of the Contracting Authority.”²³⁸ In any event, the Respondent contends that the Claimants cannot argue that the Lot 3 Contract is a “national” contract, because they brought a claim under a BIT which requires that investors be foreign entities. The Respondent also points to the Claimants’ concessions that the Lot 3 Contract was awarded after an “international tender” and that equipment that was used during the Lot 3 Project came from Europe.²³⁹
233. The Respondent argues that interpreting “transnational,” as used in Article 68.5 of the General Conditions, to mean “international” would be consistent with Article 28(2)(c) of

²³⁴ Article 68.5 of the General Conditions (C-25) (emphasis added).

²³⁵ Article 68.5(b)(ii) of the Special Conditions.

²³⁶ ROJ, ¶¶ 43, 60-61.

²³⁷ ROJ, ¶61, n.11.

²³⁸ ROJ, ¶61, n.12.

²³⁹ RRJ, ¶85.

the Revised Cotonou Convention, which states that EU cooperation shall “promote the management of sustainable development challenges with a transnational dimension.”²⁴⁰

234. Since the Lot 3 Contract was a transnational contract, the Respondent argues, the only dispute resolution option is Cotonou Convention arbitration as provided in Section 68.5(b)(ii) of the General Conditions. This is because the only alternative – dispute resolution “in accordance with the national legislation of the State of the Contracting Authority or its established international practices” under Article 68.5(b)(i) – requires the agreement of the Parties, and there was no such agreement.²⁴¹
235. In support of its argument for applying the Cotonou Arbitration Rules, the Respondent relies on the 2008 EU General Court decision in *Centro di educazione sanitaria e tecnologie appropriate sanitarie (Cestas) v. Commission of the European Communities*. In that case, the General Court stated that “contracts concluded by the applicant within the framework of projects financed by EDF funds are covered, in case of dispute, by the procedure laid down in [the Cotonou Arbitration Rules] [...]”²⁴²
236. Sending the Parties to arbitration pursuant to the Cotonou Arbitration Rules would be consistent with the BIT, the Respondent argues, because Article 9(3)(d) of the BIT permits a dispute under the BIT to be submitted to “other international arbitration arrangements, mechanisms, or instruments,” as an alternative to the ICSID Rules.²⁴³ While Article 9 of the BIT states that investors may elect among those alternatives “at their choice,”²⁴⁴ the Respondent contends that the Claimants gave up the right to elect any other dispute resolution mechanism under Article 9(3) of the BIT when they agreed in the Lot 3 Contract

²⁴⁰ ROJ, ¶¶43; RL-2.

²⁴¹ ROJ, ¶¶63.

²⁴² RL-8, ¶¶21; ROJ, ¶¶66.

²⁴³ ROJ, ¶¶85-86.

²⁴⁴ Article 9(3) BIT (C-1).

to arbitrate under the Cotonou Arbitration Rules.²⁴⁵ The Respondent bases this argument in large part on Article 9(2) of the BIT, which provides:

In case an investor or entity of one of the Contracting Parties have stipulated an investment agreement in accordance with the relevant applicable laws in force, the procedure foreseen in such investment agreements shall apply.²⁴⁶

237. The Respondent contends that the Lot 3 Contract is such an investment agreement. Article 68 of the General Conditions is not a mere “forum selection” clause, the Respondent argues, because it provides that disputes arising out of the Lot 3 Contract are within the exclusive and compulsory jurisdiction of a tribunal constituted pursuant to the Cotonou Convention Arbitration Rules.²⁴⁷ In addition, the Respondent argues that Article 68 is not a mere forum selection clause, because “recourse to Cotonou Convention arbitration has been mandated by *treaty*, and it is acknowledged in the parties’ Contract. Article 30 of [Annex IV of] the Cotonou Convention requires that disputes be settled under its ADR scheme.”²⁴⁸
238. The Respondent also points out that Article 68 of the General Conditions, unlike an ordinary forum selection clause, does not require litigation before national or municipal courts.²⁴⁹ This distinction differentiates this case, in the Respondent’s view, from *Salini v. Jordan*, in which a BIT provision similar to Article 9(2) of the BIT was at issue. The Respondent argues that *Salini* is inapposite because, unlike this case, it concerned what amounted to a “local” forum selection clause requiring that disputes be resolved by a national court.²⁵⁰

²⁴⁵ ROJ, ¶¶85-86.

²⁴⁶ ROJ, ¶¶87-88; C-1.

²⁴⁷ ROJ, ¶¶92-97.

²⁴⁸ RRJ, ¶34.

²⁴⁹ RRJ, ¶¶45-49.

²⁵⁰ RRJ, ¶54; *Salini Construttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13 (“*Salini v. Jordan*”) Decision on Jurisdiction (9 November 2004) (CL-45).

239. The Respondent further argues that the Claimants waived any right they may have had to ICSID arbitration by agreeing to the terms of the Lot 3 Contract. The Respondent cites the Decision on Jurisdiction in *Aguas del Tunari v. Bolivia*, which found that “a clear waiver of ICSID jurisdiction” would be effective.²⁵¹ In the Respondent’s view, “[a]n obligation deriving from a formal requirement imposed by an international treaty is enough to constitute a waiver by an investor of its rights to invoke ICSID jurisdiction.”²⁵²
240. The Respondent points out that a finding that the Claimants waived ICSID jurisdiction would not leave them without a forum: “the Cotonou Convention and the Arbitration Rules promulgated under it are broad enough to encompass the treaty claims that the Claimants purport to assert under the Italy-MZ BIT.”²⁵³
241. The Respondent disagrees with the Claimants that the present dispute arises under the settlement agreement rather than the Lot 3 Contract. The Respondent argues that, “[e]ven if the settlement agreement superseded the Contract, the international arbitration clause in the Contract survives and remains part of the settlement agreement, because arbitration agreements are independent and severable under accepted international law principles.”²⁵⁴ The Respondent cites *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru* for the proposition that “[t]he separability of an arbitration agreement from the contract of which it forms part is a general principle of international arbitration law today.”²⁵⁵
242. In response to the Claimants’ argument that the Respondent failed to assert that the doctrine of separability exists under Mozambican law, the Respondent cites to the witness statement of Ms. Muenda and to various arbitral awards in support of its position that arbitral

²⁵¹ *Aguas del Tunari v. Bolivia*, Decision on Respondent’s Objections to Jurisdiction (21 October 2005) (RL-13) at ¶118; ROJ, ¶96.

²⁵² RRJ, ¶¶52-61.

²⁵³ RRJ, ¶66.

²⁵⁴ ROJ, ¶98.

²⁵⁵ *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Annulment Proceeding (1 March 2011) (RL-14) at ¶131; ROJ, ¶98.

agreements are separable as a matter of both international and Mozambican law. The Respondent maintains that “any dispute under a settlement agreement must be resolved under the alternative dispute settlement mechanism of the Contract by virtue of incorporation of the arbitration clause.”²⁵⁶

243. The Respondent argues that Italy and Mozambique agreed that investors must arbitrate pursuant to the Arbitration Rules of the Cotonou Convention when the contract is financed by the EDF.²⁵⁷ Article 30 of Annex IV of the Original Cotonou Convention states that it applies to “any dispute arising between the authorities of an ACP State and a contractor, supplier or provider of services during the performance of a contract financed by the Fund [EDF],”²⁵⁸ and that those disputes “shall” be settled pursuant to the Cotonou Convention dispute resolution mechanism.²⁵⁹ The Respondent argues that all these requirements are met here.²⁶⁰
244. The Respondent bases two arguments on Article 30 of Annex IV of the Cotonou Convention. The first is that the dispute resolution provision in the Cotonou Convention applies to this dispute. The second is that the Cotonou Convention supersedes and precludes application of the BIT. Because of the similarity between Article 30 of the Cotonou Convention and Article 68 of the General Conditions, most arguments concerning the scope of the arbitration provision in the Lot 3 Contract apply *mutatis mutandis* to the arbitration provision in the Cotonou Convention.
245. The Respondent contends that this dispute arose “during the performance” of the Lot 3 Contract, as that phrase is used in Article 30 of Annex IV of the Cotonou Convention, because the 30 October 2009 settlement offer specifies that the proposed payment “cover[s] all the additional costs and financial charges incurred during the execution of the

²⁵⁶ RRJ, ¶27.

²⁵⁷ ROJ, ¶93.

²⁵⁸ R-1; ROJ, ¶59.

²⁵⁹ ROJ, ¶71.

²⁶⁰ ROJ, ¶71.

Construction Contract.”²⁶¹ In addition, the Respondent continues, this dispute arose during the performance of the Lot 3 Project, because it arose while the Parties were negotiating payment and, in the context of construction contracts, “payment” is part of “performance.”²⁶²

246. The Respondent further argues that the Claimants have failed to cite to a provision in the Lot 3 Contract that limits the scope of the arbitration clause in the Cotonou Convention to disputes arising during the performance of that Contract. Also, nothing in the Arbitration Rules of the Cotonou Convention limits its scope to disputes arising during performance. Instead, Article 1 of the Arbitration Rules refers to disputes “relating to a contract.” The Respondent asserts that this dispute “relates” to the Lot 3 Contract, because the alleged settlement agreement relates back to the Lot 3 Contract.²⁶³

247. In response to the Claimants’ argument that this dispute does not arise out of a contract that was financed by the EDF, because the settlement agreement was to be paid by Mozambique, the Respondent argues that the dispute ultimately arises out of the Lot 3 Contract, which is clearly “financed” by the EDF.²⁶⁴ In addition, the Respondent argues that the Claimants have conceded that the EDF would have paid the settlement agreement. It points out that the Claimants’ CFO in Mozambique, Mr. Guerra, testified that the EDF is responsible for invoices whereas Mozambique is responsible for taxes.²⁶⁵

248. In response to the Claimants’ argument that the Cotonou Convention does not supersede the BIT, because the Cotonou Convention is not a “successive treat[y] relating to the same subject-matter” for the purposes of Article 30 of the Vienna Convention,²⁶⁶ the Respondent argues that the Cotonou Convention and the BIT do relate to the same subject-matter,

²⁶¹ ROJ, ¶¶74-75.

²⁶² RRJ, ¶¶19-20.

²⁶³ RRJ, ¶¶17-18.

²⁶⁴ RRJ, ¶¶23-26.

²⁶⁵ Tr. 1 May 2019, p. 567, l. 10-16; Witness Statement of Guerra, ¶19.

²⁶⁶ CRMJ, ¶202.

because the Cotonou Convention deals with investor protection, and the investor-protection terms of the Cotonou Convention and the Cotonou Arbitration Rules are broad enough to encompass the Claimants' BIT claims.²⁶⁷

249. The Respondent further points out that the Cotonou Arbitration Rules were originally adopted pursuant to the Lomé Convention, the predecessor of the Cotonou Convention. In 2002, the ACP-EC Council of Ministers adopted Decision No. 2/2002 to extend the application of the arbitration rules to the Cotonou Convention.²⁶⁸ The Preamble to that decision states, *inter alia*,

(3) Article 30 of Annex IV of the Cotonou Agreement provides that any dispute arising between the authorities of an ACP State and a contractor, supplier or provider of services during the performance of a transnational contract financed by the European Development Fund shall be settled by arbitration in accordance with the procedural rules to be adopted by decision of the ACP-EC Council of Ministers upon the recommendation of the ACP-EC Development Finance Cooperation Committee.

(4) Provision should be made for applying the general regulations, the general conditions and the rules governing the conciliation and arbitration procedure referred to in the previous recitals to contracts financed from the resources of the ninth European Development Fund and any future Fund.²⁶⁹

250. Article 4 of Decision No. 2/2002 states:

Disputes regarding contracts financed from the resources of the European Development Fund which, under the general regulations and general conditions governing such contracts, must be settled in accordance with the conciliation and arbitration procedure for the said contracts, shall be settled in accordance with the procedure

²⁶⁷ RRJ, ¶¶77-78.

²⁶⁸ RL-7.

²⁶⁹ *Id.*

adopted by Decision No 3/90 of the ACP-EC Council of Ministers
of 29 March 1990.²⁷⁰

251. The Respondent argues that this Tribunal cannot simply become a Cotonou Convention tribunal, because i) ICSID cannot administer a dispute under the Cotonou Arbitration Rules, and ii) this Tribunal does not and cannot comply with the Cotonou Arbitration Rules, which require that all arbitrators be citizens of a member state.²⁷¹
252. In response to the Claimants' reliance on Article 12(1) of the BIT, which provides that, where a matter is governed by multiple international agreements, the most favorable provision shall be applied, the Respondent replies that an MFN provision like Article 12(1) "cannot apply to procedural obligations or override the intent of the parties."²⁷² The Respondent cites *Salini v. Jordan*,²⁷³ where, it says, the tribunal held that the MFN clause of the Italy-Jordan BIT did not apply to dispute settlement clauses: "[i]n the event that, as in this case, the dispute is between a foreign investor and an entity of the Jordanian State, the contractual disputes between them must, in accordance with Article 9(2), *be settled under the procedure set forth in the investment agreement*. The Tribunal has no jurisdiction to entertain them."²⁷⁴

²⁷⁰ *Id.* The Respondent also argues that the Cotonou Arbitration Rules in and of themselves require this dispute to be referred to arbitration under those rules.²⁷⁰ Article 1 of those Arbitration Rules states: "Disputes relating to a contract financed by the European Development Fund (EDF) which, pursuant to the provisions of the general conditions and the special conditions governing the contract, may be settled by conciliation or by arbitration shall be settled in accordance with these procedural rules." ROJ, ¶¶82, 84.

²⁷¹ ROJ, ¶106.

²⁷² RRJ, ¶76.

²⁷³ CL-45, ¶119.

²⁷⁴ RRJ, ¶76.

2. The Claimants' Response

253. The Claimants argue that the Lot 3 Contract merely contains a forum selection clause and that no forum selection clause can deprive an investor of its right under a BIT to resolve a treaty claim.²⁷⁵
254. The Claimants argue that, even if Article 68 of the General Conditions contained an exclusive jurisdiction clause, that provision would be a forum selection clause which could not prevent them from bringing a BIT claim under the ICSID Convention.²⁷⁶ The Claimants rely on the following authorities for the proposition that forum selection clauses do not preclude ICSID jurisdiction:
- a. *Lanco International Inc. v. Argentine Republic*.²⁷⁷ The Claimants state that in the *Lanco* case, “the respondent relied on an exclusive jurisdiction clause in a concession agreement and argued that ‘as regard any dispute that may arise under that contract recourse must be had to the Federal Contentious-Administrative Tribunals of the City of Buenos Aires, which is the jurisdiction freely agreed upon by the parties after the entry into force of the ARGENTINA-U.S. Treaty.’ The tribunal rejected this objection and upheld the investor’s right under the BIT to opt for ICSID arbitration.”²⁷⁸
 - b. *Garanti Koza v Turkmenistan*,²⁷⁹ in which the tribunal stated that “[t]he fact that the Contract provides for resolution of disputes arising under the Contract in the

²⁷⁵ CRMJ, ¶154.

²⁷⁶ CRMJ, ¶¶166-175.

²⁷⁷ *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6 (“*Lanco*”) Preliminary Decision on Jurisdiction of the Arbitral Tribunal (8 December 1998) (CL-55) at ¶7.

²⁷⁸ CRMJ, ¶166.

²⁷⁹ *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20, Award (19 December 2016) (CL-51) at ¶245.

Arbitration Court of Turkmenistan does not deprive this Tribunal of jurisdiction over claims pleaded and arising under the BIT.”²⁸⁰

- c. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*,²⁸¹ in which the tribunal stated that, “[w]here ‘the fundamental basis of the claim’ is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.”²⁸²
- d. *Siemens AG v Republic of Argentina*.²⁸³ The Claimants argue that “[t]he tribunal in *Siemens v Argentina* agreed with the *Vivendi* ad-hoc Committee that an exclusive jurisdiction clause in a contract ‘does not preclude an international tribunal’ from considering the merits of a treaty cause of action.”²⁸⁴
- e. *SGS Société Générale de Surveillance S.A v Paraguay*.²⁸⁵ The Claimants assert that “in *SGS v. Paraguay*, in answer to the question of whether a contractual forum selection clause could divest an ICSID tribunal of jurisdiction over claims for breach of treaty, the tribunal held that the answer was ‘undoubtedly negative’ and that the contractual clause could be ‘readily disposed of.’”²⁸⁶

255. In response to the Respondent’s argument that the Lot 3 Contract is a “transnational” contract within the meaning of Article 68.5 of the General Conditions, the Claimants argue

²⁸⁰ CRMJ, ¶167.

²⁸¹ *Vivendi*, Decision of the Annulment Committee (3 July 2002) (CL-19) at ¶101 (emphasis added).

²⁸² CRMJ, ¶¶168-169.

²⁸³ *Siemens AG v Republic of Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004) (CL-14) at ¶180.

²⁸⁴ CRMJ, ¶170.

²⁸⁵ *SGS v Paraguay*, Decision on Jurisdiction (12 February 2010) (CL-15) at ¶138.

²⁸⁶ CRMJ, ¶170.

that it is not clear what “national” and “transnational” mean within the context of the Lot 3 Contract and the Cotonou Convention. They point out that the Lot 3 Contract was signed by CMC Africa Austral, a Mozambican corporation, and that “it is difficult to see how the Respondent can conclude so easily that the Contract is ‘transnational.’” However, the Claimants do not go so far as to take the position that the contract is “national” within the meaning of the Lot 3 Contract and the Cotonou Convention.²⁸⁷

256. The Claimants argue that Article 68 of the General Conditions only applies to *contractual* disputes arising *during the performance* of a contract that is *financed* by the EDF. Article 68 of the General Conditions would not apply to this dispute, the Claimants argue, because (a) it is not a *contractual* dispute, but rather an investment dispute governed by international law; (b) the dispute did not arise out of the *performance* of the Lot 3 Contract; and (c) the settlement agreement was not *financed* by the EDF.²⁸⁸

- a. Contractual. The Claimants point out that Article 68.1 of the General Conditions provides that Article 68 only applies to “disputes relating to the contract.” This contractual dispute settlement mechanism would therefore not be applicable to these BIT claims.²⁸⁹
- b. Performance. The Claimants argue that the express terms of the Lot 3 Contract clearly show that disputes only fall under the Cotonou Convention when they arise out of the *performance* of a contract financed by the EDF. They point to Article 30 of Annex IV of the Revised Cotonou Convention which states “Any dispute arising [...] during the performance of as contract financed by the multi-annual financial framework of cooperation under this Agreement.”²⁹⁰ The Claimants state that the performance of the Contract was completed in November 2007 and that, by March 2009, the Engineer confirmed that he was working on the issuance of the final

²⁸⁷ CRMJ, ¶¶210-211.

²⁸⁸ CRMJ, ¶¶156-163.

²⁸⁹ CRMJ, ¶¶157-158.

²⁹⁰ CRMJ, ¶¶159-160.

certificate. This means that the performance of the Lot 3 contract was completed before the events that gave rise to this dispute occurred, i.e. the 30 November 2009 settlement offer and the non-transparent and arbitrary conduct that crystalized in August 2011.²⁹¹

- c. Financed. The Claimants argue that the settlement does not arise out of works that were *financed* by the EDF, because the settled claims were for additional works that were to be paid for by Mozambique, not the EDF.²⁹²

257. In response to the Respondent's contention that the arbitration provision survived the contract to become part of the settlement agreement because it is separable, the Claimants argue that that the separability of an arbitration clause is to be decided by domestic law, not international law, and that the Respondent has failed to establish the existence of the principle of separability under Mozambican law.²⁹³

258. In response to the Respondent's argument that the arbitral procedure in the Cotonou Convention applies pursuant to Article 9(2) of the BIT, because the Parties stipulated as much in the Lot 3 Contract, the Claimants argue that "this provision means that merely contractual breaches of contract or good faith technical discussions regarding the scope of contractual obligations are to be settled in conformity with the dispute resolution clause of the 'investment agreement.' But it does not mean that a dispute settlement clause under a contract will affect the jurisdiction of an international tribunal to consider breaches of the Treaty and international law."²⁹⁴ For this proposition, the Claimants rely on *Salini v. Jordan*, where the tribunal, in applying a BIT provision very similar to Article 9(2) of the Italy-Mozambique BIT, held that "the dispute settlement procedures provided for in the Contract could only cover claims based on breaches of the Contract. Those procedures

²⁹¹ CRMJ, ¶¶161-162.

²⁹² CRMJ, ¶162.

²⁹³ CRMJ, ¶¶164-165; RRJ, ¶27.

²⁹⁴ CRMJ, ¶174.

cannot cover claims based on breaches of the BIT (including breaches of those provisions of the BIT guaranteeing fulfilment of contracts signed with foreign investors).”²⁹⁵

259. The Claimants respond to the Respondent’s assertion that they waived ICSID jurisdiction by pointing out that Article 68 of the General Conditions is a boilerplate provision that does not evidence the “specific intention” to effect a “clear waiver of ICSID jurisdiction” that the award cited by the Respondent requires.²⁹⁶
260. The Claimants disagree with the Respondent’s argument that Article 30 of Annex IV of the Cotonou Convention itself requires that this dispute be arbitrated pursuant to the Cotonou Arbitration Rules. They argue that their claims do not involve the performance of a contract financed by the EDF, because the settlement agreement was entered into two years after the conclusion of the construction works in November 2007.²⁹⁷
261. The Claimants further argue that the Cotonou Convention allows the Parties to settle disputes “in accordance with the national legislation of the ACP State concerned or its established international practices.”²⁹⁸ This includes the arbitration procedures set out in BITs.²⁹⁹ The Claimants assert that the Respondent conceded that “Article 30 provides two choices to the investor and the Contracting State between: (a) *if the investor and the Contracting State so agree*, by recourse to national legislation, or to the Contracting States’ ‘established international practices,’ which could include the procedures in any existing BITs.”³⁰⁰

²⁹⁵ *Salini v. Jordan*, Decision on Jurisdiction (9 November 2004) (CL-45) at ¶96.

