

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

PROCEDURAL ORDER NO. 8

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

February 12, 2018

I. INTRODUCTION

1. On January 26, 2018, a draft agenda was circulated to the Parties in advance of a telephone conference to discuss the organization of the forthcoming hearing on the Respondent's most recent jurisdictional objection (the "Hearing"), which was scheduled for January 31, 2018, at 11:30 a.m. (EST). The parties were invited to submit advance comments regarding the matters in the agenda by Tuesday January 30, 2018.
2. Due to technical issues affecting one of the party-participants, the scheduled telephone conference was unable to take place on January 31, 2018. Accordingly, the same day the Tribunal requested that the parties endeavor to reach agreement on the issues set forth in the Agenda previously circulated, and to communicate by email any items of agreement, and any open matters on which no agreement has been reached, by Friday February 2, 2018.
3. Later on January 31, 2018, the Respondent submitted a letter containing its comments to the agenda.
4. On February 2, 2018, the Claimant submitted comments on the Agenda, and on February 5, 2018, the Claimant submitted a letter responding to certain matters in the Respondent's January 31, 2018 letter.
5. Having considered the parties' comments, the Tribunal makes the following order regarding the procedural aspects of the Hearing.

II. ORGANIZATION OF THE HEARING

A. SCOPE OF HEARING

6. As established in Procedural Order No. 7, at § 16, this hearing is "confined to hearing what the Respondent describe[s] as the "*in limine*" objection to jurisdiction (i.e., the Respondent's new jurisdictional objection)."

7. As directed in Procedural Order No. 7, § 17, the Parties are reminded to “focus their attention on the jurisdiction of the Tribunal in the light of Rule 45 of the ICSID Arbitration (AF) Rules.”

B. LOCATION

8. The Hearing will take place in MC 4-800, at the World Bank (Main Complex), 1818 H St NW, Washington DC 20433, **from Thursday March 15, 2018 to Friday March 16, 2018** (with preliminary set-up to be available to the parties on Wednesday March 14, 2018, at a time to be advised by ICSID). ICSID will also provide the Parties with the details regarding individual break-out rooms.

C. ATTENDANCE

9. Each Party shall inform the Tribunal and ICSID by February 23, 2018 of the members of its delegation (including any witnesses and experts attending the hearing in person).

D. SCHEDULE

10. Each hearing day will, in principle, start at 9:00 am and will end by 17:00 pm. There will be a one hour lunch break commencing at 1:00 p.m., and two fifteen-minute breaks in each half of the day (one in the morning and one in the afternoon). This schedule is subject to a general requirement for flexibility and shall be under the control of the Tribunal.
11. The hearing shall proceed according to the following order, subject to any adjustments required in the course of the hearing:
- Tribunal Opening and Logistical Matters
 - Respondent’s opening submissions (no more than 1 hour)
 - Claimant’s opening submissions (no more than 1 hour)
 - Examination of Respondent’s fact and expert witnesses
 - Examination of Claimant’s fact and expert witnesses

- Respondent's closing submissions (no more than 1 hour)
- Claimant's closing submissions (no more than 1 hour)
- Final Tribunal matters

E. ALLOCATION OF TIME

12. Time shall, in principle, be allocated equally between the parties, subject to the control of the Tribunal.
13. The Secretary of the Tribunal will record the time used by each of the parties and advise the parties daily of the length of time used, however, flexibility within the general principle of equal allocation of time shall be observed.
14. In principle, the Tribunal will reserve its questions for witnesses or experts until after the examination of that individual by the parties has concluded. Time spent on such questions shall not be attributed to either party. Where the Tribunal considers it more efficient to ask a witness or expert a brief question during the course of examination or cross-examination, the time for such questions is imputed to the party then examining the witness or expert unless the time of a given exchange exceeds 5 minutes, in which case that time is to be excluded from the calculation of the examining party's time.

F. WITNESS AND EXPERT EXAMINATION

15. The rules set out in Procedural Order No. 1 for the examination of witnesses and experts are confirmed, subject to the provisions of this paragraph. In particular, the examination and cross-examination of witnesses and experts will proceed in accordance with Section 18 of Procedural Order No. 1, the relevant parts of which read as follows:

18.1. Witnesses and experts shall be examined before the Tribunal by the Parties under the control of the President. If a Party submits a declaration or report from a witness or expert to the Tribunal, the opposing party may request that such witness or expert appear for examination before the Tribunal. The failure of that Party to produce the witness or expert for examination may result in an order from the Tribunal excluding consideration of the declaration or report submitted

by said witness or expert. Questions may also be put to the witness or expert by any Member of the Tribunal.

16. Sequestration of witnesses is not required.
17. ICSID will provide information to the parties regarding technical arrangements for the examination of certain witnesses by video link in due course.
18. The Respondent intends to undertake direct examination (and the Claimant intends to cross-examine) the following fact witnesses/experts, in the following order, and with the following anticipated estimates of time for direct- and cross-examination:
 - a. F. Manhica (in person; Respondent indicates 15 minutes for direct examination; Claimant indicates 1.5 hours for cross-examination);
 - b. Q. van der Merwe (in person; Respondent indicates 30 minutes for direct-examination; Claimant indicates 2.5 hours for cross-examination); and
 - c. T. Muenda (in person; Respondent indicates 30 minutes for direct-examination; Claimant indicates 3 hours for cross-examination).
19. The Claimant intends to undertake direct examination (and the Respondent intends to cross-examine) the following witnesses/experts, in the following order, and with the following anticipated estimates of time for direct- and cross-examination:
 - a. Ms. De Wet (by video link; Claimant indicates 15 minutes for direct-examination, 10 mins for redirect; Respondent indicates 1 hour for cross-examination);
 - b. Ms. De Beer (by video link; Claimant indicates 15 minutes for direct-examination, 10 mins for redirect; Respondent indicates 1 hour for cross-examination);
 - c. F. Jamisse Mossugueja (by video link; Claimant indicates 15 minutes for direct-examination, 10 mins for redirect; Respondent has not yet indicated a time period for cross-examination);

