

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**CMC Muratori Cementisti CMC Di Ravenna SOC. Coop.; CMC Muratori Cementisti
CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa Austral, LDA**

v.

Republic of Mozambique

(ICSID Case No. ARB/17/23)

PROCEDURAL ORDER NO. 5

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

February 15, 2019

Background

1. As provided in Section 19.1 of Procedural Order No. 1, on **February 8, 2019**, the Tribunal held a pre-hearing organizational meeting with the parties by telephone conference call. Participating in the conference call were:

Members of the Tribunal:

Mr. John M. Townsend, President of the Tribunal

Mr. Brian Casey, Arbitrator

Mr. Peter Rees QC, Arbitrator

ICSID Secretariat:

Ms. Ella Rosenberg, Secretary of the Tribunal

Tribunal Assistant

Mr. Stijn Winters

On behalf of the Claimants:

Mr. Alan Del Rio, LDR Construction Consultants

Mr. Luis González García

On behalf of the Respondent:

Mr. Juan C. Basombrio, Dorsey & Whitney LLP

Ms. Erica Haggerty, Dorsey & Whitney LLP

2. On January 16, 2019, the Tribunal had proposed a draft agenda for the organizational meeting and invited the parties to submit comments. The Respondent submitted its comments on January 31, 2019. The Claimants did not submit comments. On February 3, 2019, the Tribunal sent the parties an updated agenda.
3. Also on January 31, 2019, the Respondent raised an additional objection to the Tribunal's jurisdiction in a document entitled "Observations Regarding the European Court of Justice's *Achmea* Decision." The Respondent requested that this additional submission be accepted into the record and proposed a schedule for the parties to submit briefs on the issue. On February 3, 2019, the Tribunal invited Claimants to submit their views on the Respondent's proposed briefing schedule by February 6, 2019. On February 6, 2019, the Claimants objected to accepting the Respondent's additional jurisdictional objection into the record. Alternatively, the Claimants asked to be given adequate opportunity to respond.

4. Considering the agreements reached during the organizational meeting, and having deliberated on the outstanding issues, the Tribunal orders as follows.

Respondent's Observations Regarding *Achmea*

5. The Tribunal accepts the "Respondent's Observations Regarding the European Court of Justice's *Achmea* Decision" dated January 31, 2019 into the record. Claimants are invited to respond to these Observations by March 18, 2019. The Respondent may reply to the Claimants' response in its April 1, 2019 submission.

Hearing Dates, Location and Daily Schedule

6. The hearing will be held from Monday, April 29, 2019 through Friday, May 3, 2019. Saturday, May 4, 2019 will be considered a reserve day. At least until the further pre-hearing conference scheduled for April 11, the Tribunal will also hold Monday, May 6, 2019 in reserve.
7. As contemplated in Section 20.3 of Procedural Order No. 1, May 6, 2019 will otherwise be reserved for the Tribunal's deliberations.
8. The hearing will take place at the World Bank in Washington, D.C. The ICSID Secretariat will endeavor to book the hearing rooms in the C Building located at 1255 Connecticut Avenue, N.W. Break-out rooms for the parties and the Tribunal have been booked and will be assigned by the ICSID Secretariat in due course.
9. The daily schedule of the hearing is to be decided at the second pre-hearing organizational meeting on April 11, 2019.

Time Allocation

10. Time will generally be allocated equally between the parties. The timetable will remain under the Tribunal's control and will be subject to an appropriate degree of flexibility. The parties shall have equal time for their opening and closing statements and the Tribunal will give each party equal time with witnesses with some allowance for the imbalance in the number of witnesses.

Opening and Closing Statements

11. Each party will have two hours to make an Opening Statement. The parties should address both jurisdictional and merits issues in their respective Opening Statements.
12. Whether hearing time will be reserved for Closing Statements will be decided at the second pre-hearing organizational meeting on April 11, 2019.

Witness and Expert Examination

Notification of fact and expert witnesses

13. The Respondent anticipates that it will call all nine currently known witnesses and experts (all three of its own witnesses and all six of the Claimants' witnesses). During the organizational meeting, the Claimants objected to the Respondent calling its own witness(es) and expert(s) that Claimants do not intend to cross-examine, because Section 18.1 of Procedural Order No. 1 provides that witness statements and expert reports constitute direct testimony. The Respondent gave notice that it might reconsider calling all of Claimants' witnesses and their expert if the Tribunal were to rule that it may not call its own witnesses.
14. Section 18.1 of Procedural Order No. 1 provides that both parties have the right to call any witness or expert who has submitted a witness statement or report in accordance with Section 17.2 of Procedural Order No. 1 to testify at the hearing. The Tribunal understands that provision to include a party's own witnesses or experts even if they have not been designated for cross-examination by the adverse party.
15. The Tribunal asked the parties to confer and agree, prior to the second pre-hearing organizational meeting on April 11, 2019, on: (1) the order in which witnesses will be called at the hearing, and (2) the morning or afternoon to which each witness or expert should be assigned, with the understanding that each witness may be called up to half a day earlier or later than the time agreed. The parties should communicate this information to the Secretary no later than April 5, 2019.