²⁹⁶ CRMJ, ¶¶184-196.

²⁹⁷ CRMJ, ¶¶156-163.

²⁹⁸ Article 30 of Annex IV of the original Cotonou Convention (RL-1); *see* Article 68.5(b)(i) of the General Conditions.

²⁹⁹ CRMJ, ¶¶207-209.

³⁰⁰ ROJ, ¶45; CRMJ, ¶208.

262. The Claimants point out that the Cotonou Arbitration Rules provide that an arbitral tribunal is to apply municipal law and require that all domestic administrative procedures be exhausted before a claim is submitted. They take the position that this is further evidence that the Parties could not have agreed to settle BIT claims pursuant to the Cotonou Arbitration Rules.³⁰¹
263. The Claimants disagree with the Respondent’s reading of the EU General Court decision in *Centro di educazione sanitaria e tecnologie appropriate sanitarie (Cestas) v. Commission of the European Communities*. They argue that the EU Court does not hold that the Cotonou Convention precludes a non-Cotonou Convention tribunal from exercising jurisdiction and that, in any case, the arbitration procedures in the Cotonou Convention only apply to contractual disputes.³⁰²
264. In response to the Respondent’s argument that the Cotonou Convention supersedes the BIT, the Claimants argue that the Cotonou Convention cannot require that BIT claims be resolved pursuant to its arbitration rules, because it is not an investor protection treaty and does not contain substantive investor protections.³⁰³ They argue that the BIT is clearly *lex specialis* in relation to the much broader Cotonou Convention, and that the two treaties do not relate to the same subject matter within the meaning of Article 30 VCLT.³⁰⁴
265. The Claimants argue that Article 91 of the Cotonou Convention is irrelevant.³⁰⁵ They rely on Article 12 of the BIT to argue that, in case of a treaty conflict, the most favorable dispute settlement provision should apply.³⁰⁶ Article 12 of the BIT states:

³⁰¹ CRMJ, ¶¶213-216.

³⁰² CRMJ, ¶217.

³⁰³ CRMJ, ¶¶198-199.

³⁰⁴ CRMJ, ¶202.

³⁰⁵ Article 91 of the original Cotonou Convention provides that “No treaty, convention, agreement or arrangement of any kind between one or more Member States of the Community and one or more ACP States may impede the implementation of this Agreement.” (RL-1); CRMJ, ¶202.

³⁰⁶ C-1.

If a matter is governed both by this Agreement and by another international agreement to which both Contracting Parties are signatories, or by general international law provisions, the most favourable provisions shall be applied in either Contracting Party to the investors of the other Contracting Party.³⁰⁷

3. The Tribunal's Decision

266. The determination of whether, as the Respondent contends, the Cotonou Convention operates to cut off the access to ICSID arbitration to which the BIT would otherwise entitle the Claimants requires, first, an analysis at the level of international treaty law on the effects of the interplay among the Cotonou Convention, the ICSID Convention, and the BIT regarding the treaty obligations of the Respondent. It also requires an analysis at the level of municipal contract law on whether and to what extent the rights of the Claimants, who are not parties to any of the foregoing treaties, may be constrained by the terms of those treaties.

a. The Cotonou Convention does not supersede the BIT

267. The Cotonou Convention was signed on 23 June 2000 and entered into force on 1 April 2003. The BIT was signed on 14 December 1998, and entered into force on 17 November 2003.³⁰⁸ The dates of the two treaties are important because of the rule of treaty construction stated in Article 30 of the VCLT, which provides that, “[a]s between States parties” to “successive treaties relating to the same subject-matter,” “the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”³⁰⁹ In determining which treaty is the earlier and which is the later, commentators generally refer to the date of signature of each treaty.³¹⁰

³⁰⁷ Article 12 BIT (C-1).

³⁰⁸ CM, ¶2, n. 1.

³⁰⁹ Art. 30 (1), (2), and (4) VCLT (CL-6).

³¹⁰ Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 402. (“However, when establishing the conflict in time, the relevant date is that of the adoption of the respective treaties, not of their entry into force.”).

268. The Cotonou Convention would therefore appear to be the later treaty, but the history of the Cotonou Convention leaves room for dispute. The Cotonou Convention was not written on a blank slate, but was the last (and current) version of a series of treaties. As the European Investment Bank explained in a 2003 press release:

Cotonou follows a long tradition of trade and development aid partnerships between Europe and its former dependent countries, now grouped in the ACP group of states, under the Yaoundé and later Lomé Conventions. From 1963 until the beginning of this year when the Lomé IV convention was replaced with the Cotonou Agreement, the EIB has channeled over EUR 9 billion into investment in the ACP countries.³¹¹

269. For present purposes, it is unnecessary to look further back than the Lomé Conventions, the first of which was signed in 1975. It was succeeded by conventions referred to as Lomé II in 1979, Lomé III in 1984, and Lomé IV in 1989.³¹² Lomé IV expired on 29 February 2000. Shortly before that date, the European Commission submitted to the Council of Ministers a “[p]roposal for a Council Decision regarding the position to be taken by the Community within the ACP-EC Committee of Ambassadors with a view to producing a decision on transitional measures to cover the period between the expiry of the revised fourth ACP-EC Convention [Lomé IV] and the entry into force of the fifth ACP-EC Convention.”³¹³ The “fifth ACP-EC Convention” became known as the Cotonou Convention after it was signed at Cotonou, Benin on 23 June 2000.

³¹¹ European Investment Bank press release, “EIB launches the Cotonou Agreement Investment Facility,” <https://www.eib.org/en/press/all/2003-055-eib-launches-the-cotonou-agreement-investment-facility.htm> (last visited 9 May 2019). The EIB shares responsibility with the European Commission for managing the European Development Fund.

³¹² ACP-EEC Convention signed at Lomé on 28 February 1975 (OJ L 25, 30.1.1976, p. 2–40), available at: <http://data.europa.eu/eli/convention/1976/199/oj>; Second ACP-EEC Convention signed at Lomé on 31 October 1979 (OJ L 347, 22.12.1980, p. 2–72), available at: <http://data.europa.eu/eli/convention/1980/3225/oj>; Third ACP-EEC Convention signed at Lomé on 8 December 1984 (OJ L 86, 31.3.1986, p. 3–208), available at: <http://data.europa.eu/eli/convention/1986/125/oj>; Fourth ACP-EEC Convention signed at Lomé on 15 December 1989 (OJ L 229, 17.8.1991, p. 3–286), available at: <http://data.europa.eu/eli/convention/1991/400/oj>.

³¹³ European Commission, “Proposal for a Council Decision regarding the position to be taken by the Community within the ACP-EC Committee of Ambassadors with a view to producing a decision on transitional measures to cover the period between the expiry of the revised fourth ACP-EC Convention and the entry into force of the fifth ACP-EC Convention,” 9 February 2000, Explanatory Memorandum, [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1557433949052&uri=CELEX:52000PC0063\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1557433949052&uri=CELEX:52000PC0063(01)) (Last visited 9 May 2019).

270. On the date the Cotonou Convention entered into effect 1 April 2003, the European Commission confirmed the Cotonou Convention's status as a successor to the Lomé Conventions and the measures taken to bridge the gap between the two in a press release that stated:

The successor to the Lomé Conventions, the Cotonou Agreement has been partly implemented on a provisional basis since August 2000. One important dimension – the financial implementation provisions – had to be delayed pending ratification by the fifteen EU Member States. This is now done. The Cotonou philosophy, based on a more effective political dimension and a higher degree of flexibility in the provision of aid in order to reward performance and results, can now be fully implemented.³¹⁴

271. Since predecessors of many of the provisions of the Cotonou Convention on which the Respondent relies, such as the provision for arbitrating claims arising out of the performance of contracts for projects financed by the EDF, occur in the predecessor treaties to the Cotonou Convention, which were signed before the BIT was signed, there is room for argument as to which should be considered the later treaty. The Parties did not address that question, however, and the Tribunal does not need to resolve it, because the issue arises only if the BIT and the Cotonou Convention relate to “the same subject-matter” and their provisions are not compatible in that they cannot be applied simultaneously.³¹⁵ We therefore turn to those two questions.

272. It appears to the Tribunal that the overlap between the subject matters of the BIT and the Cotonou Convention is very small. The BIT deals entirely with the encouragement and protections offered by Italy and Mozambique to investors and investments from the other country. The Cotonou Convention states that it was concluded between “the European Community, on the one hand,” and “the Group of African, Caribbean and Pacific States (ACP), on the other,”³¹⁶ “in order to promote and expedite the economic, cultural and social

³¹⁴ European Commission press release IP/03/467, “The Cotonou Agreement enters into force today (1st April 2003),” europa.eu/rapid/press-release_IP-03-467_en.pdf (last visited 9 May 2019).

³¹⁵ Article 30(1), (3), and (4) VCLT (CL-6).

³¹⁶ RL-2, Preamble.

development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment.”³¹⁷

273. Both treaties thus seem to include economic development among their objectives, but the scale and scope of the two is significantly different. The BIT consists of 15 articles on nine pages, plus a three-page protocol. The Revised Cotonou Convention consists of 100 articles, on 106 pages, plus seven annexes on an additional 67 pages and three protocols on an additional 12 pages. The table of contents of the Cotonou Convention lists provisions dealing with the political dimension, institutional provisions, cooperation strategies, development strategies, economic and trade cooperation, development finance cooperation, financial cooperation, procedures and management systems, and provisions for the least developed, landlocked and island states. These topics cover a far wider range than the investment protection provisions of the BIT.

274. It is notable in this connection that the Cotonou Convention contains a provision explicitly encouraging the parties to that convention to enter into bilateral investment treaties. Article 78 of the Cotonou Convention, entitled “Investment Protection,” provides that:

The ACP States and the Community and its Member States, within the scope of their respective competencies, affirm the need to promote and protect either Party’s investments on their respective territories, and in this context affirm the importance of concluding, in their mutual interest, investment promotion and protection agreements which could also provide the basis for insurance and guarantee schemes.³¹⁸

275. Article 15(2) of Annex II of the Cotonou Convention similarly provides that “[w]ith a view to facilitating the negotiation of bilateral agreements on investment promotion and protection, the Contracting Parties agree to study the main clauses of a model protection agreement.”³¹⁹

³¹⁷ RL-2, Art. 1.

³¹⁸ RL-2, Art. 78(1).

³¹⁹ RL-2, Annex II, Art. 15(2).

276. It would seem evident that a treaty that affirms the need for and importance of investment promotion and protection agreements, and in which the Parties undertake to study the main clauses of such an agreement, is not itself an investment promotion and protection agreement. The Cotonou Convention and the BIT thus appear to the Tribunal not to deal with “the same subject-matter.”
277. Moreover, the provisions of the Cotonou Convention and the BIT are entirely compatible. The Cotonou Convention affirms the importance of investment promotion and protection agreements, and the BIT is such an investment promotion and investment agreement. There is no need to reconcile the two, or to give one prominence over the other, unless there is some specific conflict between their respective terms.

b. The Cotonou Convention’s arbitration provisions do not conflict with those of the BIT

278. The Respondent argues that the arbitration provisions of the Cotonou Convention are in direct contradiction to those of the BIT. While both provide for arbitration of disputes, the Cotonou Convention calls for “arbitration in accordance with the procedural rules which will be adopted by decision of the Council of Ministers at the first meeting following the signing of this Agreement”,³²⁰ while the BIT offers an investor the choice among *ad hoc* arbitration under the UNCITRAL Arbitration Rules, ICSID arbitration, and “other international arbitration arrangements, mechanisms or instruments adhered to and ratified by both Contracting Parties.”³²¹
279. The Tribunal notes, first, that the terms of the BIT do not preclude arbitration under the Cotonou Arbitration Rules. Those rules would qualify as “other international arbitration arrangements, mechanisms, or instruments adhered to and ratified by both Contracting Parties” under Article 9(3)(d) of the BIT, and both Italy and Mozambique are parties to both treaties.

³²⁰ RL-2, Annex IV, Art. 30(b)(ii).

³²¹ Article 9(3) BIT (C-1).

280. Similarly, the Cotonou Convention provides that a dispute arising out of a “transnational contract” may be submitted to arbitration under either the Cotonou Arbitration Rules or “if the Parties to the contract so agree, in accordance with the national legislation of the ACP State concerned or its established international practices.”³²² It would hardly do violence to the words of the Cotonou Convention to consider arbitration under the terms of the BIT to be one of Mozambique’s “established international practices,” and the Respondent concedes as much.³²³

281. In addition, the Tribunal finds no conflict in the subject matters for which each treaty provides for arbitration. The BIT provides for arbitration of disputes “which may arise between either Contracting Party and the investors of the other Contracting Party on investments.”³²⁴ The Cotonou Convention provides for arbitration of:

Any dispute arising between the authorities of an ACP State or the relevant organization or body at regional or intra-ACP level and a contractor, supplier or provider of services during the performance of a contract financed by the multiannual financial framework of cooperation under this Agreement [...]³²⁵

282. The present dispute is a dispute between a Contracting Party to the BIT and an investor of the other Contracting Party having to do with an investment, and thus falls within the arbitration provisions of the BIT. It is also a dispute between the authorities of an ACP State and a contractor, as specified in the Cotonou Convention. But these provisions would conflict only if this dispute arose “during the performance” of a contract financed under the framework of the Cotonou Convention.

283. The Claimants argue that the present dispute did not arise “during the performance” of the Lot 3 Contract. They assert that work under that contract was effectively completed in or

³²² RL-2, Annex IV, Art. 30(b)(i).

³²³ ROJ, ¶45.

³²⁴ C-1, Art. 9(1).

³²⁵ RL-2, Annex IV, Art. 30.

around November 2007,³²⁶ and that the Engineer submitted his final decision on the work done on 11 May 2009, showing that performance was complete by that date at the latest.³²⁷ The documentation concerning performance thus seems to have become complete with CMC Ravenna's interim payment application of 24 July 2009 seeking payment of the amount awarded, although the Final Acceptance Certificate was not issued until 14 July 2011, and that certificate stated that the contractor had completed its obligations under the contract "with effect from 24 March 2011."³²⁸ CMC Ravenna and ANE continued after 14 July 2011 to argue about what compensation CMC was due for the work done before that date, but the Tribunal has seen no suggestion that any work on Lot 3 was performed after May of 2009.

284. The current dispute cannot have arisen before 30 October 2009, the date of ANE's offer letter to CMC Ravenna, by which time performance was completed.³²⁹ Given the correspondence after that date, the Tribunal concludes that the dispute should be considered to have arisen on or after 8 August 2011, when ANE sent its letter refusing to make any further payment for the work on Lot 3.³³⁰
285. While the Tribunal agrees with the Respondent that the Claimants' claims "relate to" the Lot 3 Contract, in that the Claimants are, in effect, seeking additional compensation for their work on Lot 3, the dispute did not arise "during the performance" of that contract.
286. The present dispute arose out of the inability of CMC and ANE to agree on whether any additional amount was due for CMC's completed work on the Lot 3 Project. The Tribunal is unpersuaded by the Respondent's argument that disputes about payment constitute performance of a contract.³³¹ Even if payment itself were considered an element of

³²⁶ CM, ¶48. *See* para. 106 above.

³²⁷ The engineer's final decision is part of Exhibit C-28.

³²⁸ C-31; C-5.

³²⁹ C-2.

³³⁰ C-4.

³³¹ RRJ, ¶¶19-20.

performance, payment of the amounts authorized by ANE had been made by July 2011,³³² before the dispute arose on or after 8 August 2011.

287. Since the dispute did not arise during the performance of the Lot 3 Contract, the Cotonou Convention does not, by its terms, require this dispute to be submitted to arbitration under the Cotonou Arbitration Rules.

c. The Lot 3 Contract does not require arbitration of this dispute under the Cotonou Arbitration Rules

288. Even if the Tribunal found the Cotonou Convention to require Mozambique to submit the present dispute to arbitration under the Cotonou Arbitration Rules – and the preceding section explains that it does not – that Convention would not have any direct application to the Claimants, who are private parties. The Respondent argues that the Claimants are required to submit the present dispute to arbitration under the Cotonou Arbitration Rules, because the Claimants, or at least CMC Africa Austral, agreed in the Lot 3 Contract to do so.
289. Article 68 of the General Conditions of the Lot 3 Contract requires the Parties to “make every effort to amicably settle disputes relating to the Contract which may arise between them.”³³³ In the absence of such an amicable settlement, a dispute concerning a “national contract” is to be settled according to Mozambique’s “national legislation,” and a dispute concerning a “transnational contract” is to be settled either in accordance with that legislation, or in accordance with Mozambique’s “established international practices,” or by arbitration under the Cotonou Arbitration Rules.³³⁴

³³² Payment was authorized on 15 October 2009. The record does not show when payment was received, but the Claimants do not dispute that it was made. *See* para. 115 above. The Claimants’ letter of 26 July 2011 could have been expected to have complained if IPC 27 had not been paid by then (C-5).

³³³ C-25, General Conditions, Art. 68.1.

³³⁴ C-25, General Conditions, Art. 68.5. ICSID arbitration could, of course, be considered an aspect of Mozambique’s “established international practices.”

290. This Tribunal is not called upon to decide whether the contract to which the present dispute relates is a “national” or a “transnational” contract, because no aspect of this dispute turns on the difference.
291. The Respondent argues that the Claimants’ claims really arise out of the Lot 3 Contract, and that Article 68 of the General Conditions therefore requires those claims to be asserted in a different forum. If the Tribunal agreed that the present claims were merely claims for breach of contract, the Tribunal would agree with the Respondent’s conclusion. But the Tribunal does not agree that the claims asserted are contract claims, for the reasons explained above at paragraphs 219-222.
292. The fact that the Lot 3 Contract provides for resolution of disputes arising under that contract in either the courts of Mozambique or under the Cotonou Arbitration Rules does not deprive this Tribunal of jurisdiction over claims pleaded and arising under the BIT. As the *ad hoc* committee in *Vivendi* observed: “A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.”³³⁵
293. For the same reason, the Respondent’s argument under Article 9(2) of the BIT is unavailing. Article 9(2) provides that, “[i]n case an investor or entity of one of the Contracting Parties have stipulated an investment agreement in accordance with the relevant applicable laws in force, the procedure foreseen in such investment agreement shall apply.” Assuming for the moment that the Lot 3 Contract is such an “investment agreement,” the Tribunal has found that the Lot 3 Contract does not by its terms require the submission of the Claimants’ BIT claims to arbitration under the Cotonou Convention. There is thus no “procedure foreseen” in that agreement to apply to those claims.
294. The Claimants in this case have asserted multiple claims that the Respondent has breached its obligations under the BIT. Specifically, they allege that the Respondent has failed to treat their investment justly and fairly, in breach of Article 2(3) of the BIT, that they have been subjected to unjustified or discriminatory measures in breach of the same Article, that

³³⁵ *Vivendi*, Decision on Annulment (3 July 2002) (CL-19) at ¶103.

the Respondent has failed to create and maintain a legal framework apt to guarantee legal treatment to investors in breach of Article 2(4), and that it has failed to provide most-favored-nation treatment in breach of Article 3.³³⁶ The Tribunal does not need to decide that the Claimants can prove those claims in order to find that it has jurisdiction to consider them; it is sufficient for present purposes for the Tribunal to conclude that, if the claims can be proven, they fall within its jurisdiction. The Tribunal so concludes.

295. The Tribunal thus does not consider that the Claimants were obligated to assert their claims under the BIT in an arbitration conducted under the Cotonou Arbitration Rules, either as a matter of treaty interpretation or as a matter of contract. Neither the Cotonou Convention nor the Lot 3 Contract, in the Tribunal's view, deprive the Claimants of their right under the BIT to submit the present dispute to ICSID arbitration.

E. The ECJ's *Achmea* Judgment

1. The Respondent's Objection

296. The Respondent argues that the decision of the European Court of Justice ("ECJ") in *Slovak Republic v. Achmea*³³⁷ has in any event rendered the arbitration clause in the Italy-Mozambique BIT invalid.³³⁸ The *Achmea* decision addresses whether treaties between EU member states that provide for investor-state arbitration are compatible with EU law, when: (a) the tribunal is not a part of the EU's judicial system; (b) that tribunal may resolve disputes concerning the application or interpretation of EU law; (c) that tribunal cannot submit preliminary questions to the ECJ; and (d) its decisions are not sufficiently reviewable by EU courts.³³⁹
297. In response to the Claimants' objection that this issue was not raised in a timely manner, with its first pleading, the Respondent explains that the Joint Declaration of 22 EU member

³³⁶ CM, ¶200.

