

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Oded Besserglik v. Republic of Mozambique
(ICSID Case No. ARB (AF)/14/2)**

PROCEDURAL ORDER NO. 7

Mr. Makhdoom Ali Khan, President of the Tribunal
Hon. L. Yves Fortier PC, CC, OQ, QC, Arbitrator
Mr. Claus von Wobeser, Arbitrator

Secretary of the Tribunal
Ms. Anna Holloway

I. PROCEDURAL HISTORY

1. On April 4 2017, the Tribunal issued Procedural Order No. 5. This determined the procedural calendar after the postponement of the hearing on jurisdiction and liability (the “Hearing”), scheduled for the week of March 6 2017. Procedural Order No. 5 provided that the postponed Hearing would take place in Washington, D.C. during the week of August 7 2017.
2. On June 19 2017, the Tribunal issued Procedural Order No. 6, which related to the admissibility of additional submissions filed by the Parties, including witness and expert statements.
3. On June 20 2017, the Respondent sent a letter and a “Motion to Dismiss and, in the alternative, *In Limine*” (the “Motion”) to the Tribunal. The Respondent’s Motion requests the immediate and summary dismissal of all the Claimant’s claims on the basis that the Mozambique-South Africa BIT never entered into force (the “new jurisdictional objection”). The Motion also requests that the proceedings be suspended until the Tribunal rules on the Respondent’s requests.
4. On June 22 2017, the Claimant’s counsel indicated that it would not be in a position to respond to the Respondent’s new jurisdictional objection until the following week, and also requested that the June 23 2017 deadline for witness notification in relation to the upcoming Hearing be suspended. By email of that same date, the Respondent indicated that it did not object to the suspension of all deadlines until the resolution of the new jurisdictional objection by the Tribunal.
5. Also on June 22 2017, the Tribunal noted the Parties’ agreement to suspend the deadline for the notification of witnesses, and invited the Claimant to file a response to the Respondent’s new jurisdictional objection by June 29 2017. The Tribunal also confirmed that the pre-hearing organizational meeting scheduled to take place on June 30 2017 by teleconference would proceed as planned. It proposed to include the new jurisdictional objection as an agenda item for that teleconference.

6. On June 23 2017, the Claimant indicated that it opposed the Respondent's new jurisdictional objection, and that it may need further time to gather the necessary information to address the objection.
7. On June 25 2017, the Parties received the draft agenda for the pre-hearing organizational meeting. The Parties were invited to identify additional agenda items or to provide any comments on the agenda by Thursday, June 29 2017. The procedure for addressing the Respondent's new jurisdictional objection was included in the agenda. The cover letter emphasized that the new jurisdictional objection was included only to discuss the *procedure* to address the Respondent's new jurisdictional objection —*not* to discuss the merits of the new jurisdictional objection.
8. On June 26 2017, the Respondent sent an email indicating that the Parties had agreed to: suspend all remaining deadlines including the August Hearing in the procedural calendar; a briefing schedule beginning with the Claimant's response to the Respondent's new jurisdictional objection due on July 7 2017 to address the new jurisdictional objection, and a second round of submissions to be completed on August 4 2017 and; reserve the Hearing dates for a hearing limited to the new jurisdictional objection, if one were to be needed. This agreement was confirmed by the Claimant in its email of the next day, though the Claimant also indicated that it may seek an extension of the deadlines for submissions on the new jurisdictional objection.
9. By letter of June 27 2017, ICSID informed the Parties of the Tribunal's decision to accept the July 7 2017 deadline for the Claimant's response to the Respondent's new jurisdictional objection. The letter also indicated the Tribunal's preliminary view that all jurisdictional objections be addressed during the Hearing, including the new jurisdictional objection, with issues concerning liability to be heard later. Moreover, the letter indicated that the Tribunal would determine the next steps, including deadlines for further written submissions, after the pre-hearing organizational meeting.

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10. On June 29 2017, the Respondent submitted a letter commenting on the draft agenda. The Respondent maintained that the Hearing should not proceed until the new jurisdictional objection has been addressed. The Respondent also suggested that a hearing on the new jurisdictional objection could be conducted by telephone conference. The Claimant did not provide any comments on the draft agenda.
11. Following the procedural calendar set forth in Procedural Order No. 5, a pre-hearing organizational meeting took place by teleconference on June 30 2017. In addition to the Members of the Tribunal, the Secretary of the Tribunal, and Ms. Anna Holloway, ICSID Legal Counsel, participating in the teleconference were:

On behalf of the Claimant:

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

On behalf of the Respondent:

Mr. Patrick Jefferys	Independent Counsel
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12. During the pre-hearing organizational meeting, each Party commented on the procedure to address the new jurisdictional objection raised by the Respondent on June 20 2017. The Parties agreed that the dates for an evidentiary hearing on jurisdiction would be determined, only if required, after the Claimant had filed its Rejoinder on August 18 2017.
13. The Parties agreed on the following procedural timetable:

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Submission / Event	Date
Claimant's Response to the Respondent's new jurisdictional objection.	Friday, July 14, 2017
Respondent's Reply on its new jurisdictional objection	Friday, August 4, 2017
Claimant's Rejoinder on Respondent's new jurisdictional objection	Friday, August 18, 2017

14. The Tribunal observed that, in spite of the Tribunal's best efforts, the matter had already been considerably delayed. It emphasized that the proposed timetable would cause further and considerable delay to the proceedings and would result in the cancellation of the Hearing scheduled from August 7-11 2017 (with one day in reserve).
15. The Tribunal pointed out that this would be the second such cancellation and that both cancellations were caused by the Parties' agreement and in spite of the Tribunal's reservations.
16. The Tribunal invited the Parties to reconsider the matter so that all jurisdictional objections could be addressed in the forthcoming Hearing. The Parties, however, did not agree. They insisted on the cancellation of the Hearing and for it to be re-scheduled after the above procedure was completed. They further agreed that such Hearing be confined to hearing what the Respondent described as the "*in limine*" objection to jurisdiction (i.e., the Respondent's new jurisdictional objection).
17. The Parties indicated that such a hearing may potentially take place remotely (by telephone or conference), unless witnesses were to be called, and agreed to revert to the Tribunal regarding (1) whether their preference was for an in-person Hearing or a Hearing by video/telephone (and if in-person, the suggested venue); and (2) suggested dates for such a Hearing (understanding that the Tribunal Members would still need to review their calendars to determine their availability). They also agreed that, in the event of an in-person Hearing to address the Respondent's new jurisdictional objection, they would confer to try

to reach agreement on the procedural matters set forth in the draft agenda circulated on June 25 2017 and to update the Tribunal regarding any agreement reached.

18. The Parties also agreed that in the event that the Respondent's new jurisdictional objection was overruled by the Tribunal, the remainder of the issues on jurisdiction and liability (excluding issues of damages) would be heard together, in one hearing.
19. The Tribunal directed the Parties that in their pleadings and in the re-scheduled hearing they should focus their attention on the jurisdiction of the Tribunal in the light of Rule 45 of the ICSID Arbitration (AF) Rules.
20. The Tribunal also noted that in view of the two cancellations an appropriate method for determining cancellation costs in future should be considered by the Parties. The Secretary of the Tribunal was requested to put forward a cancellation costs method applied by other ICSID Tribunals.
21. The Tribunal also made it clear that if either Party disagreed the Secretary was to inform the Tribunal only that no consensus had been reached. The Tribunal was not to be informed about either who disagreed or the reasons for such disagreement.
22. By letter of July 15 2017, ICSID wrote to the Parties, to request that they consider agreeing to the application of the following cancellation fee formula in the event of any future hearing cancellations or postponements:
 - i. Each Member of the Tribunal shall receive a fee equivalent to 25% of the hearing time reserved (but not used) due to postponement or cancellation of a hearing at the request of one or both Parties made less than 30 days (but more than 14 days) prior to commencement of the hearing;
 - ii. Each Member of the Tribunal shall receive a fee equivalent to 50% of the hearing time reserved (but not used) due to postponement or cancellation of a hearing at the

request of one or both Parties made 14 days or less (but more than 7 days) prior to commencement of the hearing;

- iii. Each Member of the Tribunal shall receive a fee equivalent to 100% of the hearing time reserved (but not used) due to postponement or cancellation of a hearing at the request of one or both Parties made 7 days or less prior to commencement of the hearing;
 - iv. Any such fees would be paid from the Parties' advances made to the Centre, and the Tribunal will determine the allocation of these fees and expenses in its decision on costs.
23. The Parties were requested to provide their views on the proposal to the Secretary alone by July 21 2017. On July 24 2017, the Secretary of the Tribunal informed the Tribunal that the Parties had not agreed to the cancellation formula.

II. TRIBUNAL'S ANALYSIS AND DECISION

24. In view of the agreement of the Parties the Tribunal approves two rounds of replies, as proposed by the Parties.

The Tribunal also approves the procedural timetable agreed between the Parties according to Paragraph 13 above.

The Parties are directed to focus their submissions on pertinent matters, addressing the merits and admissibility of the Respondent's new jurisdictional objection as it relates to the jurisdiction and competence of the Tribunal, in light of Article 45 of the Arbitration (AF) Rules.

25. As per Clause 3.4 of Procedural Order No. 1, the Parties are also to reimburse members of the Tribunal for any "*Non-refundable expenses incurred in connection with a hearing as a*

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result of a postponement or cancellation of the hearing...” This will be done in consultation with the Tribunal’s Secretary.

[signed]

On behalf of the Tribunal
Makhdoom Ali Khan
President of the Tribunal
Date: July 27, 2017