Sequestration

16. Fact witnesses shall be sequestered, i.e., they shall not be permitted to attend the hearing before they are called to testify, but may attend after they have testified.
17. The expert witnesses shall not be sequestered, i.e., they shall be permitted to attend any and all parts of the hearing.
18. Other than the examination itself, there shall be no communication between counsel and their fact or expert witnesses from the commencement of such witness' examination until the conclusion of such witness' examination.

Format of Witness and Expert Examination

19. There may be up to 10 minutes of direct examination for fact witnesses and up to 30 minutes of direct examination for expert witnesses. Expert witnesses may give an affirmative presentation *in lieu* of direct examination.
20. The Tribunal may ask any witness or expert questions at any time during the examination.

Mr. Fernando Manhica

21. Claimants have taken the position that Mr. Manhica, a witness for the Respondent, should be considered an expert witness. Respondent considers Mr. Manhica to be a fact witness whose testimony contains both factual and legal elements. On review of his statement, the Tribunal finds that Mr. Manhica has offered both fact and expert testimony. He will be subject to the same sequestration rules as a fact witness, but he will be allowed 20 minutes of direct examination.

Hearing Materials

Hearing Bundles

22. The parties will provide the following at the hearing:
 - **One** hard copy of the complete consolidated record, including pleadings, witness statements, expert reports, and exhibits, to be created and submitted jointly by the parties;

- **Seven** hard copy bundles of the key documents, one for each arbitrator, one for the Tribunal Assistant, one for the Secretary of the Tribunal, one for the court reporter and one for the interpreter, to which each party expects to make repeat reference during the hearing, to be submitted separately by the parties (7 clearly labeled bundles for the Claimants, 7 clearly labeled bundles for the Respondent);
23. By April 11, 2019, each party shall provide each member of the Tribunal and the Secretary of the Tribunal with a memory stick or other electronic storage device containing a complete consolidated record, including pleadings, witness statements, expert reports, and exhibits, accessible (if possible) by a hyperlinked chronological index.
24. The parties may prepare separately bundles of selected documents for use at the hearing in the cross-examination of witnesses and experts, if they wish.

Demonstrative Exhibits

25. The relevant rules regarding demonstrative exhibits are set out in Section 16.7 of Procedural Order No. 1. “Demonstrative exhibits” refers to any type of visual aid, including PowerPoint Presentations, charts, and tabulations. Parties shall provide demonstrative exhibits to the Tribunal Members at the time they intend to use them.

Submission of New Evidence/ Exhibits During the Hearing

26. The relevant rules regarding additional documents and new evidence are set out in Sections 16.3 and 16.7 of Procedural Order No. 1.

Post-Hearing Matters

27. At the end of the hearing, the Tribunal will decide, in consultation with the parties, whether post-hearing briefs shall be submitted and, if so, their timing, scope, format, length and content.
28. Cost submissions will be made on a date to be determined by the Tribunal in consultation with the parties at the end of the hearing.

Logistics

Interpretation

29. Both parties have indicated that they will require simultaneous Portuguese-English interpretation for witnesses, experts, and party representatives. The ICSID Secretariat will arrange for these interpretation services to be provided throughout the hearing.

Records of the hearing

30. As contemplated by Section 21 of Procedural Order No. 1, an audio recording will be made of each day of the hearing, as well as a stenographic record of the proceedings in English. The ICSID Secretariat has arranged for audio recording and court reporting.
31. The Court reporter shall provide use of LiveNote (in English) throughout the hearing. The parties will separately notify the Secretariat of their requirements regarding the number of LiveNote terminals each requires.
32. The Court reporter will provide electronic copies of the transcript as soon as possible after the end of each hearing day.

Other issues

33. The parties will work with the Secretary of the Tribunal to put into place all necessary technical requirements for the hearing. The Secretary of the Tribunal will convey to the Tribunal for its decision any unresolved issues as needed.
34. Further logistical details, including setup, entry passes, room assignment, internet connections, and catering will be provided in due course.

For the Arbitral Tribunal:

[Signed]

President
Date: February 15, 2019