³³⁷ *Slovak Republic v. Achmea BV* ("Achmea"), [2018] 2 C.M.L.R. 40 (RL-37).

³³⁸ ROA.

³³⁹ RL-37.

states, including Italy, on the effects of *Achmea* was only issued on 15 January 2019 (the “Joint Declaration”).³⁴⁰ The Respondent asserts that, according to that Declaration, the reasoning of *Achmea* also applies to the Energy Charter Treaty, which includes non-EU member states.³⁴¹ The Joint Declaration states:

Furthermore, international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied.³⁴²

298. The Respondent asserts that, applying the reasoning of the Joint Declaration, the *Achmea* decision must also apply to BITs between member states (in this case Italy) and non-member states (in this case Mozambique).³⁴³ It contends that two propositions necessarily follow:

- a. As the Cotonou Convention (to which the EU itself is a party) is an integral part of EU law, and as *Achmea* has affirmed the supremacy of EU law over investor-state arbitration agreements, the arbitration clause in the Italy-Mozambique BIT is void to the extent that it conflicts with the Cotonou Convention.³⁴⁴ In addition, the arbitration provision in the BIT is void because Italy’s interpretation of *Achmea* terminates, because of reciprocity, Mozambique’s obligations.³⁴⁵
- b. The Claimants cannot invoke the arbitration clause in the BIT, according to the Respondent, because doing so would require an international tribunal to decide on

³⁴⁰ RL-36.

³⁴¹ ROA, ¶3.

³⁴² RL-36, p. 2.

³⁴³ ROA, ¶3.

³⁴⁴ ROA, ¶5.

³⁴⁵ RRA, ¶¶3-4.

the application of EU law (specifically, the Cotonou Convention) and render an award which cannot be reviewed by EU courts, neither of which is permitted by *Achmea*.³⁴⁶

299. The Respondent argues that *UP and C.D Holding Internationale v. Hungary* (“*UP and C.D Holding*”), an ICSID arbitration brought under the France-Hungary BIT, was wrongly decided.³⁴⁷ In that case, the respondent argued on the basis of the *Achmea* decision that the ICSID tribunal lacked jurisdiction.³⁴⁸ The tribunal rejected that argument and found that the *Achmea* decision had no application to an arbitration under the ICSID Convention. The tribunal reasoned that:

*The Achmea Decision contains no reference to the ICSID Convention or to ICSID Arbitration. Therefore, and in view of the above mentioned determinative differences between the Achmea case and the present one, the Achmea Decision cannot be understood or interpreted as creating or supporting an argument that, by its accession to the EU, Hungary was no longer bound by the ICSID Convention.*³⁴⁹

300. The Respondent argues that the *Achmea* decision did reference the ICSID Convention.³⁵⁰ The Respondent argues that the BIT in this case is unenforceable, because *Achmea* prevents Italy from being bound by the BIT “and, consequently, neither can the Republic of Mozambique based on lack of reciprocity.”³⁵¹ For the proposition that reciprocity mandates that treaty provisions are applicable only to the extent that and as long as they are acceptable to both Parties, the Respondent relies on the award in *Daimler Financial Services AG v. Argentine Republic*, which stated:

³⁴⁶ ROA, ¶6.

³⁴⁷ *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award (9 October 2018) (RL-38); ROA, ¶¶37-38.

³⁴⁸ *UP and C.D Holding*, Award (9 October 2018)(RL-38) at ¶63.

³⁴⁹ *UP and C.D Holding*, Award (9 October 2018)(RL-38) at ¶258; ROA, ¶36 (emphasis in original).

³⁵⁰ ROA, ¶37.

³⁵¹ ROA, ¶39; RRA, ¶¶45-50.

BITs are reciprocal bilateral treaties negotiated between two sovereign State parties. The general purpose of BITs is of course primarily to protect and promote foreign investment; but it is to do so *within the framework acceptable to both of the State parties*. These two aspects must always be held in tension. They are the yin and yang of bilateral investment treaties and cannot be separated without doing violence to the will of the states that conclude such treaties.³⁵²

301. In support of its argument that the *Achmea* decision applies to bilateral investment treaties between EU member states and non-member states like the BIT, the Respondent relies on the following authorities:

- a. An article by John I. Blanck (Attorney Advisor at the United States Department of State) entitled “Slovak Republic v. Achmea BV: The Death Knell for Intra-EU BITs?”³⁵³ That article states:

More broadly, the issue raised by the CJEU, that an investment arbitration might result in the lack of effectiveness and uniformity of EU law, might occur when an EU member state is a respondent in any BIT arbitration, not just pursuant to intra-EU BIT ones. The United States has nine BITs with EU member states, and if U.S. investors were to bring claims before an arbitral tribunal pursuant to any of these BITs, the potential for EU law to be interpreted or applied also exists.

- b. An article by Laurens Ankersmit entitled “Achmea: The Beginning of the End for ISDS in and with Europe?”³⁵⁴ That article states:

More complex is the question of the future of extra-EU BITs—those concluded between EU member states and non-member states. The thrust of the ECJ’s reasoning makes it clear that arbitration clauses contained in such agreements are not immune from challenge. Indeed, tribunals under

³⁵² *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012) (RL-43) at ¶161; RRA, ¶46 (emphasis in original).

³⁵³ ASIL, 19 June 2018 (RL-40); ROA, ¶44 (emphasis in original).

³⁵⁴ Investment Treaty News, International Institute for Sustainable Development, 24 April 2018 (RL-41); ROA, ¶45 (emphasis in original).

such treaties may very well potentially remove disputes involving questions of EU law and EU remedies from EU member state courts. As a result, EU member states may be required to terminate these agreements, and the enforceability of awards before EU member state courts is in doubt.

302. In response to the authorities cited by the Claimants in support of the proposition that the *Achmea* decision is not relevant to an international tribunal that is asked to apply international law, the Respondent argues:

a. Regarding *Vattenfall AB and others v. Federal Republic of Germany*:³⁵⁵

In the Joint Declaration, Italy has stated that the *Achmea* decision does apply to a treaty involving non-EU Member States. *Vattenfall* is outdated and cannot be used to interpret the Joint Declaration because it predates the Joint Declaration. Further, for purposes of reciprocity what the tribunal concluded in *Vattenfall* is irrelevant. What matters is the view of the Republic of Italy. [...] *Vattenfall* is also inapposite because it did not involve two competing international treaties between the same parties with arbitration provisions. In contrast, this dispute involves the Cotonou Convention and Italy-MZ BIT with competing arbitration provisions and this Tribunal must decide which treaty prevails. [...] Further, nothing in *Vattenfall* contradicts the conclusion that while Cotonou Convention arbitration is consistent with the *Achmea* decision because a Cotonou Convention tribunal is formed under EU law, an ICSID tribunal offends *Achmea* because it is not formed under EU law [...].³⁵⁶

b. Regarding Opinion 1/17 of the Advocate General:³⁵⁷

The arguments of the Advocate General do nothing to change the result in these proceedings. The Advocate General is not the ECJ. The ECJ opinion prevails on its own terms. But relevant for purposes of reciprocity, Italy, the

³⁵⁵ *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, (“*Vattenfall*”), Decision on the *Achmea* Issue (31 August 2018) (CL-62).

³⁵⁶ RRA, ¶¶27-29.

³⁵⁷ Opinion 1/17 of the Advocate General (29 January 2019) (CL-63).

other Contracting State to the Italy-MZ BIT, has declared in the Joint Declaration that the *Achmea* decision does apply to an international agreement *which includes non-EU States* [...] Thus, the Joint Declaration of Italy and twenty-two EU Member States disputes the Advocate General's view. The Advocate General is not a party to the Italy-MZ BIT, and cannot force Italy to afford reciprocity to Mozambique under the Italy-MZ BIT.³⁵⁸

- c. Regarding *Greentech Energy Systems A/S, GWM Renewable Energy I S.P.A., GWM Renewable Energy II S.P.A. v. The Kingdom of Spain*.³⁵⁹

Greentech, like *Vattenfall*, predates the Joint Declaration, and thus is not useful in evaluating the effect of the Joint Declaration. [...] Italy, and twenty-two other EU Member States, declared that the *Achmea* decision applies to treaties with non-EU Member States despite the *Greentech* and *Vattenfall*, therefore rejecting those decisions.³⁶⁰

- d. Regarding *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*,³⁶¹ and *UP and C.D Holding*.³⁶²

Claimants also cite to *Masdar v. Spain* and *UP and C.D v. Hungary* to argue that the *Achmea* judgment does not apply to multilateral treaties such as the ECT. [...] Claimants argue that the considerations are different between relationships involving EU Member States and those involving a non-EU Member State and EU Member State. [...] [T]he Joint Declaration indicates that the *Achmea* decision may be applied more broadly to multilateral treaties such as the

³⁵⁸ RRA, ¶31 (emphasis in original).

³⁵⁹ *Greentech Energy Systems A/S, GWM Renewable Energy I S.P.A., GWM Renewable Energy II S.P.A. v. The Kingdom of Spain*, SCC Arbitration (2015/150) (“*Greentech*”) Final Award (14 November 2018) (CL-64).

³⁶⁰ RRA, ¶32.

³⁶¹ *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1 (“*Masdar v. Spain*”) Final Award (16 May 2018) (CL-65).

³⁶² *UP and C.D Holding*, Award (9 October 2018) (RL-38).

ECT, and thus the reasoning of the cited decisions is outdated after the Joint Declaration.³⁶³

303. The Respondent further argues that this Tribunal does not have jurisdiction because it is called upon to decide a question of EU law. It states that:

The *Achmea* decision held that an EU Member State cannot enter into an investment treaty whereby issues of EU law are referred for decision to an international tribunal, instead of an EU court. That is because EU courts have exclusive jurisdiction to decide issues of EU law. Before this Tribunal is the issue of whether the arbitration provisions of the Cotonou Convention govern this dispute. The EU itself is a party to the Cotonou Convention, and thus the Cotonou Convention is part of EU law. International agreements entered into by the EU itself are a part of EU law. [...] Thus, this Tribunal must determine whether, as a matter of EU law—that is, under the Cotonou Convention—this dispute must be decided in a Cotonou Convention arbitration, instead of an ICSID Convention arbitration. Application of the Italy-MZ BIT in these proceedings does involve EU law.³⁶⁴

304. At a minimum, the Respondent argues, the decision in *Achmea* confirms that the Claimants' claims must be arbitrated under the Cotonou Arbitration Rules. In this connection, the Respondent points to Article 91 of the original Cotonou Convention, which states:

No treaty, convention, agreement or arrangement of any kind between one or more Member States of the Community and one or more ACP States may impede the implementation of this Agreement.³⁶⁵

305. The Respondent argues that this Article has the effect that the arbitration clause in the BIT cannot impede the application of the arbitration clause in the Cotonou Convention.³⁶⁶ The Respondent concludes that “the *Achmea* decision mandates, or at least makes preferable,

³⁶³ RRA, ¶40.

³⁶⁴ RRA, ¶19.

³⁶⁵ RL-1, Article 91.

³⁶⁶ ROA, ¶13.

the conclusion that the arbitration provisions of the Cotonou Convention are exclusive or take precedence over the arbitration provisions of the Italy-Mozambique BIT. As a result, the reasoning in the *Achmea* decision further confirms the supremacy of Article 9[(1)] of the Cotonou Convention and, thus, that this Tribunal lacks jurisdiction under the Italy-Mozambique BIT.”³⁶⁷

306. The Tribunal asked the Parties to give their views on the implications of the 7 May 2019 interim decision in the *Eskosol v. Italy* arbitration and the 30 April 2019 Opinion 1/17 of the European Court of Justice, both of which became available after the Hearing. The *Eskosol* decision held that the *Achmea* decision did not affect arbitral jurisdiction over an intra-EU Energy Charter Treaty arbitration. In Opinion 1/17, the ECJ held that the investor-state dispute resolution clause in the Comprehensive Economic and Trade Agreement between Canada and the European Union is compatible with EU law. The Respondent submitted the following observations:

a. Regarding *Eskosol v. Italy*, the Respondent stated:

4. The *Eskosol* [...] tribunal derived its jurisdiction from the ICSID Convention, and there was nothing in the ECT Treaty, applicable BIT or *Achmea* decision that ‘deprived’ that tribunal of ICSID Convention jurisdiction. In sharp contrast, in the case before this Tribunal, the situation is *completely different*. [...]

5. Under Article 91, the arbitration provisions of the Cotonou Convention expressly preempt application of the arbitration provisions of the Italy-Mozambique BIT [...]. Therefore, this Tribunal lacks any *preexisting* international law-based jurisdiction under the ICSID Convention. Here, *Eskosol*’s holding that the tribunal cannot be ‘deprived’ of ICSID Convention jurisdiction is irrelevant and inapplicable, because this Tribunal did not have ICSID Convention Jurisdiction *in the first place*. [...]

10. The *Eskosol* tribunal also missed the point when it observed that the *Achmea* decision cannot “retroactively” invalidate consent. *Eskosol*, ¶ 199, RL-61. The point is that,

³⁶⁷ ROA, ¶19. In the original text, referring to Article 9, which the Tribunal believes was intended as Article 9(1).

because Italy did not have authority to enter into the BIT in the first place, there was never any consent in the first place. In other words, the purported “consent” is void *ab initio*. This is precisely the view that has been presented by the EU in the amicus brief in the *Micula* case in the United States. The European Commission stated its official view that the *Achmea* decision applied “with full force to agreements to resolve disputes by ICSID arbitration.” EU Amicus Brief, p. 13, RL-46. “Here, the arbitration agreement underlying the [ICSID] Award is void.” (*Id.* p. 11).³⁶⁸

b. Regarding Opinion 1/17 of the European Court of Justice, the Respondent stated:

15. Opinion 1/17 is distinguishable because unlike CETA, Article 91 of the Cotonou Convention mandates application of its arbitration rules over the provisions of the Italy-Mozambique BIT permitting ICSID Convention arbitration, as discussed above. Such a clause was absent in *Eskosol* and the Opinion 1/17.

16. In Opinion 1/17, the CJEU considered two factors regarding whether CETA was compatible with the autonomy of the EU legal order: CETA did not “confer on the envisaged tribunals any power to interpret or apply EU law” and did not establish tribunals that “may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.” Opinion 1/17, ¶ 119, RL-62.

17. In contrast, here this Tribunal is being asked to interpret EU law. Moreover, unlike CETA, here there are also no procedural safeguards in ICSID Convention arbitration to protect against the risk anticipated in *Achmea*.³⁶⁹

2. The Claimants’ Response

307. As a preliminary matter, the Claimants assert that the Respondent’s objections were untimely, because Rule 41 of the ICSID Rules and Procedural Order No. 1 require

³⁶⁸ Respondent’s Observations to *Eskosol* and Opinion 1/17, ¶¶4,5, 10 (emphasis in original). The Tribunal notes that the argument made by the European Commission in its amicus brief in the *Micula* case was rejected by the United States District Court to which that brief was addressed after the close of briefing in this arbitration. See *Micula v. Romania*, Case No. 17-cv-02332 (APM), Memorandum Opinion, 11 Sept. 2019 at ¶¶19-22.

³⁶⁹ Respondent’s Observations to *Eskosol* and Opinion 1/17, ¶¶15-17.

jurisdictional objections to be raised in the Respondent’s Memorial on Jurisdiction. The *Achmea* objection was not and should for that reason be dismissed.³⁷⁰ They also argue that, as the Tribunal was not constituted on the basis of any legal order other than the BIT, it cannot apply EU law, including the Cotonou Convention, to ascertain its jurisdiction.³⁷¹

308. The Claimants rely on the following authorities on the question whether “EU law (and the *Achmea* judgement) is relevant to the question of jurisdiction of international tribunals under investment treaties”:³⁷²

a. *Vattenfall AB and others v. Federal Republic of Germany*.³⁷³ The tribunal in this case held that “EU law does not constitute principles of international law which may be used to derive meaning from Article 26 of the ECT, since it is not general law applicable as such to the interpretation and application of the arbitration clause in another treaty such as the ECT.”³⁷⁴

b. Opinion 1/17 of the Advocate General of the European Court of Justice.³⁷⁵ The Advocate General found that:

110. I would add, in this regard, that, contrary to the situation in the BIT at issue in the case which gave rise to the judgment in *Achmea*, which contained a clause on the applicable law which could suggest that the arbitration tribunal concerned had jurisdiction to hear and determine disputes relating to the interpretation and application of EU law, the CETA clearly states, as I will have occasion to expand upon later, that the applicable law before the CETA Tribunal consists exclusively of the relevant provisions of that agreement, as interpreted in accordance with international law. The domestic law of each Party, of which

³⁷⁰ COA, ¶¶3-4.

³⁷¹ COA, ¶16.

³⁷² COA, ¶11.

³⁷³ *Vattenfall*, Decision on the *Achmea* Issue (31 August 2018) (CL-62) at ¶133.

³⁷⁴ COA, ¶11.

³⁷⁵ Opinion 1/17 of the Advocate General of the European Court of Justice (29 January 2019) (CL-63).

EU law forms part in the case of the Member States, can be taken into account by that Tribunal only as a matter of fact, and the meaning ascribed to domestic law is not binding on the courts and tribunals or the authorities of the defendant Party. In addition, unlike in the case of bilateral investment treaties between Member States such as that at issue in the case which gave rise to the judgment in *Achmea*, EU law does not form part of the international law applicable between the Parties [EU and Canada].

111. Furthermore, in order to distinguish clearly between the case of bilateral investment treaties between Member States and that of investment agreements such as the CETA, the Court took care in its judgment in *Achmea* to recall its settled case-law that ‘an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected.

- c. *Greentech Energy Systems A/S, GWM Renewable Energy I S.P.A., GWM Renewable Energy II S.P.A. v. The Kingdom of Spain*.³⁷⁶ The tribunal held that its “jurisdiction is derived from the express terms of the ECT, a binding treaty under international law. The Tribunal is not an institution of the European legal order, and it is not subject to the requirements of this legal order.”³⁷⁷

³⁷⁶ *Greentech*, Final Award (14 November 2018) (CL-64) at ¶218.

³⁷⁷ COA, ¶15.

- d. *Eskosol S.P.A. in Liquidazione v. Italian Republic*.³⁷⁸ The Claimants argue that, as the BIT regime and EU law operate independently, the BIT cannot be incompatible with EU law.³⁷⁹ The *Eskosol* tribunal found in this regard that:

Ultimately, the bottom line is that in a case of contradiction, each legal order remains bound by its own rules, for purposes of its own judgments. The CJEU's conclusions regarding the EU legal order are addressed to EU Member States and European institutions, and they accordingly may have no choice but to take steps consistent with the CJEU's ruling, including submitting arguments to international tribunals based on the EU legal order. But the CJEU's conclusions derived from EU law do not alter this Tribunal's mandate to proceed under the legal order on which its jurisdiction is founded, namely the ECT. This means that an international investment tribunal empaneled under the ECT is not bound by the jurisprudence of the CJEU, just as the CJEU is not bound by decisions taken by ECT tribunals.³⁸⁰

309. The Claimants further take the position that *Achmea* does not apply to the BIT, which was concluded between an EU member state (Italy) and a non-member state (Mozambique). They argue that *Achmea* involved a dispute about an intra-EU BIT, which specifically required an arbitral tribunal to take any agreements between the Contracting Parties into account as applicable law.³⁸¹ They rely on the following authorities:

- a. *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*.³⁸² The tribunal in this case held that “the *Achmea* Judgment does not take into consideration, and thus it cannot be applied to, multilateral treaties, such as the ECT, to which the EU itself is a party.”

³⁷⁸ *Eskosol v. Italy*, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes (7 May 2019) (RL-61).

³⁷⁹ Claimants' Comments on Opinion 1/17 and Award *Eskosol v. Italy*, at IV.6.

³⁸⁰ *Eskosol v. Italy*, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes (7 May 2019) (RL-61) at ¶184.

³⁸¹ COA, ¶¶18-21.

³⁸² *Masdar v. Spain*, Final Award (16 May 2018) (CL-65) at ¶679.

- b. Opinion 1/17 of the Advocate General of the European Court of Justice.³⁸³ The Advocate General found:

109. Accordingly, since Section F of Chapter 8 of the CETA is contained in an agreement with a third State, which is intended to be concluded by the European Union and its Member States and governs relations between those Parties and not the mutual relations between Member States, the line of reasoning developed by the Court in its judgment in *Achmea* in the light of Articles 267 and 344 TFEU does not appear to me to be capable of applying to the ICS. [...]

167. As the Commission rightly states in its observations, the role of the CETA Tribunal is not to apply internal EU law, rather merely the provisions of the CETA. That agreement offers additional protection under international law and provides for a specific mechanism which allows the investors of the other Party to rely on that protection. That being said, it does not, however, restrict the substantive rights enjoyed by foreign investors under internal EU law. Nor does it have the effect of limiting the jurisdiction of the Court or of the courts and tribunals of the Member States to hear and determine actions brought with a view to ensuring the observance of such rights as are afforded by internal EU law.

168. Accordingly, the establishment of the ICS does not prevent foreign investors from seeking to protect their investments by bringing proceedings before the courts and tribunals of the Parties with a view to the domestic law of those Parties being applied. [...] These are therefore two complementary legal remedies and not substitutes for one another.

- c. *UP and C.D Holding Internationale v. Hungary*.³⁸⁴ The tribunal in this case held that “[its jurisdiction was] based on the ICSID Convention, i.e. a multilateral public international law treaty for the specific purpose of resolving investment disputes

³⁸³ Opinion 1/17 Advocate General of the European Court of Justice (29 January 2019) (CL-63); COA, ¶¶23, 24.

³⁸⁴ *UP and C.D Holding*, Award (9 October 2018) (RL-38); COA, ¶25.

between private parties and a State (here, Hungary) [...] in a public international law context and not in a national or regional context.”

- d. *Eskosol S.P.A. in Liquidazione v. Italian Republic*.³⁸⁵ The Claimants argue that the tribunal in this case “concluded that the *Achmea* decision – while perfectly valid with regard to certain intra-EU BITs from the perspective of the EU legal order – ‘does not disturb the jurisdiction to decide a dispute in the international legal order under the ECT.’ The *Eskosol* tribunal recognised ‘the vocabulary used by the CJEU in its dispositif is an undeniable reference only to bilateral treaties among EU Member States, not multilateral treaties to which the EU itself gave imprimatur by virtue of ratification.’ [...] It stated that in the *Achmea* decision the CJEU ‘refer only to a bilateral treaty, and cannot be simply presumed to extend [...] to multilateral treaties involving non-EU Member States.’”³⁸⁶
- e. Opinion 1/17 of the European Court of Justice.³⁸⁷ The Claimants point to the ECJ’s statement that:

[A]n international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law.³⁸⁸

The Claimants contend that the ECJ expressly limited the application and effect of the *Achmea* decision to agreements between EU member states and that such agreements are only incompatible with EU law if the determination of the tribunal has an “adverse effect on the autonomy of the EU legal order.” They further argue

³⁸⁵ *Eskosol v. Italy*, Decision on Italy’s Request for Immediate Termination and Italy’s Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes (7 May 2019) (RL-61).

³⁸⁶ Claimants’ Comments on Opinion 1/17 and Award *Eskosol v. Italy*, at III.7 (emphasis in original); *Eskosol v. Italy*, Decision on Italy’s Request for Immediate Termination and Italy’s Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes (7 May 2019) (RL-61) at ¶¶154, 168-169, 177-178.

³⁸⁷ Opinion 1/17 (RL-62).

³⁸⁸ Claimants’ Comments on Opinion 1/17 and Award *Eskosol v. Italy*, at III.3; Opinion 1/17 (RL-62) at ¶106.

that the ECJ held that the jurisdiction of EU courts “does not take precedence over the jurisdiction of another international court or tribunal established by international agreement, even in circumstances where that agreement is an integral part of EU law, and the EU is itself a party.”³⁸⁹ The ECJ said:

It follows from the foregoing that EU law does not preclude Section F of Chapter Eight of the CETA either from providing for the creation of a Tribunal, an Appellate Tribunal and, subsequently, a multilateral investment Tribunal or from conferring on those Tribunals the jurisdiction to interpret and apply the provisions of the agreement having regard to the rules and principles of international law applicable between the Parties. On the other hand, since those Tribunals stand outside the EU judicial system, they cannot have the power to interpret or apply provisions of EU law other than those of the CETA or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.³⁹⁰

310. The Claimants further rely on Opinion 1/17 of the ECJ to support the notions that: (a) “the fact that the envisaged ISDS mechanism stands outside the EU judicial system does not mean, in itself, that that mechanism adversely affects the autonomy of the EU legal order,” and (b) that an international tribunal can take EU law into account as a matter of fact without doing so.³⁹¹
311. The Claimants draw an analogy between the ECJ’s decision and this arbitration, stating that “[t]he power of the CETA tribunal to interpret and apply the law ‘is confined to the provisions of the CETA and that such interpretation or application must be undertaken in accordance with the rules and principles of international law applicable between the Parties.’ The same situation pertains in this case. The Tribunal must apply the provisions

³⁸⁹ Claimants’ Comments on Opinion 1/17 and Award *Eskosol v. Italy*, at III.4; Opinion 1/17 (RL-62) at ¶¶116, 117, 127.

³⁹⁰ Claimants’ Comments on Opinion 1/17 and Award *Eskosol v. Italy*, at III.5; Opinion 1/17 (RL-62) at ¶118.

³⁹¹ Claimants’ Comments on Opinion 1/17 and Award *Eskosol v. Italy*, at IV.2; Opinion 1/17 (RL-62) at ¶¶115, 131.

of the Italy-Mozambique BIT, and by virtue of paragraph 5(b) of the Protocol to the Treaty, also ‘the principles of international law recognized by the two Contracting Parties.’”³⁹²

312. The Claimants further rely on the *Eskosol* award to argue that Italy’s offer to arbitrate under the BIT was not void as a result of the *Achmea* decision. The tribunal in that case stated:

[W]hatever the scope and reach of the *Achmea* Judgment may be, it cannot be considered as a matter of international law to automatically invalidate, for Italy or any under [sic] EU Member State, either the ECT as a whole or the consent to arbitration reflected in Article 26 of the ECT. The Tribunal considers that the principle of legal certainty entitles investors to rely legitimately upon a State’s written consent to arbitrate disputes, as long as that consent has not been withdrawn or invalidated through the proper procedures, including those set forth in the underlying treaty and the express provisions in the VCLT.³⁹³

3. The Tribunal’s Decision

a. The *Achmea* objection was timely

313. The Claimants argue, based on ICSID Arbitration Rule 41(1), that the Respondent’s objection to jurisdiction based on the decision of the ECJ in *Achmea* was untimely, because it was not one of the objections raised in the Respondent’s Objections to Jurisdiction on 20 July 2018.
314. The Claimants are correct that the Respondent’s *Achmea* objection was not one of the Respondent’s initial objections to jurisdiction. Indeed, it was not raised until 31 January 2019, almost three months after the submission of the Respondent’s Counter Memorial on the Merits and six months after the Respondent’s Objections to Jurisdiction. However, the Respondent states that it bases this objection not on the original 6 March 2018 decision of the ECJ in *Achmea*, but rather on the Joint Declaration of 15 January 2019.³⁹⁴

³⁹² Claimants’ Comments on Opinion 1/17 and Award *Eskosol v. Italy*, at IV.3; Opinion 1/17 (RL-62) at ¶122.

³⁹³ Claimants’ Comments on Opinion 1/17 and Award *Eskosol v. Italy*, at V.1-2; *Eskosol v. Italy*, Decision on Italy’s Request for Immediate Termination and Italy’s Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes (7 May 2019) (RL-61) at ¶198.

³⁹⁴ RL-36.

315. The Joint Declaration had not been issued and was thus not known to the Respondent when the Respondent submitted its Objections to Jurisdiction on 20 July 2018 and its Counter Memorial on 2 November 2018. The Respondent submitted its *Achmea* Observations within two weeks after the Joint Declaration was issued. The Tribunal therefore considers that the objection raised in the Respondent’s *Achmea* Observations was “made as early as possible,” as required by Rule 41(1). The Claimants’ untimeliness objection is consequently rejected.

b. The ECJ’s *Achmea* Decision does not deprive this Tribunal of jurisdiction

316. This Tribunal is not called upon to comment on the soundness or wisdom of the decision of the ECJ in *Achmea*. Our concern with that decision is limited to examining whether one effect of that decision is, as the Respondent urges, to invalidate the mutual consent of Italy and Mozambique, expressed in the BIT, to arbitrate disputes about investments with investors of the other State. The Tribunal concludes that the decision in *Achmea* has no such effect on the consent of Mozambique in Article 9 of the BIT to arbitrate the dispute before us.

317. The decision of the ECJ in *Achmea* addresses the status of bilateral investment treaties concluded between member states of the European Union. The ECJ’s decision in that case concluded that the Treaty on the Functioning of the European Union:

[M]ust be interpreted as precluding a provision in an international agreement concluded **between Member States**, such as art.8 of the [Netherlands-Slovakia] BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.³⁹⁵

318. The present arbitration was brought pursuant to the bilateral investment treaty between Italy, which is a member state of the European Union, and Mozambique, which is not. While the *Achmea* Decision of the ECJ found arbitration provisions in intra-EU BITs to be

³⁹⁵ *Achmea* Decision (RL-37) at ¶60 (emphasis added).

incompatible with the EU treaties, that Decision expresses no view concerning the status of agreements to arbitrate contained in extra-EU treaties, such as the BIT under which this arbitration was commenced.

319. The Respondent relies heavily on the Joint Declaration.³⁹⁶ That Joint Declaration was not signed by all of the member states of the EU, but it was signed by Italy.³⁹⁷
320. The focus of the Joint Declaration, however, is firmly on intra-EU investment arbitration, with a particular emphasis on investment protection under the Energy Charter Treaty. The Joint Declaration states, in its first declarative paragraph:

By the present declaration, Member States inform investment arbitration tribunals about the legal consequences of the *Achmea* judgment, as set out in this declaration, in all pending **intra-EU** investment arbitration proceedings brought either under bilateral investment treaties concluded **between Member States** or under the Energy Charter Treaty.³⁹⁸

321. In its introduction, the Joint Declaration explains the inclusion of the Energy Charter Treaty reference:

Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause **applicable between Member States**. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied.³⁹⁹

322. The Joint Declaration thus concentrates on applying the judgment in *Achmea* to multilateral treaties among EU member states that contain investor protection provisions and that provide for arbitration, such as the ECT, as well as bilateral treaties among member states

³⁹⁶ RL-36.

³⁹⁷ Hungary and a group of five other member states signed two separate declarations expressing different views on the ECT problem on 16 January 2019.

³⁹⁸ RL-36, p. 3 (emphasis added). The Joint Declaration further states: “By the present declaration, Member States inform the investor community that no new intra-EU investment arbitration proceeding should be initiated.” (RL-36) at p. 3, and “In light of the *Achmea* judgment, Member States will terminate all bilateral investment treaties concluded between them [...]” (RL-36) at p. 4.

³⁹⁹ *Id.*, p. 2 (emphasis added).

to the same effect. The Declaration notes that “international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties.”⁴⁰⁰ But the BIT is not such a treaty. The Joint Declaration makes no mention of extra-EU treaties or of arbitration proceedings conducted pursuant to such treaties.

323. The Respondent argues that the significance of the Joint Declaration is that it was signed by Italy and thus reflects the position of Italy. The Respondent argues that the position taken by Italy in the Joint Declaration is inconsistent with Italy’s continued consent to arbitration under the BIT. Since, the Respondent argues, the obligations created by the BIT are reciprocal, if Italy is no longer bound by its consent to arbitrate, then Mozambique can no longer be bound by its reciprocal consent to arbitrate.⁴⁰¹
324. The Tribunal finds this analysis unpersuasive. The Joint Declaration says nothing about the many extra-EU treaties to which the signatory states are parties. Significantly, in the view of the Tribunal, Italy has taken no step to denounce or to terminate the BIT. Nor has Mozambique.
325. Article 15(1) of the BIT provides that it was to remain effective for ten years from the date of notification of ratification, which was 17 November 2003.⁴⁰² The same Article then provides that the treaty “shall remain in force for further periods of 5 years thereafter, unless one of the Contracting Parties withdraws in writing by not later than one year notice before the expiry date.” No evidence has been put before this Tribunal that either Italy or Mozambique has ever given notice of withdrawal pursuant to Article 15(1) of the BIT, or that Italy or Mozambique has taken any other step to terminate its obligations under that treaty. And even if notice of withdrawal had been given, Article 15(2) of the BIT provides

⁴⁰⁰ *Id.*, p. 2.

⁴⁰¹ RRA, ¶20.

⁴⁰² CM, ¶2, n. 1; C-1.

that any investment made before expiry of the BIT would be protected for an additional five years after termination.

326. Mozambique made an offer to Italian investors in Article 9 of the BIT, consenting to arbitrate disputes arising out of their investments in Mozambique. Mozambique had not made any effort to withdraw that offer when the Claimants accepted it by commencing this arbitration in 2017. An offer to arbitrate the present dispute had thus been made and accepted before the decision in *Achmea* was issued or the member states issued their declaration. A valid and binding agreement to arbitrate has thus been formed. That agreement is subject to international law, not to EU law. The ICSID Convention provides that, “[w]hen the parties have given their consent, no party may withdraw its consent unilaterally.”⁴⁰³ Neither the *Achmea* Decision nor the Joint Declaration appears to this Tribunal to invalidate the consent of the parties to an extra-EU treaty to arbitrate as of the date when the agreement to arbitrate became binding on both parties.
327. The Respondent urges that the essence of the *Achmea* Decision is that tribunals organized outside of the legal order of the EU, such as the present tribunal, should not interpret or apply EU law, which that decision makes the exclusive province of courts inside the EU legal order.⁴⁰⁴ Even if that were a correct reading of the *Achmea* Decision, however, it would not appear to this Tribunal to be an obstacle to exercising jurisdiction over the present dispute. The present dispute involves a claim that Mozambique breached its obligations under international law, and specifically under the BIT, in relation to its dealings with the Claimants concerning what the Claimants believe to have been a binding settlement of a dispute concerning payments allegedly owed to the Claimants for their work on the Lot 3 Contract. The Lot 3 Contract is a contract under the law of Mozambique,⁴⁰⁵

⁴⁰³ ICSID Convention Article 25(1).

⁴⁰⁴ ROA, ¶24.

⁴⁰⁵ Article 2(1) of the General Conditions provides that “The law of the Contract shall be the law of the State of the Contracting Authority unless otherwise stated in the Special Conditions.” Article 2 of the Special Conditions provides that “The applicable law is the Law of Mozambique.” (C-25).

and nothing in the correspondence alleged to constitute a settlement agreement elects any different law to govern the settlement.

328. Indeed, the only element of EU law that is even arguably relevant to the present dispute is the Cotonou Convention, to which the EU itself is a party, along with its member states. But the only provisions of the Cotonou Convention alleged to apply to the present dispute are the dispute resolution provisions contained in Article 30 of Annex IV of that convention. Those provisions, as already explained,⁴⁰⁶ require that disputes arising “during the performance” of a contract financed by the EDF, such as the Lot 3 Contract, must be arbitrated under the Cotonou Arbitration Rules.⁴⁰⁷ The Tribunal has found, as a matter of fact, that the claims asserted in this proceeding did *not* arise “during the performance” of the Lot 3 Contract.⁴⁰⁸ These claims therefore fall outside of the reach of Article 30 of Annex IV of the Cotonou Convention.
329. Such a finding would not constitute an impermissible interpretation of EU law, even if this Tribunal were bound by EU law.⁴⁰⁹ The ECJ made this clear in its Opinion 1/17, responding to a request from Belgium for the court’s views on the dispute resolution mechanism proposed for the Comprehensive Economic and Trade Agreement being negotiated between the EU and Canada. That opinion was issued on 30 April 2019, during the hearing on the merits of this arbitration, but the Parties were invited to make submissions on the significance of that Opinion in post-hearing briefs that were submitted simultaneously on 22 May 2019.
330. In Opinion 1/17, the court stated that:

Indeed, with respect to international agreements entered into by the Union, the jurisdiction of the courts and tribunals specified in Article 19 TEU to interpret and apply those agreements does not

⁴⁰⁶ See para. 282, above.

⁴⁰⁷ RL-2, Annex IV, Art. 30.

⁴⁰⁸ See paras. 282-287, above.

⁴⁰⁹ This Tribunal is inclined to agree with the *Eskosol* tribunal that it is not bound by EU law, but its conclusion does not rest on that belief.

take precedence over either the jurisdiction of the courts and tribunals of the non-Member States with which those agreements were concluded or that of the international courts or tribunals that are established by such agreements.

Accordingly, while those agreements are an integral part of EU law and may therefore be the subject of references for a preliminary ruling [...] they concern no less those non-Member States and may therefore also be interpreted by the courts and tribunals of those States. [...]⁴¹⁰

331. The Respondent argues that Article 91 of the Cotonou Convention effectively overrides the arbitration provisions of the BIT. Article 91 provides:

No treaty, convention, agreement or arrangement of any kind between one or more Member States of the Community and one or more ACP States may impede the implementation of this Agreement.⁴¹¹

The Tribunal agrees that Article 91 would make it difficult to apply any provision of any other treaty that would “impede the implementation” of the Cotonou Convention, unless the other treaty was later in time and dealt with the same subject matter, as provided by Article 30 VCLT. However, the Tribunal does not believe that any provision of the Italy-Mozambique BIT impedes the implementation of the Cotonou Convention. The only provision of the BIT alleged to be inconsistent with the Cotonou Convention is the provision for arbitration under the ICSID Rules in Article 9 of the BIT, which is argued by the Respondent to be inconsistent with the portion of Article 30 of Annex IV that provides for arbitration of disputes under the Cotonou Arbitration Rules. But Article 30 of Annex IV only applies to disputes arising “during the performance” of a contract financed by the EDF, and the Tribunal has already explained its conclusion that this is not such a dispute.⁴¹²

332. The Tribunal also notes that the Cotonou Convention expresses no hostility to bilateral investment treaties in general. To the contrary, in Article 78 of the Cotonou Convention,

⁴¹⁰ Opinion 1/17 (RL-62) at ¶¶116-117.

⁴¹¹ RL-2.

⁴¹² See paras. 282-287, above.

the European Community itself and its Member States, together with the ACP states, affirmed “the need to promote and protect either Party’s investments on their respective territories, and in this context affirm the importance of concluding, in their mutual interest, investment promotion and protection agreements [...]”⁴¹³

333. The absence of hostility to extra-EU bilateral investment treaties is confirmed by Regulation No. 1219/2012, adopted on 12 December 2012 by the European Parliament and the Council of the European Union. The Regulation established “transitional arrangements for bilateral investment agreements between Member States and third countries,”⁴¹⁴ observing that EU member states maintained a high number of BITs with third countries and that such agreements “remain binding on the Member States under public international law.”⁴¹⁵ The Regulation’s aim is the “appropriate management” of the conditions for the continuing existence of those BITs as well as of their relationship with the EU’s investment policy.⁴¹⁶ Notably, Regulation 1219/2012 acknowledges that BITs with third countries should be maintained in force “in the interest of Union investors and their investments in third countries,”⁴¹⁷ but it was nevertheless “necessary to provide for certain arrangements to ensure that bilateral investment agreements, **maintained in force pursuant to [the] Regulation, remain operational, including as regards dispute settlement**, while at the same time respecting the Union’s exclusive competence.”⁴¹⁸
334. The Italy-Mozambique BIT appears to have been one of those “maintained in force pursuant to [the] Regulation.” According to Article 2 of the Regulation, the EU Member States had to notify the EU Commission of all BIT’s with third countries signed before 1 December 2009. Article 3 provides that “bilateral investment agreements notified

⁴¹³ RL-2, Article 78(1).

⁴¹⁴ Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012, Official Journal of the European Union of 20 December 2012 (L 351/40).

⁴¹⁵ *Id.*, preamble at 4-5.

⁴¹⁶ *Id.* at 5.

⁴¹⁷ *Id.* at 6.

⁴¹⁸ *Id.* at 16 (emphasis added).

pursuant to Article 2 of this Regulation may be maintained in force, or enter into force, in accordance with the TFEU and this Regulation.” Pursuant to Article 4(1), “[e]very 12 months the Commission shall publish in the Official Journal of the European Union a list of the bilateral investment agreements notified pursuant to Article 2.” The Italy-Mozambique BIT is included both in the list published on 27 April 2016⁴¹⁹ and in the list published on 11 May 2017,⁴²⁰ three days after this arbitration was initiated.

335. The *Achmea* Decision has left open a number of issues, including:

- a. Whether the decision has any application to extra-EU BITs.⁴²¹
- b. Whether the decision is applicable to arbitrations conducted under the ICSID Arbitration Rules, such as the present arbitration. The arbitration that gave rise to the *Achmea* decision was conducted under the UNCITRAL Arbitration Rules, and had its seat in Germany. The dispute reached the ECJ as the result of a reference from the German courts, which had been asked to set aside the award. Under the ICSID Convention, however, no such application to the court at the seat of arbitration could be made.⁴²²
- c. Whether the decision extends to multilateral treaties, such as the ECT.

⁴¹⁹ List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Official Journal of the European Union of 27 April 2016, C 149/1, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1569235854600&uri=CELEX:52016XC0427\(03\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1569235854600&uri=CELEX:52016XC0427(03)).

⁴²⁰ List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Official Journal of the European Union of 11 May 2017, C 147/1, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1569235854600&uri=CELEX:52017XC0511\(04\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1569235854600&uri=CELEX:52017XC0511(04)).

⁴²¹ John I. Blanck, “Slovak Republic v. Achmea BV: The Death Knell for Intra-EU BITs?” (RL-40); Laurens Ankersmit, “Achmea: The Beginning of the End for ISDS in and with Europe?” Investment Treaty News, International Institute for Sustainable Development, 24 April 2018 (RL-41).

⁴²² See, e.g., *UP and C.D Holding*, Award (9 October 2018) (RL-38); *Vattenfall*, Decision on the Achmea Issue (31 August 2018) (CL-62).

These questions are of considerable interest, and each has been argued by the Parties, but this Tribunal needs to confront only the first one to resolve the dispute before us.⁴²³

336. The *Achmea* Decision explicitly addresses agreements between member states of the EU, not between member states and non-member states. The Joint Declaration does not advocate extending the effect of the *Achmea* Decision to extra-EU BITs, and Opinion 1/17 clearly states that the jurisdiction of EU courts “does not take precedence over” the jurisdiction of tribunals established by agreements between member states and non-member states.⁴²⁴ We do not read the *Achmea* Decision itself, or the Joint Declaration containing Italy’s gloss on the *Achmea* Decision, to express any hostility to the dispute resolution provisions of treaties between EU member states and non-member states, such as those in the BIT, or to disturb the acceptance of such treaties embodied in Regulation 1219/2012. The Tribunal is accordingly not persuaded that the *Achmea* Decision has any application to BITs between EU member states and non-member states, such as the BIT under which this arbitration was commenced.
337. Nor is the Tribunal persuaded that there is any conflict between the provisions of the BIT and the Cotonou Convention, or any other expression of EU law, that would otherwise bring the principles of the *Achmea* Decision into play.
338. The Tribunal therefore concludes that nothing in the *Achmea* Decision or in the Joint Declaration deprives this Tribunal of jurisdiction to decide the present dispute. We therefore reject the Respondent’s argument that the consent it expressed in the BIT to arbitration of disputes with Italian investors was invalidated or otherwise affected by that decision.

⁴²³ The second and third questions are thoroughly and thoughtfully analyzed in the Decision on Italy’s Request for Immediate Termination and Italy’s Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes in *Eskosol v. Italy* (7 May 2019) (RL-61).

⁴²⁴ Opinion 1/17, ¶116. That opinion notes (at ¶129) that the “principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State.”

339. For all of the reasons explained above, the Tribunal finds that it has jurisdiction to address the merits of the dispute between the Parties, and does so in the following section of this Award.

V. MERITS

340. The Claimants assert that Mozambique has breached its obligations under the following provisions of the BIT:

- a. Article 2(3), which requires the just and fair treatment of investments,⁴²⁵ and which also requires that investments should not be subjected to unjustified or discriminatory measures.⁴²⁶
- b. Article 2(4), which requires Mozambique to create and maintain a legal framework apt to guarantee to investors legal treatment, in good faith, of all undertakings.⁴²⁷
- c. Article 3, which requires Mozambique to provide Italian investors treatment that is no less favorable than that accorded by Mozambique to investors of third states.⁴²⁸

341. The Claimants contend that the following actions and failures to act by Mozambique breached these treaty obligations:

- (1) Mozambique's refusal to honor its undertaking to pay the settlement amount allegedly agreed;
- (2) Mozambique's unreasonable delay in responding to the Claimants' requests for payment of that amount;
- (3) Mozambique's unjustifiable delay in issuing the Certificate of Completion;
- (4) Mozambique's decision to revisit and ignore the settlement agreement, seeking advice and expressly relying on an opinion which lacks any

⁴²⁵ CM, ¶200.1.

⁴²⁶ *Id.*, ¶200.2.

⁴²⁷ *Id.*, ¶200.3.

⁴²⁸ *Id.*, ¶¶273-274.

legitimate justification without informing and involving the Claimants in the process; and

- (5) The contradictory, inconsistent and non-transparent conduct of the Mozambican Government throughout the process which began after the 2 November 2009 letter and continued from January 2010 to November 2011.⁴²⁹

342. The Respondent denies having breached any of its obligations under the BIT. In addition, it argues that the Claimants are barred from bringing their claims because the statute of limitations has expired, and because they unreasonably delayed bringing their claims.
343. This Award will consider each of the breaches asserted by the Claimants and the Respondent's defenses to each, as well as the untimeliness defenses raised by the Respondent and the Claimants' reply thereto.
344. First, however, it addresses the key factual issue presented to the Tribunal: whether a settlement agreement was concluded between the Parties. The Claimants assert that "[t]his case is about an obligation assumed by the Respondent to pay to CMC 8.22 million euros and the unjustifiable repudiation of such commitment,"⁴³⁰ and the Respondent denies that any agreement to settle the Claimants' claims was ever reached.⁴³¹

A. The existence of a settlement agreement

345. The Claimants argue that a settlement agreement was formed by their acceptance on 2 November 2009 of the offer made by ANE on 30 October 2009.⁴³²
346. The 30 October 2009 letter to CMC from the Director General of ANE, Mr. Nunes, states in pertinent part:

On the basis of what above mentioned, ANE hereby proposes to CMC Ravenna the agreement on Euro 8,220,888 against Euro

⁴²⁹ CM, ¶200.

⁴³⁰ CM, ¶6; CRMJ, ¶64.

⁴³¹ RM, ¶2.

⁴³² See para. 350, below.

15.802.053, covering all the additional costs and financial charges incurred during the execution of the Construction Contract, according to the enclosed table.

In accordance with what agreed and negotiated, the payments of the amount subject of the agreement may be made in installations during the year 2010.

We request to the Contractor CMC Ravenna, in case of agreement on what above mentioned, to provide a written confirmation of the acceptance of the above described conditions within the maximum time limit of 7 days from the receipt of the present letter.⁴³³

The table attached to the 30 October 2009 offer letter shows how ANE arrived at the figure of EUR 8,220,888.⁴³⁴

347. The Claimants' reply to that letter, dated 2 November 2009, states:

We acknowledge receipt of your letter Ref. 036/DG/2009, that we appreciate.

We agree with your proposal to set the amount of Euro 8.220.888 clarifying that is additional to the amount already certified and processed for the payment with IPC no. 27.⁴³⁵

348. The Parties agree that the 30 October 2009 letter constituted an offer to enter into a settlement agreement.⁴³⁶ They disagree as to whether the 2 November 2009 letter constituted an acceptance of that offer.

349. The Parties agree that the law applicable to whether a settlement agreement was formed is Mozambican law.⁴³⁷ Both the Claimants' expert Mr. Timbane and the Respondent's expert

⁴³³ C-2 (Claimants' amended translation).

⁴³⁴ That table is reproduced at paragraph 130 of this Award.

⁴³⁵ C-3 (Claimants' amended translation).

⁴³⁶ CRMJ, ¶61; RCM, ¶53.

⁴³⁷ CRMJ, ¶65; RCM, ¶87.

Ms. Muenda submitted expert reports and testified at the hearing about the Mozambican law of offer and acceptance.⁴³⁸

1. The Claimants' Claim

350. The Claimants argue that their 2 November 2009 letter created a binding settlement agreement, and disagree with the Respondent's argument that the 2 November 2009 letter contained a counteroffer, which the Respondent did not accept.⁴³⁹ In other words, the Claimants contend that ANE offered EUR 8,220,888 on top of (in addition to) the amount certified in IPC 27, while the Respondent contends that the offer included the amount already certified.

351. Mr. Timbane, the Claimants' expert on the law of Mozambique, states in his report:

12. Pursuant to Mozambican legislation, a contractual offer has a **binding effect**. In this regard, Article 224(1) of the Civil Code provides that "*a contractual declaration that has an offeree becomes effective as soon as it reaches the offeree's sphere of influence or knowledge*".

13. Similarly, the contractual offer has a **duration**; this means that its effectiveness is limited in time. This is what results from Article 228, which provides that:

1. A contractual offer binds the offeror as follows:

a) If the offeror or the parties agree on a fixed time for the acceptance, the offer made stands until the time limit expires;

[...]

15. Lastly, and now specifically in regard to acceptance, it is important to bear in mind that "[the] **acceptance with additions, limitations or other modifications** amounts to a rejection of the offer; but if the modification is sufficiently precise, it amounts to a new offer, if no other meaning results from the declaration" (Article 233 of the Civil Code).

⁴³⁸ Legal Opinion of Mr. Timbane; First and Second Witness Statements of Ms. Muenda.

⁴³⁹ RCM, ¶¶54, 56.

[...]

19. The offer must be complete, firm, and adequate in form, i.e., contain all the necessary elements that, with an acceptance, would make it possible to enter into a contract, demonstrate a clear intention to enter into a transaction under the conditions mentioned and, finally, be made in the form required by the contract.

20. The **acceptance**, differently, “*is the declaration by which the offeree of a contractual offer, or any other person interested in the public offer, demonstrates its agreement with the respective content. The acceptance, like the offer, and for similar reasons is a recipienda declaration [does not require acceptance by the recipient to be effective]*”.

[...]

26. Starting by addressing the binding effect of the contractual offer, case law has put forth that “[*the*] contracts are entered into by the acceptance of an offer” and that “[*a*] declaration may qualify as a contractual offer if it encompasses the following characteristics: if it is complete and precise, definite and adequate in form”.

[...]

30. Finally, and regarding the issue of acceptance with modifications (rejection of the offer or formulation of new offer), provided for in Article 233 of the Civil Code, we would draw to your attention the decision of *Tribunal da Relação de Lisboa* dated 05.05.2009:

[...] When the recipient, instead of simply accepting an offer, introduces modifications, ‘the roles reverse: the original offeror becomes the offeree, and vice-versa. And the circumstances will remain as such until there is a full meeting of wills, meaning until there is an acceptance that conforms to the offer. Only then will the intention of the parties reveal the same substantial content in regard to all the clauses. Only then ends the cycle of formation of the contract.’ [...]⁴⁴⁰

352. Mr. Timbane concludes that the Claimants’ letter of 2 November 2009 constitutes an acceptance of the Respondent’s 30 October 2009 offer, creating a binding settlement

⁴⁴⁰ Legal Opinion of Mr. Timbane (emphasis in original).

agreement. He argues that it cannot have been a counteroffer, because “a counter-offer (*‘new offer’*) is only present *‘if the modification is sufficiently precise’* – which is clearly not the case. [...] CMC states a clarification and in no way suggests any addition, limitation, or other modification to the offer it had received from ANE.”⁴⁴¹

353. At the Hearing, the Tribunal asked Mr. Timbane to what extent the Parties’ subjective intentions and the circumstances both prior to and following the purported agreement can be taken into account:

MR CASEY: Mr Timbane, just a few questions to help us here. Under Mozambique law, to what extent are we permitted to look at the surrounding circumstances in interpreting the offer or proposal? For example, the documents that may have gone back and forth between the parties prior to the offer, to what extent can we look at those, if at all?

MR TIMBANE: There is a principle that exists in Mozambican law from what I studied. Mozambican law is a civil law based on good faith. Someone who negotiates with another party has to act in good faith and have correct behaviour in order to reach a goal.

Looking at that and at article 227 of the civil code, we see that the behavior of the parties is important to ascertain what we want to achieve. This is an example that the Mozambican law establishes, and we can conclude that the behavior of the parties are essential to what the parties state. It’s a declaration or statement and we can look at it in, for instance, ANE’s letter as a single document and there is nothing else to look at but that letter. We have to look at the surrounding circumstances.⁴⁴²

[...]

MR CASEY: Another question, general question, about Mozambique law. When we are looking to interpret the proposal, to what extent is it admissible to look at or to determine the intention of the offeror? In other words, can we look at other documents to try and determine what the intention of the offeror was under Mozambique law?

⁴⁴¹ Legal Opinion of Mr. Timbane, ¶39 (emphasis in original).

⁴⁴² Tr. 30 April 2019 p. 365, l. 17 – p. 366, l. 17.

MR TIMBANE: That depends on the circumstances. It depends on the circumstances because the proposal may be made after one single conversation, a brief conversation. There may even not exist a conversation. I know that someone sells a given product and I present a proposal, but there can also be a context. In this concrete case, we were talking about -- and the proposal states it very clearly that there were other aspects that had been discussed. There were negotiations, conversations and so forth, and it is important to make this assessment, this analysis.⁴⁴³

[...]

MR REES: Mr Timbane, I just have one further question about what you can and can't do in Mozambican law to help interpret an offer and acceptance situation. We've dealt with what happened prior to the possible formation of a contract. To what extent under Mozambican law can you look at the conduct of the parties after the date in which an alleged contract has been made?

MR TIMBANE: The conduct of the parties, in the sequence of that may be relevant, but from the moment that there is an agreement between the two parties, after that the parties may have different behaviour or they may converge in their behaviour, and it is an agreement and maybe in that you are already looking ahead. The question was if there are any doubts if there was an agreement or not, a subsequent behaviour may be important to determine whether there was an agreement or not, if there were any doubts. I don't have doubts in this concrete case.⁴⁴⁴

354. The Claimants argue that applying these principles of Mozambican law to this case results in the conclusion that a binding settlement was agreed to:

CMC's letter of 2 November 2009 does not introduce any new term. It is a clear and unqualified expression of assent ("[w]e agree with your proposal to set the amount of Euro 8.220.888"). The clarification in relation to IPC 27 does not disqualify the acceptance and does not amount to a counter-offer because it does not purport to vary the terms of the offer made by ANE, it merely clarifies CMC's understanding of ANE's offer. Moreover, CMC's letter of 13 January 2010, by which it enclosed two invoices totaling

⁴⁴³ Tr. 30 April 2019 p. 367, l. 19 – p. 368, l. 14.

⁴⁴⁴ Tr. 30 April 2019, p. 368, l. 17 – p. 369, l. 12.

€8,220,888, further confirms CMC’s acceptance of ANE’s offer and ANE did not object to CMC’s acceptance. Furthermore, when ANE first indicated that there was nothing to pay CMC – 20 months after the event – it relied on abstract “principles” of “public administration”, but it did not dispute the legally binding nature of the commitment.⁴⁴⁵

355. The Claimants further contend that the Respondent’s counteroffer theory was developed over the course of this arbitration and had never before been raised by the Mozambican authorities.⁴⁴⁶
356. At the Hearing, the Tribunal invited the Claimants to specify what documentary evidence in the record they considered supportive of their position that the Respondent’s 30 October 2009 letter had made an offer of EUR 8,220,888 *on top of* the EUR 2,440,925 already awarded to the Claimants in IPC 27. In response, the Claimants pointed to the following documents:
- a. CMC’s letter to ANE of 14 October 2009 in which CMC referred to a “discrepancy of approximately 8,257,785.96 € between our amounts and those of the Supervisor’s Representative.”⁴⁴⁷
 - b. Annex 2 to ANE’s letter to CMC dated 8 August 2011, showing that ANE authorized payment of the amount specified in IPC 27 to the Claimants on 15 October 2009—before ANE made its 30 October 2009 offer.⁴⁴⁸
 - c. Mr. Nunes’ 20 October 2009 letter to the Minister stating that “[t]he Contractor does not demand immediate payment of the outstanding amounts.” The letter proposes a settlement offer of EUR 8,370,888, which was approved by the Minister in a handwritten notation dated 29 October 2009. The Claimants argue that, since payment of the EUR 2.4 million in IPC 27 had been authorized five days before

⁴⁴⁵ CRMJ, ¶71.

⁴⁴⁶ CRMJ, ¶88.

⁴⁴⁷ C-34; Tr. 1 May 2019, pp. 457, 458.

⁴⁴⁸ C-4; Tr. 1 May 2019, pp. 459, 460.

this letter, these “outstanding amounts” must be additional to that EUR 2.4 million.⁴⁴⁹

- d. ANE’s 30 October 2009 letter containing an offer to settle for EUR 8,220,888.⁴⁵⁰ The Claimants describe that amount as very close to the “discrepancy” of EUR 8,257,785.96 mentioned in the Claimants’ letter of 14 October 2009.⁴⁵¹ The Claimants could not reproduce the calculation they made to arrive at the “discrepancy” of EUR 8,257,785.96, nor could they account for the EUR 36,897.96 difference between that figure and the EUR 8,220,888 offered by ANE.⁴⁵²
- e. The document headed “Subject Bill Book,” listing two invoices for a total amount of EUR 8,220,888 containing a handwritten note in Portuguese stating “[i]t is consistent with our balance as of 31/12/17.” The Claimants argue that this amounts to an acknowledgement of the amount due to them by “technical officials of ANE.”⁴⁵³
- f. Annex II to the Engineer’s Determination of 11 May 2009, read in combination with the table attached to ANE’s offer letter of 30 October 2009. The Claimants point out that the amounts awarded by the Engineer for individual claim items and the amounts offered for those same claim items in ANE’s table, together, are always less than the amounts originally claimed for those items by the Claimants.⁴⁵⁴

2. The Respondent’s Defense

357. The Respondent argues that no settlement agreement was ever reached because there “was no offer and acceptance, or ‘meeting of the minds,’ on the amount to be paid on the

⁴⁴⁹ C-35 (emphasis added); Tr. 1 May 2019, pp. 460, 461.

⁴⁵⁰ C-2.

⁴⁵¹ C-34; Tr. 1 May 2019, p. 463.

⁴⁵² Tr. 1 May 2019, pp. 475, 476; p. 482, l. 15-18.

⁴⁵³ CM, ¶222; C-49; Tr. 1 May 2019, pp. 463, 464.

⁴⁵⁴ C-28; C-2; Tr. 1 May 2019, pp. 473, 474.

Claimants’ construction claims.” The Respondent asserts that this has consistently been its position.⁴⁵⁵

358. The Respondent’s expert Ms. Muenda provides the following explanation of the Mozambican law of offer and acceptance in her report:

1. Under the general principles of Mozambican law, an offer must be accepted through the same medium and terms in which it was exactly made, without modifications. An attempt to accept the offer on different terms instead creates a counter-offer, and this is understood as a rejection of the original offer.

2. If we consider, *arguendo*, that ANE’s communication dated October 30, 2009, ref. 036/DG/2009, is a settlement offer in the amount of 8,220,888.00 Euros, the Contractor’s answer, dated November 2, 2009, ref. 2179/09/CMC/NG, stating that it agrees with ANE’s proposal in the same amount but “with the clarification that it is an additional amount to the already certified and processed for payment in the IPC No. 27” is clearly in such terms a statement which is not an acceptance of the offer.

3. Because the answer given above by CMC does not reflect the image and content of the offer made by ANE, it cannot be considered as acceptance, much less it can be said that the statements of the parties indicate, per se, the formation of a settlement agreement according to the principles of law embodied in Mozambican legislation. Instead, the Contractor’s letter dated November 2, 2009 constitutes a true counter-offer, particularly given that the Contractor in its answer considered that the 8,220,888 Euros expressed in the offer letter should be additional to the payment processed through IPC No. 27, referring to the payment on the claims as determined in the Engineer’s Final Decision of May 11, 2009.⁴⁵⁶

359. Ms. Muenda further testified that correspondence between the Parties and their conduct to each other can be taken into account when determining whether an agreement was formed.⁴⁵⁷

⁴⁵⁵ RCM, ¶¶82; C-4; First Witness Statement of C. Grachane, ¶¶20, 22.

⁴⁵⁶ First Witness Statement of Ms. Muenda, ¶¶1-3.

⁴⁵⁷ Tr. 30 April 2019, pp. 388, 389.

360. The Respondent asserts that the Parties' do not disagree about the law, but about its application to the facts.⁴⁵⁸ The Respondent points out that the Parties agree that, under Mozambican law, the test to determine whether an offer was made and accepted is an objective one, meaning that the subjective intent of the Parties is of no consequence.⁴⁵⁹
361. At the Hearing, in response to questions from the Tribunal about a hypothetical posed initially by the Claimants' counsel, Ms. Muenda testified as follows:

MR REES: Let me just try this once again. The buyer only wants red apples. The seller is saying, I offer to sell you ten apples and the seller intends to give him five red and five green apples. Is that going to create a contract for the buyer to buy ten red apples? Because the intention of the seller is different.

MS MUENDA: There is -- there cannot be -- whenever there is an intention that's different from the other party, there cannot be no contract, no agreement. In order for an agreement to exist, there must be agreement on the content in terms of quality and colour, everything. So in that situation, there would be no contract.

MR REES: Right. So I think the answer to my final question, then, is obvious. If the seller intends to sell ten red apples but simply says, I offer you ten apples and the buyer says, I accept your offer of ten apples clarifying they are red, we have a meeting of minds and a contract?

MS MUENDA: Correct. The seller is offering ten red apples and the buyer wants to buy ten red apples.

MR REES: OK. So the question for a court or an arbitral tribunal seeking to examine whether there is a contract between the parties is to establish the intent of the seller in those circumstances?

MS MUENDA: If the question posed to the Tribunal is to evaluate the intention of the seller for a contract, the Tribunal must assess the intention on both parties, both the party offering and the party buying. You can't infer anything by looking only one of the parties

⁴⁵⁸ RRM, ¶61.

⁴⁵⁹ RRM, ¶56; CRMJ, ¶70.

because a contract is the meeting of the minds of at least two people.⁴⁶⁰

362. The Respondent argues that the Claimants did not “clearly” accept the offer made by ANE on 30 October 2009 to settle for “Euro 8.220.888 against Euro 15.802.053, covering all the additional costs and financial charges incurred during the execution of the Construction Contract, according to the enclosed table.”⁴⁶¹ Rather, the Claimants made a counteroffer by stating in their 2 November 2009 letter that the settlement offer should be “additional to the amount already certified and processed for the payment with IPC no. 27.”⁴⁶² This, the Respondent continues, makes the 2 November 2009 letter a counteroffer for a settlement in a total amount of EUR 10,661,813, as opposed to the “total amount” of EUR 8,220,888 proposed by ANE.⁴⁶³
363. For its assertion that the offer of EUR 8,220,888 was not on top of, but rather included the amount already certified by the engineer, the Respondent notes that the 30 October 2009 offer letter states: “ANE informs you that the dossier presented by the Contractor has been analyzed again.” This, the Respondent argues, shows that ANE’s offer was based on a re-evaluation of all of the Claimants’ claims, not just of the residual claim amount that was not awarded by the Engineer.⁴⁶⁴
364. Respondent further argues that a comparison between the amounts awarded by the Engineer for individual claim items and the corresponding amounts offered by ANE shows that ANE offered to adjust, not add to, the amount certified by the Engineer. The Respondent submitted the overview below:⁴⁶⁵

⁴⁶⁰ Tr. 30 April 2019, p. 409, l. 13 - p. 410, l. 24.

⁴⁶¹ C-2.

⁴⁶² C-3.

⁴⁶³ RCM, ¶88; C-2; C-3.

⁴⁶⁴ RCM, ¶102; Tr. 1 May 2019, p. 513; C-2.

⁴⁶⁵ Respondent’s Demonstrative Exhibit 1; Tr. 1 May 2019, p. 519.

	C-4 (Engineer Report, Annex II)			C-2 (ANE Oct. 30, 2009 Letter Table)		
Description	Claims #	CMC Requested	Engineer Allowed	Item #	CMC Requested	Amount Offered by ANE
Delayed access	2	470.512,79	65.295	2	470.513	300.000,00
Cut to spoil	5	6.783.895,66	1.432.983	4	6.783.896	4.500.000,00
Unforeseen days off	10	45.725,85	18.033	5	45.726	0
[Blank]	----	0	9.017	---		
Borrow pits	14	1.750.570,08	915.597	7	1.750.570	700.000,00
TOTALS		9.050.704,38	2.440.925		9.050.705	5.500.000

365. In this overview, the Respondent included all claim items for which the Engineer awarded additional compensation on the left side, and ANE's offers for the corresponding claim items on the right side.⁴⁶⁶ The total amount offered by ANE in this chart is EUR 5,500,000, not EUR 8,220,888, because ANE also offered the Claimants EUR 2,720,888 for claims that were either not considered by the Engineer, or for which the Engineer did not award additional compensation.

366. The Respondent argues that ANE thus increased the amounts awarded by the Engineer for claim items 2 and 5, and decreased the amounts awarded by the Engineer for claim items 10 and 14.⁴⁶⁷ The Respondent contends that, because ANE reconsidered claim items that had already been reviewed by the Engineer, the EUR 5.5 million offered by ANE must include the EUR 2.4 million that had been certified by the Engineer:⁴⁶⁸

[I]f you look at the totals, these are the relevant claims because they are the claims that get you to the 2.4 million, the amount the engineer said should be paid. What has happened is that in his offer, Mr Nunes has increased the amount from the 2.4 to the 5.5 on those same claims. So there's absolutely no doubt that the 2.4 is included in the 5.5. It's the same claims. It's the same descriptions. To the penny, it's the same amounts requested by CMC. The only

⁴⁶⁶ Tr. 1 May 2019, pp. 516, 517; C-28; C-2. Claim "[Blank]" was not included in ANE's offer letter.

⁴⁶⁷ Tr. 1 May 2019, pp. 517-519.

⁴⁶⁸ Tr. 1 May 2019, p. 519.

difference is what is obvious on this chart. Mr Nunes has increased the amount from 2.4 to 5.5.⁴⁶⁹

367. The Respondent then goes on to address “how do you get from the 5.5 to the 8.2?”⁴⁷⁰ The Respondent says that “there are two things that Nunes does,”⁴⁷¹ and submitted an exhibit at the hearing to illustrate, the relevant portion of which reads as follows:

- C2 also addresses items numbers 1, 6, 8, 9 and 10, which correspond to claims numbers 3, 8, 15, 16 and 17. For these items ANE offered 690.888.
- C2 also addresses items 3 and 11, which are not included as claims. For these two items ANE, offers 2.030.000.
- **Total ANE offer:** $5.500.000 + 690.888 + 2.030.000 =$
8.220.888.⁴⁷²

368. To show that ANE did not intend to pay more than EUR 8,220,888, the Respondent relies on the text of the 30 October 2009 offer letter, which “proposes to CMC Ravenna the agreement on Euro 8.220.888 against Euro 15.802.053, covering all the additional costs and financial charges.” The Respondent contends that, if the amounts offered by ANE were to be added to the amount certified by the Engineer, the total would exceed the EUR 8.2 million offered.⁴⁷³

369. The Respondent further points out that ANE’s offer stipulated that it expired after seven days. Because ANE regarded the Claimants’ letter of 2 November 2009 as a counteroffer, and no other communication was received within the seven-day period, the Respondent takes the position that no settlement agreement was formed.⁴⁷⁴

⁴⁶⁹ Tr. 1 May 2019, pp. 519, 520.

⁴⁷⁰ Tr. 1 May 2019, p. 521, l. 5-6.

⁴⁷¹ Tr. 1 May 2019, p. 521, l. 6-7.

⁴⁷² Respondent’s Demonstrative Exhibit 1 (emphasis in original). C-2 is the exhibit number identifying Mr. Nunes’s letter to CMC of 30 October 2009.

⁴⁷³ Tr. 1 May 2019, pp. 530-533.

⁴⁷⁴ RCM, ¶89; C-2; C-3.

3. The Tribunal's Decision

370. Whether a settlement agreement was reached is a question to be resolved under Mozambican law. There is no serious disagreement between the parties concerning the law of Mozambique on offer and acceptance. Both experts agreed that an offer must be accepted in the terms in which it was made in order for the offer to result in a binding agreement.⁴⁷⁵ Both experts agreed that a response to an offer that varies its terms amounts to a rejection of the original offer and makes a new offer, which the party that made the original offer may accept or reject.⁴⁷⁶
371. Applying these agreed rules of law to the facts before us, if Claimants' response of 2 November 2009⁴⁷⁷ to ANE's offer letter dated 30 October 2009⁴⁷⁸ was an unconditional acceptance of the offer made in that letter, a settlement agreement was formed. If CMC's response changed the terms of the offer, then no agreement was reached, because it is undisputed that ANE never accepted any change to the terms of its offer. Whether or not ANE and CMC ever reached a settlement agreement therefore turns on whether CMC accepted ANE's offer unconditionally or whether it effectively made a counterproposal.
372. The Tribunal is not able to resolve this question on the basis of testimony concerning the intentions of the Parties to the exchange of letters in October and November 2009.

⁴⁷⁵ First Witness Statement of Ms. Muenda, ¶1 ("Under the general principles of Mozambican law, an offer must be accepted through the same medium and terms in which it was exactly made, without modifications."); Legal Opinion of Mr. Timbane, ¶30 ("we would draw to your attention the decision of *Tribunal da Relação de Lisboa* dated 05.05.2009: [...] When the recipient, instead of simply accepting an offer, introduces modifications, 'the roles reverse: the original offeror becomes the offeree, and vice-versa. And the circumstances will remain as such until there is a full meeting of wills, meaning until there is an acceptance that conforms to the offer. Only then will the intention of the parties reveal the same substantial content in regard to all the clauses.'").

⁴⁷⁶ Legal Opinion of Mr. Timbane, ¶15 ("in regard to acceptance, it is important to bear in mind that '[the] **acceptance with additions, limitations or other modifications** amounts to a rejection of the offer; but if the modification is sufficiently precise, it amounts to a new offer, if no other meaning results from the declaration' (Article 233 of the Civil Code)."); First Witness Statement of Ms. Muenda, ¶1 ("An attempt to accept the offer on different terms instead creates a counter-offer, and this is understood as a rejection of the original offer.").

⁴⁷⁷ C-3.

⁴⁷⁸ C-2.

Mr. Gridella signed the 2 November 2009 letter for CMC and would therefore have first-hand knowledge. In his Second Witness Statement, Mr. Gridella stated unequivocally that:

CMC's letter referenced 2179/09/CMC/NG of 2 November 2009 was indeed an acceptance of ANE's offer of settlement. The letter of 2 November 2009 was intended to clarify and explain what was said in the conversations I had with Mr. Nunes. CMC's acceptance letter of 2 November 2009 was not a further request by the Contractor for more money than was offered by ANE.⁴⁷⁹

However, Mr. Gridella failed to appear at the hearing, although he had been asked to be present for cross examination. The Tribunal declines to reach a conclusion on such a controverted question solely on the basis of the written testimony of a witness who was called for cross examination but did not appear.

373. More important, the intention of CMC seems less important on this point than the intention of ANE – that is, precisely what did ANE's offer comprise? CMC could well have understood ANE's offer to have been for EUR 8,220,888 plus the amounts already paid and could sincerely have believed it was accepting that offer, although the inclusion in its acceptance letter of the sentence “clarifying that is additional to the amount already certified” shows that it believed some clarification to be necessary. But no amount of “clarification” by the offeree could, unless subsequently agreed to, change what the offeror intended. We therefore turn to what the offeror intended.
374. The Respondent's sole fact witness was Mr. Cecilio Grachane. Mr. Grachane became the General Director of ANE in January of 2011, and served in that capacity until July of 2013.⁴⁸⁰ Previously, from 2004 to 2011, Mr. Grachane worked as a plan director and financial analyst, and also as Secretary of the Roads Council, at the Ministry of Public Works and Water Resources, of which ANE is a component.⁴⁸¹ He was thus not at ANE in 2009, and did not participate in the drafting of ANE's letter to CMC dated 30 October

⁴⁷⁹ Second Witness Statement of N. Gridella, ¶3.1.

⁴⁸⁰ First Witness Statement of C. Grachane, ¶2.

⁴⁸¹ Tr. 30 April 2019, pp. 233, 234.

2009. Nor did Mr. Grachane discuss the content of that letter with Mr. Nunes, who signed the letter as the Director of ANE, or with Mr. Zacarias, the Minister of Public Works with whom Mr. Nunes corresponded in October 2009 concerning the settlement proposal.⁴⁸² Mr. Grachane thus had no direct, contemporaneous knowledge of the intentions of ANE or the Ministry vis-à-vis CMC at the time that ANE's letter was prepared and sent.

375. Mr. Grachane stated in his witness statement that, as Director of ANE in 2011, he "sent the correspondence dated August 8, 2011 explaining there was no balance due to the Contractor; the Contractor did not establish its right to any claimed additional sums; and more, that the Contractor had already received payment in full for the claims as determined by the Engineer's Final Decision, everything having been settled through Invoice 27."⁴⁸³ He went on to express his opinion that:

There was no balance due because the parties had never reached a settlement agreement on the amount and, as noted, ANE had paid the value of the claims as determined through the contractual claims process and in the precise terms stated in the final Engineer report. Although Mr. Nunes sent a proposal dated October 30, 2009, which was unfounded from my perspective, that proposal was never accepted by the Contractor because the Contractor sought to receive the proposed amount as an additional amount to the value of the claims as shown in Mr. Nunes' October 30 correspondence. In other words, the Contractor's November 2, 2009 response sought payment of 10.6 million Euros instead of the 8.2 million Euros proposed by Mr. Nunes.⁴⁸⁴

376. The Tribunal thus had before it Mr. Gridella's untested written statement that CMC considered its letter of 2 November 2009 to be an acceptance of the offer made in ANE's letter of 30 October 2009, and Mr. Grachane's after-the-fact statement that ANE considered CMC's letter to be an unacceptable counteroffer. While the testimony of these two witnesses reflects the current positions of each side in this arbitration, and the Tribunal has no reason to believe that the views they express are not sincerely held, the Tribunal

⁴⁸² Tr. 30 April 2019, p. 255. *See* C-12 and para. 124, above.

⁴⁸³ First Witness Statement of C. Grachane, ¶19.

⁴⁸⁴ First Witness Statement of C. Grachane, ¶ 20.

does not consider that the witness testimony resolves the issue. The Tribunal thus turns to the other evidence available to it, the documents in the record.

377. We begin with the offer letter itself.⁴⁸⁵ That letter phrased ANE's offer in the following terms:

On the basis of what above mentioned, ANE hereby proposes to CMC Ravenna the agreement on Euro 8.220.888 against Euro 15.802.053, covering all the additional costs and financial charges incurred during the execution of the Construction Contract, according to the enclosed table.⁴⁸⁶

378. To ascertain what claims ANE was offering to settle, therefore, it is important to focus on what claims were embraced within the total of EUR 15,802,053 referenced in the offer letter. The sum of EUR 8,220,888 was simply the amount that ANE said that it was willing to pay in settlement of the claim for the larger amount. The components of the EUR 15,802,053 figure were shown in the table attached to ANE's 30 October 2009 letter, and added up to EUR 14,052,053 before interest was added. The relevant columns of that table show the following breakdown:

	Description	Amount (Euros) requested by the Contractor
1	Demining of borrow pits. Increase of borrow pits due to technical reason	167,133
2	Delay on payment of compensation to local people by Contracting Authority	470,513
3	Delay on submission of the required documentation by the Contracting Authority for custom clearance material	1,393,193
4	Increase of quantities of cut to spoil	6,783,896
5	Unexpected Additional holidays	45,726

⁴⁸⁵ C-2; *see* para. 346, above.

⁴⁸⁶ C-2 (Claimants' amended translation).

6	Disruption due to delay on payments	195,396
7	Increase of borrow pits	1,750,570
8	ROP cost of labour	584,429
9	Hard excavation	123,755
10	Increase of cement for stabilization	81,286
11	Extra works post TOC	2,456,157
	SUB TOTAL	14,052,053
12	Interest on above amounts (rough calculation)	1,750,000
	TOTAL	15,802,053

379. For purposes of this analysis, the portion of the EUR 15,802,053 figure representing estimated interest (EUR 1,750,000) can be disregarded. The question then becomes whether the EUR 2,440,925 awarded to CMC by the Engineer was or was not included in the total claim amount of EUR 14,052,053 in the table attached to ANE's letter of 30 October 2009.

380. When the Engineer awarded EUR 2,440,925 to CMC in his letter of 11 May 2009,⁴⁸⁷ he awarded that amount against a claim by CMC for a total amount of EUR 12,759,498.18. The Engineer awarded a portion of the amounts claimed in four of the twenty line items submitted by CMC to the Engineer (representing 70% of CMC's total claim), plus an unexplained additional amount, as shown in the table below; he awarded nothing for the other line items.⁴⁸⁸

Claim Number	Description	Amount for which CMC applied to the Engineer	Amount awarded by Engineer
2	Delay on payment of compensation to local people by Contracting Authority	470,512.79	65,295
5	Increase of quantities of cut to spoil	6,783,895.86	1,432,983

⁴⁸⁷ C-28.

⁴⁸⁸ C-28, Annex II (Claimants' amended translation).

10	Unexpected Additional holidays	45,725.85	18,033
14	Increase of borrow pits	1,750,570.08	915,597
	Unexplained additional amount		9,017
		9,050,704.58	2,440,925

381. When CMC wrote to ANE on 6 October 2009 to complain about the amounts awarded by the Engineer, it presented a claim for six items, plus interest, totaling EUR 13,315,000. Leaving interest aside, the claim presented was for total compensation of EUR 11,815,000, as summarized in Annex 2 to CMC's letter,⁴⁸⁹ reproduced in part here:

	Description	Claimed Amount
1	Borrow pits demining - increase of borrow pit quantity due to technical reasons	167,000
2	Delay of payment by the Contracting Authority of compensations	470,000
3	Late issuance of documentation required for the importation of materials and parts by the Contracting Authority	1,400,000
4	Exaggerate increase of cut to spoil	9,500,000
5	Chipping rescreening	83,000
6	Disruption due to lack of/ late payment	195,000
7	Interests on the above mentioned amounts	1,500,000
	TOTAL	13,315,000

Two of these items (Nos. 2 and 4) had been awarded by the Engineer in smaller amounts; the Engineer had awarded nothing in the other categories claimed.

382. At least from items 2 and 4, it would appear that CMC did not subtract the amounts awarded by the Engineer from the amounts it asked ANE to pay. For item 2, it asked ANE for EUR 470,000, which is less than (and appears to have been rounded down from) the EUR 470,512.79 for which it had asked the Engineer, but the difference between the figures is not the EUR 65,295 awarded by the Engineer. For item 4, rather than reducing the EUR 6,783,895.86 for which it asked the Engineer by the EUR 1,432,983 awarded by the Engineer, CMC *increased* its demand to EUR 9,500,000.

⁴⁸⁹ C-33 (Claimants' amended translation).

383. It is very difficult to compare the numbers assigned to individual items by CMC, the Engineer, and ANE in their communications with each other with any precision, because the categories for which claims were made were not consistent, the figures assigned to particular categories changed over the period from May through October 2009, and the total amount demanded changed with each articulation of the claim.
384. A more reliable guide to the intentions of ANE emerges from comparing the amounts awarded by the Engineer on 11 May 2009 with the amounts offered by ANE on 30 October 2009. ANE offered more than the Engineer had awarded for two line items (Engineer's items 2 and 5/ANE items 2 and 4), and less than the Engineer for one item (Engineer's item 14; ANE item 7). ANE, unlike the Engineer, awarded nothing on the fourth (Engineer's item 10/ANE item 5). The numbers are such, however, that on each line of overlap, one could either add the ANE number to the Engineer's number, or replace the Engineer's number with the ANE number, without exceeding the amount for which CMC applied in the first place.

Engineer's Claim Number	Description	Amount for which CMC applied to the Engineer	Amount awarded by Engineer	ANE Item Number	Amount Offered by ANE
2	Delay on payment of compensation to local people by Contracting Authority	470,512.79	65,295	2	300,000
5	Increase of quantities of cut to spoil	6,783,895.86	1,432,983	4	4,500,000
10	Unexpected Additional holidays	45,725.85	18,033	5	0
14	Increase of borrow pits	1,750,570.08	915,597	7	700,000
	Unexplained additional amount		9,017		
		9,050,704.58	2,440,925		

385. The total amounts of CMC's various claims against ANE, while not entirely free from ambiguity, seem to the Tribunal to offer more reliable guidance to what CMC had in mind

than the line items. CMC first asked the Engineer for EUR 12,759,498.18, in response to which request he awarded EUR 2,440,925 on 11 May 2009. CMC then requested EUR 11,815,000 (without interest) from ANE on 6 October 2009. But CMC's figures do not tell us what ANE had in mind. For that we turn to the correspondence between the Director of ANE and the Minister.

386. Director Nunes of ANE submitted a memorandum to the Minister of Public Works and Housing on 20 October 2009, proposing to “[n]egotiate with the contractor a reasonable compensation proposal considering the proposal put forward in annex 2.”⁴⁹⁰ Annex 2 to that memorandum put the total amount “Requested by Builder” at EUR 14,052,053, before adding interest.⁴⁹¹ That is the same figure as the subtotal before interest in the table attached to ANE's offer letter of 30 October 2009 (see para. 378 above). None of the total amounts demanded ever exceeded, or even equaled, the total figure, EUR 15,802,053 (including interest), against which ANE's letter of 30 October 2009 made the offer of EUR 8,220,888.

387. To recap, CMC's total claims, excluding amounts claimed as interest, were stated by either CMC or ANE to be as follows between May and October 2009:

- 11 May 2009 (CMC) EUR 12,759,498.18
- 6 October 2009 (CMC) EUR 11,815,000
- 20 October 2009 (ANE) EUR 14,052,053
- 30 October 2009 (ANE) EUR 14,052,053

388. To read ANE's 30 October 2009 letter as intending for its offer of EUR 8,220,888 to be entirely in addition to the amount awarded by the Engineer, one would have to add the amount awarded by the Engineer to the total claim that ANE intended to settle, EUR 14,052,053 after subtracting interest. If we were to add EUR 14,052,053 to EUR 2,440,925, the sum would be EUR 16,492,978. That figure is higher than any total amount of compensation that CMC ever claimed. Indeed, ANE's base figure of EUR 14,052,053 is

⁴⁹⁰ C-12 (Claimants' amended translation).

⁴⁹¹ C-12, Annex 2.

higher than any total amount of compensation that CMC ever claimed or that ANE ever considered. It seems more likely to the Tribunal that ANE understood and intended the EUR 14,052,053 that it took as the starting point for calculating its offer to include the claims which the Engineer had already considered, and thus for the EUR 8,220,888 that it offered to include the EUR 2,440,925 already awarded by the Engineer.⁴⁹²

389. The Tribunal therefore concludes, based on the documentary record before us, that ANE did not intend in its letter of 30 October 2009 to offer CMC EUR 8,220,888 in addition to the EUR 2,440,925 awarded to CMC by the Engineer. Rather, the letters and numbers exchanged between the Parties lead us to conclude that ANE intended its offer to resolve all of CMC's claims against ANE, including the amounts that had been certified by the Engineer as due.
390. The foregoing conclusion about what ANE is likely to have intended to include in its offer leads to the further conclusion that CMC's response to that offer, "clarifying" that the EUR 8,220,888 offered was "additional to" the amount certified by the Engineer, was not an unqualified acceptance of ANE's offer. Rather, it amounted to a counteroffer.
391. On the understanding of Mozambique law to which the experts presented by both Parties agreed, such a counteroffer amounted to a rejection of the original offer, unless the counteroffer was itself accepted by the party that made the original offer. While the Claimants argued that, if a counteroffer was made, the Respondent had accepted it,⁴⁹³ the evidence advanced for that proposition is that ANE did not immediately reject CMC's invoices, and the testimony of Mr. Gridella. The Tribunal does not find the former convincing, and is not (for the reasons explained at paragraphs 74-75 above) prepared to base a conclusion upon the latter.

⁴⁹² Had ANE intended to offer EUR 8,220,888 on top of the EUR 2,440,925, it would presumably have said that the settlement proposal was against EUR 13,361,128 rather than against EUR 15,802,053.

⁴⁹³ Tr. 1 May 2019, p. 490, l. 17 – p. 491, l. 17.

392. For the foregoing reasons, the Tribunal finds that no agreement was reached between CMC and ANE in November of 2009 on an amount to be paid by ANE to settle CMC’s claims, so that no binding settlement agreement was ever concluded.

B. Article 2(3) of the BIT: Did Mozambique Treat the Claimants Justly and Fairly?

1. The Claimants’ Claim

393. The Claimants contend that Mozambique’s obligation under Article 2(3) of the BIT to “at all times ensure just and fair treatment of the investments of investors of the other Contracting Party”⁴⁹⁴ is analogous to the fair and equitable treatment (“FET”) standard found in other treaties.⁴⁹⁵ The Claimants contend that Mozambique violated the FET standard, and thus breached its obligations to them under Article 2(3), by:

- a. arbitrary, inconsistent, and contradictory conduct;
- b. frustrating the Claimants’ legitimate expectations;
- c. acting in bad faith;
- d. not acting in a sufficiently transparent manner; and
- e. coercing the Claimants.⁴⁹⁶

394. The Claimants assert that, regardless of whether a settlement agreement exists under Mozambican law, they were not treated justly and fairly, because Mozambican authorities led them to believe that an agreement had been reached on the additional Lot 3 claims.⁴⁹⁷

⁴⁹⁴ C-1.

⁴⁹⁵ CM, ¶202.

⁴⁹⁶ CM, ¶¶202-205.

⁴⁹⁷ CRMJ, ¶102.

a. Arbitrary, inconsistent, and contradictory conduct

395. The Claimants first contend that Mozambique acted in an arbitrary, inconsistent, and contradictory manner towards their investments.⁴⁹⁸
396. The Claimants argue that state conduct is arbitrary when it is “not justified by the rule of law” and, to a reasonable and impartial person, “creates the effect of ‘shock’ or ‘surprise’.”⁴⁹⁹ Repudiating an agreement with an investor amounts, the Claimants say, to a “willful disregard of due process of law, an act which shocks, or at least surprises a sense of juridical propriety;”⁵⁰⁰ “[t]he repudiation of the settlement agreement reached on 2 November 2009 by the Government after 20 months of silence surprises and shocks any reasonable and impartial person.”⁵⁰¹
397. The Claimants argue that a state’s conduct is inconsistent and contradictory when it amounts to a willful refusal by a government authority, not based on reasonable grounds, to abide by its contractual obligations. The FET standard requires governments to act “in an open manner and consistent with commitments it has undertaken.”⁵⁰² As an example, the Claimants point to the award in *PSEG Global*, in which the tribunal found a violation of the FET standard “because Turkey kept changing its position vis-à-vis the investors. It

⁴⁹⁸ CM, ¶¶207-222.

⁴⁹⁹ CM, ¶¶207-210; relying on *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (CL-22) at ¶309; *Elettronica Sicula s.p.a., (United States of America v. Italy)*, Judgment (20 July 1989) (CL-31) ICJ Reports (1989); *Pope & Talbot Inc. v. The Government of Canada*, Award in respect of Damages (31 May 2002) (CL-23) at ¶64.

⁵⁰⁰ *Elettronica Sicula s.p.a., (United States of America v. Italy)*, Judgment (20 July 1989), ICJ Reports (1989), (CL-31) at pp. 76, 77; CM, ¶211.

⁵⁰¹ CM, ¶211.

⁵⁰² CM, ¶¶212-218; relying on *PSEG Global Inc v Republic of Turkey*, ICSID Case No. ARB/02/5, (“*PSEG Global*”) Award, (CL-27) at ¶¶246, 254; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability (CL-37) at ¶185; Schreuer, C. “Fair and Equitable Treatment in Arbitral Practice”, the Journal of World Investment & Trade (2005) (CL-21) at p. 380; *Mondev International Ltd. v. United States of America*, (“*Mondev*”), ICSID Case No. ARB(AF)/99/2, Award (CL-26) at ¶134; *Eureko B.V. v. Poland*, Partial Award (CL-18) at ¶¶231-234; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8 (“*Siemens*”) Award (6 February 2007) (CL-25) at ¶319; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (“*Tecmed*”) Award (CL-24) at ¶154.

stated that it was, ‘not only the law that kept changing but notably the attitudes and policies of the administration.’”⁵⁰³

398. The Claimants argue that Mozambique’s conduct was arbitrary, inconsistent, and contradictory, because:

- a. Mozambique offered to enter into a settlement agreement on 30 October 2009, made the Claimants believe that the settlement agreement would be honored after it was accepted on 2 November 2009, and then repudiated that commitment on 8 August 2011.⁵⁰⁴
- b. Mozambique failed to respond to the Claimants’ repeated requests for payment during the period from 2010 until 2017 and refused to engage in good faith discussions during that time period.⁵⁰⁵
- c. More specifically, the Government failed to inform the Claimants in a timely manner that its position regarding the settlement agreement had changed after a new Minister of Public Works and a new Director General of ANE took office following the 2009 elections, instead waiting for 20 months to reply to the Claimants’ requests for payment.⁵⁰⁶

399. In addition, the Claimants insist that Mozambique claimed to base its decision not to honor the settlement agreement on a report by the private engineering firm Consultec, without giving the Claimants a meaningful opportunity to respond to Consultec’s findings.⁵⁰⁷ The grounds for non-payment invoked in the Consultec report, such as “public interest” and “unjust enrichment,” were never adequately explained and merely served as a pretext for

⁵⁰³ CM, ¶217; *PSEG Global Award* (CL-27) at ¶254.

⁵⁰⁴ CM, ¶¶219-220; C-4.

⁵⁰⁵ CM, ¶219.

⁵⁰⁶ CM, ¶220.

⁵⁰⁷ CM, ¶219.

an arbitrary decision that had no basis in genuine legal reasoning.⁵⁰⁸ The contradiction and inconsistency in Mozambique's position, the Claimants continue, became apparent in December 2017, when technical officials from ANE acknowledged the amount due and payable to ANE.⁵⁰⁹

b. Frustrating the Claimants' legitimate expectations

400. The Claimants argue that a predictable legal framework is an essential element of fair and equitable treatment, and that a predictable legal framework includes the obligation "to protect the legitimate expectations arising from specific representations made by the State to the investor."⁵¹⁰ According to the Claimants, "legitimate expectations are based on specific representations or promises made, or unilateral conditions offered explicitly by the host State such as contracts."⁵¹¹ This includes the situation where the host state assumed a specific obligation regarding the investor after the making of the initial investment.⁵¹² The Claimants assert that the Respondent frustrated their legitimate expectation that they would be paid 8.2 million euros in 2010 pursuant to the settlement agreement.⁵¹³
401. In response to the Respondent's submission that legitimate expectations must arise at the time when the investment was made or acquired, the Claimants argue that their expectations were created when the Lot 3 Contract was signed. They reason that, by entering into that agreement, the Respondent committed to respect contractual undertakings such as the Claimants' right to payment under a subsequent settlement agreement.⁵¹⁴

⁵⁰⁸ CM, ¶¶220-221.

⁵⁰⁹ CM, ¶222.

⁵¹⁰ CM, ¶¶223-225.

⁵¹¹ CM, ¶226.

⁵¹² CM, ¶228.

⁵¹³ CM, ¶232.

⁵¹⁴ CRMJ, ¶¶106-108.

c. Acting in bad faith

402. The Claimants argue that Mozambique violated the FET standard by acting in bad faith, which they contend is an inherent component of that standard.⁵¹⁵ The Claimants argue that Mozambique acted in bad faith by shifting its position with regard to the settlement agreement after the new political appointees assumed their offices at ANE and the Ministry, by waiting more than 20 months to reply to a request for payment, by revisiting the settlement agreement, and by failing to engage in meaningful discussions to resolve outstanding issues.⁵¹⁶

d. Not acting with sufficient transparency

403. The Claimants argue that Mozambique has not been sufficiently transparent, meaning that Mozambique did not maintain a legal framework that was readily apparent to the Claimants and to which they could trace any decision affecting them.⁵¹⁷ The Claimants take the position that the lengthy delays and lack of valid reasons for refusing payment amount to non-transparency in willful disregard of due process of law and in breach of the BIT.⁵¹⁸

404. In response to the Respondent's assertion that the applicable legal framework did not change, the Claimants argue that such a change is only one of the factors to be considered. The Claimants contend that the FET standard is breached when an investor is not treated in an even-handed and just manner.⁵¹⁹

e. Coercion

405. The Claimants argue that Mozambique violated the FET standard by engaging in coercion, which consisted in pressuring them into "agreeing to a predetermined result." The Claimants contend that "Mozambique's refusal to pay and to honor its commitment can

⁵¹⁵ CM, ¶236.

⁵¹⁶ CM, ¶¶241-242.

⁵¹⁷ CM, ¶¶243-244.

⁵¹⁸ CM, ¶¶246-248.

⁵¹⁹ CRMJ, ¶110.

only be explained by a desire to avoid payment or to force a renegotiation of the Lot 3 Project and the two additional disputes. This amounts, in the Claimants' submission, to coercion and a breach of Mozambique's promise of just and fair treatment.⁵²⁰

2. The Respondent's Defense

406. The Respondent denies that it failed in any way to treat the Claimants' investment justly and fairly, as required by Article 2 of the BIT.⁵²¹ It argues that the non-payment of a non-existent settlement agreement cannot be a basis for a violation of the requirement of just and fair treatment. According to the Respondent, ANE's settlement offer was not accepted by the Claimants, and the Claimants' counteroffer was not accepted by ANE.⁵²² The Respondent further contends that its decision to engage a neutral third-party consultant to review CMC's claim is evidence that it has treated the Claimants fairly.⁵²³
407. In reply to the Claimants' argument that Mozambique's conduct was arbitrary, inconsistent, and contradictory, the Respondent argues that it did not "repudiate" the settlement agreement, but rather consistently took the position that there was no settlement agreement. The Respondent communicated this position to the Claimants in its 8 August 2011 letter. It also gave a detailed explanation of why it would not make payments which were not approved by the Engineer in the 2009 Engineer's Final Decision and in the 2011 Consultec Report.⁵²⁴ The Respondent further points out that it did not wait 20 months to respond to the Claimants: its 8 August 2011 letter expressing its refusal to pay came within two weeks of the Claimants' letter of 26 July 2011, in which they first complained about non-payment.⁵²⁵

⁵²⁰ CM, ¶¶252-253.

⁵²¹ RCM, ¶143.

⁵²² RCM, ¶154.

⁵²³ RCM, ¶¶155-156.

⁵²⁴ RRM, ¶¶142-143; C-4; C-28; C-40.

⁵²⁵ RRM, ¶145; C-37.

408. The Respondent submits that, to be legitimate, the Claimants' expectations must be based on the local legal order as it was understood at the time of the investment. It insists that no sovereign action was taken to change Mozambique's legal order to the detriment of the Claimants after their purported investment, and points out that the Claimants have not established that the Respondent changed its position in any material respect.⁵²⁶ The Respondent further asserts that the Claimants have not established that Mozambique failed to provide a stable and predictable business environment at any time.⁵²⁷ In any case, the Claimants could not have had a legitimate expectation that the Respondent would abide by a non-existing agreement.⁵²⁸
409. The Respondent denies that it acted in bad faith. It contends that it has granted the Claimants every opportunity to substantiate their claim, and that it engaged an independent third party to review their claims without being required to do so. The Respondent points out that the mere fact that the Claimants were able to meet with the President, the Prime Minister, the Minister of Public Works, and the Director of ANE shows that they were given every opportunity to be heard.⁵²⁹
410. As to the alleged lack of transparency, the Respondent submits that the applicable legal framework is readily apparent and that all decisions affecting the Claimants can be traced back to that framework. The Mozambican law of contracts, and of offer and acceptance, is not ambiguous.⁵³⁰
411. As regards the Claimants' argument that they were coerced, the Respondent contends that it is the Claimants who attempted to leverage the Lot 2 Contract in an attempt to effect a

⁵²⁶ RCM, ¶¶163, 167.

⁵²⁷ RCM, ¶164.

⁵²⁸ RCM, ¶165.

⁵²⁹ RCM, ¶¶170-173.

⁵³⁰ RCM, ¶¶174-176.

settlement of their Lot 3 claim. The Respondent did not seek to amend or revise the Lot 3 Contract, under which the Respondent insists that no payment is due to the Claimants.⁵³¹

3. The Tribunal's Decision

412. The Claimants frame their claim that they were denied just and fair treatment in violation of Article 2(3) of the BIT in the alternative: Either ANE had agreed to a settlement of their claims, and it was unjust and unfair for ANE and the Government of Mozambique to refuse to honor that settlement agreement, or, it was unjust and unfair of the Respondent to refuse to agree to pay them more than the Engineer had awarded.
413. The Claimants' claim that the Respondent's refusal to honor the settlement agreement amounted to unjust and unfair treatment cannot survive the Tribunal's finding, in the preceding section of this Award, that no settlement agreement was ever concluded. That finding disposes of the following claims without the need for further analysis:
- a. The Claimants' claim that the Respondent's failure to abide by its contractual undertakings was arbitrary, inconsistent, and unreasonable, because there was no contractual obligation by which the Respondent was required to abide; and
 - b. The Claimants' claim that the Respondent's conduct frustrated their legitimate expectations that the state would respect its representations to the investor that it would be paid, because no such representations have been shown to have been made.
414. The Claimants assert, however, that the Respondent is in breach of its duty to treat their investments justly and fairly in several respects that do not depend on the existence of a settlement agreement. The Claimants contend that their claims that the Respondent acted in bad faith, with insufficient transparency, and that it subjected the Claimants to coercion, all constitute claims for breaches of Article 2(3) that do not depend on the predicate of a settlement agreement. The Tribunal therefore addresses each of those claims separately.

⁵³¹ RCM, ¶¶179-180.

a. Bad faith

415. There is no explicit requirement in the BIT that a State Party must act in good faith. Indeed, the International Court of Justice has observed that good faith, as a concept, “is not in itself a source of obligation.”⁵³² The Claimants assert that good faith is an inherent component of the FET standard, and that Mozambique effectively agreed to an FET standard by agreeing, in Article 2(3), to “ensure just and fair treatment of the investments of investors of the other Contracting Party.”⁵³³
416. The Claimants argue that the Respondent acted in bad faith: (1) by shifting its position with regard to the settlement agreement after new political appointees at ANE and the Ministry took office; (2) by waiting more than 20 months to reply to CMC’s request for payment; (3) by revisiting the settlement agreement; and (4) by failing to engage in meaningful discussions to resolve outstanding issues.⁵³⁴ The Tribunal does not find the Respondent’s conduct in any of these respects to amount to bad faith.
417. First, the Claimants have not established that the Respondent shifted its position on settlement at all, much less that it did so in bad faith. ANE extended a settlement offer to CMC on 30 October 2009, but CMC did not accept that offer. The offer expired by its terms seven days after it was made, and ANE never made another offer. It is true that a new administrator of ANE, Mr. Grachane, took over as General Director of ANE in January of 2011, and Mr. Grachane made it clear that he felt that it had been a mistake for ANE to make the settlement offer in the first place.⁵³⁵ But the offer made in 2009 had expired long before Mr. Grachane took office. It is not bad faith for two successive holders of the same office to hold different views, and that is all that the Claimants have established on this point.

⁵³² Border and Transborder Armed Actions (Nicar. v. Hond.), Judgment, 1988 I.C.J. 69, 105 (Dec. 20), quoted in B. M. Cremades, *Good Faith in International Arbitration*, A M. U. INT’L L. REV. 27:4 (2012).

⁵³³ C-1.

⁵³⁴ CM, ¶¶241-242.

⁵³⁵ See First Witness Statement of C. Grachane, ¶20.

418. The Tribunal agrees that ANE's treatment of CMC's invoices 28 and 29, which were submitted for the sums that the Claimants contend that ANE had agreed to pay (EUR 3,200,938.04 and EUR 5,578,970.34) on 13 January 2010, could have been more diligent.⁵³⁶ Those invoices provided ANE and the Government with an opportunity to clear up the misunderstanding early on, but neither took advantage of that opportunity. The fault, such as it is, does not lie entirely with the Respondent, however, because CMC made no apparent effort to follow up. There is no record before the Tribunal of any correspondence from either side on the subject for a year and a half after these invoices were submitted. Mr. Gridella's witness statement seeks to explain CMC's inaction by stating that Mr. Nunes had left ANE in March 2010, and that Mr. Gridella was then informed that no funds were available, but that "monies were more readily available at the start or end of each year,"⁵³⁷ but this is hardly persuasive evidence of either diligence on the part of the Claimants or of bad faith on the part of the Respondent. Both sides could clearly have done better, but it does not appear to the Tribunal that either side has advanced any evidence of bad faith on the part of the other.
419. The Claimants' third allegation of bad faith – that the Respondent revisited the settlement agreement – seems to depend on the existence of a settlement agreement, and would fail for that reason even if it was otherwise understandable. The fourth allegation – an alleged failure to discuss meaningful issues – may be frustrating to the party that wants to talk, but the Claimants failed entirely to explain (much less to convince the Tribunal) how such a failure could amount to bad faith.
420. The claim that the Respondent acted in bad faith is accordingly rejected.

⁵³⁶ C-36. Mr. Gridella stated that "invoicing would have been delayed to have it brought into the 2010 fiscal year." First Witness Statement of N. Gridella, ¶48.

⁵³⁷ First Witness Statement of N. Gridella, ¶50.

b. Transparency

421. The Claimants allege that Mozambique failed to maintain a legal framework that was readily apparent to the Claimants and to which they could trace decisions affecting them. The Tribunal finds this allegation unpersuasive on the facts and on the law.
422. On the facts, the Claimants have identified no instance in which Mozambique concealed who was making a decision. The documentary record shows that the Director General of ANE, Mr. Nunes, consulted with the Minister of Public Works before extending a settlement offer to CMC, that the Minister approved the offer, and that the offer was made.⁵³⁸ Nothing in that sequence shows a lack of transparency or any confusion about who was responsible for making decisions.
423. After CMC responded to ANE's offer in November 2009, there was silence from ANE and the Ministry. There is on that account some room for criticism, since one could wish in retrospect that ANE had informed CMC promptly that it considered CMC's response to the offer to be a counteroffer, and thus a rejection of the offer. But not every deficiency in communication amounts to a denial of just and fair treatment. CMC was told clearly that the offer was good for seven days, and CMC failed to accept the offer unconditionally within those seven days. ANE was under no obligation to say anything more. And, as noted above, the long period of silence during most of 2010 and half of 2011 is as much chargeable to the Claimants as it is to the Respondent.
424. The Tribunal does not exclude the possibility that a treaty provision calling for just and fair treatment of investments may provide the same protections as an FET clause, nor does it deny that the duty of fair and equitable treatment may include an obligation of transparency. But the Tribunal is not persuaded that the circumstances before it demonstrate any violation of the BIT on this account. The Tribunal accordingly rejects the Claimants' claim under Article 2(3) of the BIT based on an alleged lack of transparency.

⁵³⁸ C-12; C-2.

c. Coercion

425. The Claimants assert that the Respondent pressured them into “agreeing to a predetermined result.”⁵³⁹ The Tribunal finds no evidence in the facts before it of improper pressure being exerted by the Respondent, or of any agreement to any result, predetermined or otherwise, having been reached between the Claimants and the Respondent.
426. ANE paid in full the amounts to which the Engineer determined the Claimants to be entitled for their work on the Lot 3 Contract. On 30 October 2009, it effectively offered to pay approximately EUR 5.8 million more, but the Claimants did not accept that offer. Thereafter, ANE refused to pay more for the Lot 3 work, either on its own or in conjunction with CMC’s work on Lot 2 and other projects described by Mr. Alicandri. The Claimants have, however, failed to demonstrate how ANE’s refusals to pay amounted to coercion, or to explain what it is that they were coerced to do.
427. The Claimants point to authorities, including the decisions of the arbitral tribunals in *Tecmed* and *Saluka*, that coercion “may be considered inconsistent with the fair and equitable treatment to be given to international investments.”⁵⁴⁰ The Tribunal accepts that as a correct statement of international law, but finds no occasion to apply that law in this case. The claim of coercion is accordingly rejected.

C. Article 2(3) of the BIT: Did Mozambique Impair the Claimants’ Investments by Unjustified or Discriminatory Measures?

1. The Claimants’ Claim

428. The Claimants contend that Mozambique’s conduct with regard to the settlement offer after 30 October 2009 also breached the portion of Article 2(3) of the BIT that provides that:

Either Contracting Party shall ensure that the management, maintenance, use, transformation, enjoyment or assignment of the investments effected in its territory by investors of the other Contracting Party, as well as companies and enterprises in which

⁵³⁹ CM, ¶¶252-253.

⁵⁴⁰ *Tecmed*, Award (CL-24) at ¶163; see CM, ¶¶249-251; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (CL-22) at ¶308.

these investments have be effected, shall in no way, be subject to unjustified or discriminatory measures.⁵⁴¹

429. The Claimants argue that Mozambique breached Article 2(3) by disregarding its obligation to pay the Claimants the amount agreed without any justifiable reason. In particular, they point out that Mozambique has not alleged that the Claimants failed to fulfil any obligation to ANE or to Mozambique. The Claimants state that Mozambique's true reason for altering its position was a change in the leadership of the Ministry and ANE, and that it commissioned the Consultec report to obtain a pretext for refusing to pay the 8.2 million committed to the Claimants.⁵⁴²

430. The Claimants have not developed the argument that Mozambique's conduct was discriminatory, nor have they submitted any evidence of discrimination.

2. The Respondent's Defense

431. The Respondent replies that its conduct was not unjustified, because there was no binding settlement agreement, because ANE followed the contractual procedures established in the Lot 3 Contract, and because ANE never altered its position on what was due to the Claimants after they refused ANE's settlement offer of 30 October 2009.⁵⁴³

3. The Tribunal's Decision

432. As with many of their other claims, the Claimants' claim that their investment in Mozambique was subjected to unjustified measures is premised on ANE having entered into an agreement to settle CMC's Lot 3 claims. Since the Tribunal has found in Part V.A(3) above that no settlement agreement was concluded between ANE and CMC, the predicate for this claim falls away.

433. The Claimants' claim that they were subjected to unjustified measures is dismissed for failure to establish an underlying obligation of the State. The Claimants' claim that they

⁵⁴¹ C-1.

⁵⁴² CM, ¶¶256-261; CRMJ, ¶118.1.

⁵⁴³ RCM, ¶¶185-187.

were subjected to discriminatory measures is dismissed for failure to advance any evidence of discrimination.

D. 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?

1. The Claimants' Claim

434. Article 2(4) of the BIT provides that:

Each Contracting Party shall create and maintain, in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor.

435. The Claimants interpret Article 2(4) as a guarantee that “commitments assumed by the State must be complied [with] in good faith.”⁵⁴⁴ In effect, they read it as the equivalent of an umbrella clause, even though they also (as discussed in the next section of this Award) seek to import an umbrella clause from another treaty. They contend that: “a violation by a host State of a binding undertaking assumed with regard to a specific investor may constitute a violation of Article 2(4) of the Treaty.”⁵⁴⁵ The Claimants argue that Mozambique breached Article 2(4) of the BIT by “repudiating its obligation to pay.”⁵⁴⁶

436. In response to the Respondent’s argument that Article 2(4) comes into play only if the host state’s “commitment” operated as an inducement to an investor to make its investment in the first place, the Claimants argue that Article 2(4) of the BIT, which applies to “all undertakings,” contains no such limitation.⁵⁴⁷

⁵⁴⁴ CM, ¶¶262-265.

⁵⁴⁵ CM, ¶265.

⁵⁴⁶ CM, ¶271.

⁵⁴⁷ CRMJ, ¶123.

2. The Respondent's Defense

437. The Respondent replies that, since the settlement agreement was never agreed to, there was never an “undertaking” within the meaning of Article 2(4) of the BIT to pay the amount claimed.
438. The Respondent further argues that Article 2(4) applies only to an investor's legitimate expectations with regard to undertakings and representations made by the host state to induce investments, before a particular investment is made. Even if the purported settlement agreement had existed, the Respondent argues, it would have come into being after the Claimants' alleged investment was made, so that the alleged “undertaking” could not have been an inducement to make any investment.⁵⁴⁸

3. The Tribunal's Decision

439. The Tribunal's finding that no settlement agreement was reached between CMC and ANE is also fatal to this claim, which is premised on the existence of a binding undertaking that the State has failed to honor. In the absence of such an undertaking, the premise for this claim falls away.
440. In addition to the absence of an undertaking, the Claimant has not demonstrated any failure on the part of the Respondent to “create and maintain, in its territory a legal framework apt to guarantee to investors the continuity of legal treatment.”⁵⁴⁹ No deficiency in the legal framework available to the Claimants was identified.
441. The Claimants' claim for a breach of Article 2(4) of the BIT is accordingly dismissed.

E. Does the MFN Clause Allow Claimants to Import An Umbrella Clause From the Switzerland-Mozambique BIT?

1. The Claimants' Claim

442. Article 3 of the BIT provides:

⁵⁴⁸ RCM, ¶¶190-195.

⁵⁴⁹ Article 2(4) BIT (C-1).

1. Both Contracting Parties, within the bounds of their own territory, shall offer investments effected by, and the income accruing to, investors of the other Contracting Party no less favourable treatment than that accorded to its own nationals or investors of Third States.

2. In case, from the legislation of one of the Contracting Parties, or from the international obligations in force or that may come into force for the future for one of the Contracting Parties, should come out a legal framework according to which the investors of the other Contracting Party would be granted a more favourable treatment than the one foreseen in this Agreement, that more favourable treatment will apply also for the outstanding relationships.

443. The Claimants take the position that this MFN provision entitles them to rely on other bilateral investment treaties to which Mozambique is a party that are more favorable to them than the BIT. They invoke in particular Article 11(2) of the Switzerland-Mozambique BIT, which provides that: “[e]ach Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.”⁵⁵⁰

444. The Claimants argue that Mozambique’s failure to comply with the 2009 settlement agreement constitutes a breach of Article 3 of the BIT, in that it amounts to a failure by Mozambique to observe obligations it assumed with regard to an investment in its territory.⁵⁵¹

445. Nevertheless, the Claimants’ final request for relief in their Reply on the Merits does not include any request for any remedy for any breach of Article 3 of the BIT.⁵⁵²

2. The Respondent’s Defense

446. The Respondent replies that this argument is essentially the same as the Claimants’ argument that the Respondent must observe all undertakings assumed with regard to them.

⁵⁵⁰ CM, ¶275; CL-35.

⁵⁵¹ CM, ¶279.

⁵⁵² CM, ¶288; CRMJ, ¶321.

It contends that both arguments fail for the same reasons stated above, specifically the fact that no settlement agreement was ever reached.⁵⁵³

3. The Tribunal's Decision

447. The Claimants seek to use Article 3 of the BIT, the MFN clause, to import into the BIT the “umbrella clause” from the Switzerland-Mozambique BIT, and then to argue that the Respondent failed to observe an “obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.”⁵⁵⁴
448. There is a well-documented difference of opinion among investment treaty tribunals concerning whether and to what extent an MFN clause may properly be used to vary the terms of the investor-state arbitration provisions of a BIT. The Decision on Jurisdiction in *Garanti Koza LLP v. Turkmenistan* collected citations to the various published decisions to have considered the issue, and found them to be evenly divided on that question.⁵⁵⁵
449. This is not a question that this Tribunal is required to address, however. The underlying “obligation” that the Claimants assert that the Respondent has failed to observe is the alleged settlement agreement between ANE and CMC. Since the Tribunal has concluded in Part V.A(3) above that no settlement agreement was reached between ANE and CMC, the predicate for this claim is as absent as it is for the Claimants’ claim under Article 2(4) of the BIT. This claim is dismissed for the same reason.

F. Are the Claimants’ Claims Timely?

1. The Respondent’s Objection

450. The Respondent asserts that the requirement in Article 1 of the BIT that investments be “in conformity with the laws and regulations of the Contracting Parties” mandates that the

⁵⁵³ RCM, ¶200.

⁵⁵⁴ Agreement between the Swiss Confederation and the Republic of Mozambique on the Promotion and Reciprocal Protection of Investments, signed in Maputo on 29 November 2002, Article 11(2) (CL-35).

⁵⁵⁵ *Garanti Koza LLP v. Turkmenistan*, Decision on the Objection to Jurisdiction for Lack of Consent, ICSID Case No. ARB/11/20 (3 July 2013).

Claimants' investments must be in conformity with the laws of Mozambique, including the statutes of limitation.⁵⁵⁶

451. The Respondent argues that the Claimants' claim would have come into existence, if at all, at the end of 2010, when the Respondent purportedly failed to honor its alleged undertaking to make payment in the course of 2010. The Claimants have not pursued their contract claim in any venue and did not commence this arbitral proceeding until 2017.⁵⁵⁷
452. Ms. Muenda testified that, so far as is relevant here, Mozambican law provides for either one, two, or three-year statutes of limitation.⁵⁵⁸ She opined that the general limitation period of 20 years advocated by the Claimants does not apply in this case; that period applies only when no specific limitation period fits the case, and the three-year limitation period referred to in Article 498(1) of the Civil Code of Mozambique applies here.⁵⁵⁹ The Respondent contends that the longest limitation period that could apply to this case—three years—expired on 31 December 2013 at the latest.⁵⁶⁰
453. In response to the Claimants' assertion that the Respondent has been in continuous breach of its treaty obligations since 2011, the Respondent argues that the Claimants failed to prove that they diligently pursued their claim or that they reasonably believed that amicable settlement was possible.⁵⁶¹
454. In response to the Claimants' argument that the Respondent is estopped from raising a timeliness objection because it stated that it would accept the jurisdiction of a Cotonou Convention tribunal, the Respondent argues that the fact that ANE and the Ministry would

⁵⁵⁶ RCM, ¶120.

⁵⁵⁷ RCM, ¶121.

⁵⁵⁸ First Witness Statement of Ms. Muenda, ¶¶6-10.

⁵⁵⁹ Second Witness Statement of Ms. Muenda, ¶¶20, 21, 33.

⁵⁶⁰ RCM, ¶123.

⁵⁶¹ RRM, ¶124.

accept a different jurisdiction does not estop Mozambique from raising an objection to this Tribunal's jurisdiction.⁵⁶²

455. In addition, the Respondent argues that the Claimants have unreasonably delayed in bringing their claims.⁵⁶³ The Claimants have been on notice about the Respondent's position since August 2011.⁵⁶⁴

2. The Claimants' Response

456. The Claimants contend that the Respondent's argument regarding the timeliness of their claims must be rejected because such arguments raise issues of admissibility. Pursuant to Procedural Order No. 1, any issue of admissibility should have been raised in the Respondent's Memorial on Jurisdiction.⁵⁶⁵
457. The Claimants further take the position that the Respondent is estopped from raising this objection because it stated, during the Hearing on Bifurcation, that it would accept the jurisdiction of an arbitral tribunal constituted under the Cotonou Arbitration Rules. The Claimants contend that the objection now raised by the Respondent would have applied equally in a Cotonou Convention arbitration.⁵⁶⁶
458. The Claimants contend that the wording of the BIT does not contain a time limit for bringing claims based on international law. They argue that there is no legal basis under the applicable rules of international law for the premise that domestic statutes of limitation apply to treaty claims based on international law.⁵⁶⁷

⁵⁶² RRM, ¶122.

⁵⁶³ RCM, ¶¶132-133.

⁵⁶⁴ RRM, ¶126.

⁵⁶⁵ CRMJ, ¶73.

⁵⁶⁶ CRMJ, ¶74.

⁵⁶⁷ CRMJ, ¶75.

459. The Claimants argue that even if the domestic limitation period were to be relevant, it would not have lapsed. Mr. Timbane opined that neither the one, two, nor three-year limitation periods referred to by Ms. Muenda applies, but rather the general limitation period of 20 years provided for in Article 309 of the Civil Code of Mozambique.⁵⁶⁸ The three-year period, which the Respondent seems to argue is applicable does not apply, Mr. Timbane says, because that period only applies to non-contractual liability.⁵⁶⁹ Nor are the one or two-year periods relevant in this case.⁵⁷⁰ The settlement agreement between the Parties gave rise to contractual liability limited only by the general limitation period of 20 years.⁵⁷¹
460. The Claimants further reason that if any of the one, two, or three-year limitation periods were to apply, it has not lapsed, because the Respondent has been in continuous breach of its obligations under the BIT since its non-transparent behavior that started in 2010 and lasted until 2016.⁵⁷²
461. In response to the Respondent's argument that the Claimants unreasonably delayed in bringing their claims, the Claimants insist that any alleged delay was reasonable, because they persisted in their efforts to reach an amicable solution through 2016.⁵⁷³

3. The Tribunal's Decision

462. The Claimants' claims before this Tribunal arise under the BIT and international law. Neither provides a limitations period, so the Claimants' claims are not time barred.⁵⁷⁴

⁵⁶⁸ Legal Opinion of Mr. Timbane, ¶66.

⁵⁶⁹ Legal Opinion of Mr. Timbane, ¶¶57, 68.

⁵⁷⁰ Legal Opinion of Mr. Timbane, ¶¶69-73.

⁵⁷¹ Legal Opinion of Mr. Timbane, ¶77.

⁵⁷² CRMJ, ¶¶77-78.

⁵⁷³ CRMJ, ¶80; Witness Statement of E. Alicandri, ¶¶23-26, 30, 31, 39-45.

⁵⁷⁴ See Restatement, Third, Foreign Relations Law of the United States (Revised) (1987), reporters' note 2 & comment c to § 902 ("No general rule of international law limits the time within which a claim can be made"), citing *George W. Cook (U.S.A.) v. United Mexican States, General Claims Commission* (3 June 1927), Reports of International Arbitral Awards, Volume IV, p. 214.

Having reached that conclusion, the Tribunal need not rule on the Claimants' argument that the Respondent's statute of limitations defense was not raised in a timely manner.

463. This Tribunal has no occasion or competence to rule on what period of limitations might apply to any claims that the Claimant might seek to bring under the Lot 3 Contract.

464. The Respondent's objection to the timeliness of the Claimants' claims is dismissed.

G. Summary of the Tribunal's Decisions on the Merits

465. For the reasons explained above, the Tribunal finds that the Claimants have failed to prevail on any of their claims. It therefore finds in favor of the Respondent, and dismisses each of the Claimants' claims.

VI. DAMAGES

466. The Claimants have argued two theories of damages. Their primary theory is that they have suffered damages in the amount of EUR 8,220,888, resulting from the failure of the Respondent to honor a legally binding settlement agreement requiring it to pay them that amount, in violation of international law.⁵⁷⁵

467. In the alternative, regardless of whether a settlement agreement exists, the Claimants argue that the Respondent was unjustly enriched in the amount of EUR 8,220,888. Because the Respondent conducted itself in a manner inconsistent with the requirement of fair and equitable treatment, the Claimants are entitled to be compensated for the additional works carried out by them. The Claimants contend that the value of those additional works is equal to the unpaid invoices for a total amount of EUR 8,220,888.⁵⁷⁶

⁵⁷⁵ CRMJ, ¶310.

⁵⁷⁶ CRMJ, ¶¶312-316.

468. The Claimants further claim interest at the EURIBOR three-month rate plus a 5% risk premium for Mozambique, compounded semi-annually from January 2010 until full payment is made.⁵⁷⁷
469. The Respondent argues that the Claimants' primary damages theory must fail, because there was no valid and binding settlement agreement.⁵⁷⁸
470. The Respondent argues that the Claimants' alternative damages theory must also be rejected on the ground that it was raised too late. The Claimants first made this argument in their Reply on the Merits. The Respondent takes the position that the Claimants cannot change horses midstream by turning a purely contract-based damages claim into a claim based on work that was allegedly carried out under the underlying Lot 3 Contract.⁵⁷⁹
471. In any case, the Respondent says that the Claimants' alternative theory must be rejected, because the Claimants have not substantiated their position that they were paid EUR 8,220,888 too little for their work on the Lot 3 Project.
472. Having found no breach of any article of the BIT by the Respondent, the Tribunal necessarily finds that the Claimants are not entitled to recover any damages for breach of the BIT.
473. Any claim the Claimants may have based on the value of the work done under the Lot 3 Contract or alleging any error on the part of the Engineer would be claims to be pursued under the dispute resolution provisions of that contract. This Tribunal has no jurisdiction to consider such claims or to rule on whether or not they would now be time barred.
474. The Tribunal accordingly awards no damages to the Claimants. There is thus no occasion for the Tribunal to address the subject of interest.

⁵⁷⁷ CRMJ, ¶317.

⁵⁷⁸ RRM, ¶¶151-153.

⁵⁷⁹ RRM, ¶¶154-156.

VII. COSTS

475. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

476. ICSID Arbitration Rule 28(1) provides:

Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

477. On 29 May 2019, each party to this arbitration submitted an application for its costs in this proceeding pursuant to ICSID Arbitration Rule 28(2).

478. In Claimants' Submission on Costs, the Claimants applied for reimbursement by the Respondent of the following costs:⁵⁸⁰

Item	Amount
Counsel Fees:	€307,027 Euro
Counsel Expenses:	€8,485 Euro
ICSID fees:	\$ 250,000 USD ⁵⁸¹
Mozambican Expert Legal Advice:	€48,982 Euro

⁵⁸⁰ The Claimants made a separate application for fees and costs incurred in relation to the question of jurisdiction (pars. 16-18 of Claimants' Submission on Costs), but that appears to be a subset of the total.

⁵⁸¹ This number includes the USD 25,000 non-reimbursable filing fee. The Claimants paid a further advance of USD 75,000 which is not included in this total. Therefore, the advances paid by the Claimants to ICSID (not including the filing fee) amount to USD 299,970 USD.

Translations:	€3,813 Euro
Salaries of CMC staff who assisted in preparation of documents:	€52,000 Euro
Expenses of Claimants and counsel attending hearing and witness interviews:	€30,952 Euro
Totals:	Euro: €451,259, plus USD: \$ 250,000

479. The Respondent, in Respondent's Statement of Costs, applied for reimbursement by the Claimants of the following costs:

- (a) US \$778,252.34 in attorneys' fees;
- (b) US \$45,544.53 in costs;
- (c) US \$423,480 in expert's fees; and
- (d) US \$225,000 in ICSID and arbitrators' fees.

Total: US \$1,472,276.87

480. The Tribunal understands that both the Claimants and the Respondent believe that only the prevailing party should recover its costs, that each believes that it should be the prevailing party, and that both therefore believe that the other side should not recover any costs at all. The Respondent has also submitted an Opposition to the Claimants' Statement of Costs in which it reiterates, in some detail, its positions on the merits. The Claimants objected to the admission of the Respondent's Opposition on the grounds that it was in the nature of a post-hearing brief,⁵⁸² which the Parties agreed to forego.⁵⁸³ In defending its costs application, the Respondent made a similar objection to paragraphs 7-9 of the Claimants' application for costs.⁵⁸⁴

481. The Tribunal agrees with the Claimants that paragraphs 3 through 9 of Respondent's Opposition consists of argument as to why the Claimants should not prevail on their claims, rather than comments on the particulars of the Claimants' application for costs. The

⁵⁸² See para. 83, above.

⁵⁸³ Tr. 1 May 2019, p. 570, l. 7-9.

⁵⁸⁴ Respondent's e-mail of 12 June 2019.

Claimants engaged in advocacy to a significantly lesser extent than the Respondent, but still went beyond what was appropriate in a costs application.

482. The advocacy contained in paragraphs 3 through 9 of the Respondent's Opposition to the Claimants' Statement of Costs, and also in paragraphs 8 and 9 of the Claimants' Submission on Costs, has accordingly been disregarded.
483. The Tribunal has considered the submissions of both sides concerning costs and finds both submissions reasonable in amount. However, the Tribunal agrees with the Parties that any allocation of the costs of one party to another party should be based, at least in significant part, on which party has prevailed in the arbitration.
484. In this arbitration, the Claimants have prevailed on the many objections to the Tribunal's jurisdiction advanced by the Respondent, including at least one issue – the effect of the Cotonou Convention – that appears to be an issue of first impression in an ICSID arbitration. These jurisdictional issues required considerable effort and briefing by both sides.
485. The Respondent, on the other hand, while unsuccessful in its objections to jurisdiction, has prevailed on the merits of the Claimants' claims.
486. In these circumstances, where each party has been successful on a significant element of the case and unsuccessful on the other, the Tribunal decides that the costs of the arbitration – the fees and expenses invoiced to the Parties by ICSID – should be borne equally by the Parties, and that each party should bear its own costs and expenses of presenting its case.
487. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to 474,768.90 (in USD):

Arbitrators' fees and expenses	
John Townsend	123,793.01
J. Brian Casey	56,909.43
Peter Rees QC	89,529.29
Assistant's fees and expenses	29,733.00
ICSID's administrative fees	126,000.00
Direct expenses (estimated)	48,804.17
Total	<u>474,768.90</u>

488. The above costs have been paid out of the advances made by the Parties (the Claimants have advanced USD 299,970 and the Respondent advanced USD 225,000). Each Party's share of the costs of arbitration amounts to USD 237,384.45. Accordingly, the Respondent shall pay the Claimants USD 12,384.45 and the remaining balance will be reimbursed to the Claimants.

VIII. AWARD

489. For the reasons set forth above, the Tribunal makes the following Award:

- a. For the reasons stated in Part IV of this Award, the Tribunal concludes that it has jurisdiction to hear the claims presented by the Claimants.
- b. For the reasons stated in Part V of this Award, the Tribunal finds that the Respondent has prevailed on the merits, and accordingly dismisses each of the Claimants' claims.
- c. For the reasons stated in Part VII of this Award, the Tribunal decides that the costs of the arbitration should be borne equally by the Parties, as provided in paragraph 488, and that each party should bear its own costs and expenses of presenting its case.
- d. All other requests for relief are dismissed.

[Signed]

[Signed]

J. Brian Casey
Arbitrator

Peter Rees QC
Arbitrator

Date: [3 October 2019]

Date: [8 October 2019]

[Signed]

John M. Townsend
President of the Tribunal

Date: [1 October 2019]