- d. H. Matlaba (by video link; Claimant indicates 15 minutes for direct-examination, 10 mins for redirect; Respondent indicates 1 hour for cross-examination);
 - e. R. Marto; (by video link Claimant indicates 15 minutes for direct-examination, 10 mins for redirect; Respondent indicates 1 hour for cross-examination);
 - f. Oded Besserglik (in person Claimant indicates 20 minutes for direct-examination, 10 mins for redirect; Respondent indicates 30 minutes for cross-examination);
 - g. Dror Besserglik (in person; Claimant indicates 10 minutes for direct-examination, 10 mins for redirect; Respondent indicates 30 minutes for cross-examination);
 - h. Z. Nonxuba (in person; Claimant indicates 30 minutes for direct-examination; 10 mins for redirect; Respondent indicates 1 hour for cross-examination).
20. The Tribunal notes that there remains some uncertainty as to whether the Claimant will be able to produce Ms. de Beer and Ms. de Wet. The Claimant is required to confirm, by February 21, 2018, whether it will be able to produce these witnesses.
21. The Tribunal declines at this stage to impose any time limits on the direct- and cross-examination of witnesses and experts. However, the parties are reminded that they are subject to the principal of equal allocation of time, and that there are only 13 sitting hours scheduled in total for the hearing, in deciding how long they wish to conduct each direct-examination and cross-examination. It points out that the cumulative time indicated by the parties (set forth above) significantly exceeds the total time available, and that the parties' will need to adjust their estimates accordingly.
22. Any redirect or recross-examination of a witness or expert will count towards the time of the party undertaking that examination. Redirect shall be used exceptionally and confined to matters raised during the course of cross-examination, subject to the Tribunal's discretion.

G. DOCUMENTATION AND HEARING MATERIALS

(1) Demonstratives

23. Section 16.7 of Procedural Order No. 1, is confirmed, as modified and supplemented in this section. Section 16.7 provides:

16.7. Demonstrative exhibits (such as Power Point slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence. Each party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The party submitting such exhibits shall provide them in hard copy to the other party, the Tribunal Members, the Tribunal Secretary, the court reporter and interpreter(s) at the hearing.

24. Complete copies of all demonstratives used by the Parties shall be submitted in hardcopy at the beginning of the relevant presentation, with electronic copies to follow by email by the end of that same day. Sufficient hardcopies for the Tribunal, the Tribunal Secretary, the opposing Party, and the court reporter(s) shall be provided.

(2) Hearing Bundles

25. Each party shall submit to each Member of the Tribunal, to the Tribunal Secretary, and to the opposing party, by Wednesday February 28, 2018:
- a. A hardcopy hearing bundle, including an index, and all memorials and submissions, witness and expert statements, and fact and legal exhibits submitted by that party.
 - b. A USB drive containing an electronic version of the party's hearing bundle as described above, as well as electronic copies of all legal exhibits. Electronic files shall be consistently named with sufficient detail.
26. On the same date, the parties shall upload their respective electronic hearing bundles to the Box account established for this case. The electronic hearing bundle shall not be transmitted by email.

27. Both the hardcopy and electronic copies of the hearing bundle shall be arranged systematically and by category (i.e., all submissions shall be grouped together, in chronological order, all witness statements shall be grouped together, with all witness statements by a particular individual arranged together consecutively in chronological order, all fact exhibits shall be grouped together in consecutive order (commencing from Exhibit C-001/R-001 respectively), etc. Electronic file names shall indicate the content of the document in question and, for submissions and witness and expert statements, the date of the document. If useful, the parties may choose to utilize the file naming format set forth in **Annex A**.

28. All references to documents in the Hearing shall be to the relevant document's current designation as set forth in the indexes to the Parties' respective hearing bundles.

H. SKELETON ARGUMENTS

29. The Parties shall submit short skeleton arguments (not to exceed 15 pages, and not to add any arguments beyond those already canvassed in the submissions) by March 8, 2018.

I. AGREED CHRONOLOGY

30. The Parties shall submit an agreed chronology of the facts and events pertinent to the Respondent's "*in limine*" objection to jurisdiction (i.e., the Respondent's new jurisdictional objection) by Monday March 12, 2018.

J. POST-HEARING BRIEFS AND STATEMENTS OF COSTS/SUBMISSIONS ON COSTS

31. The format and timing of costs statements and any submissions on the allocation of costs, as well as the need for, and timing and format of, post hearing briefs shall be determined by the Tribunal on the final day of the Hearing, in consultation with the Parties.

K. PUBLIC ACCESS

32. As provided in Procedural Order No. 1, § 20.7, the hearing will be open to the public.

III. HEARING LOGISTICS

A. VENUE AND SET-UP

33. ICSID will liaise with the Parties and the Tribunal regarding the specific logistical details of the Hearing, including set-up, catering, and technology requirements.

B. COURT REPORTER ARRANGEMENTS

34. Sections 21.1, 21.3 and 21.4 of Procedural Order No. 1 are confirmed, except as modified in this section. Those provisions provide:

21.1. Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the parties and the Tribunal Members.

...

21.3. A verbatim transcript in the procedural language shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the parties or ordered by the Tribunal, the verbatim transcript shall be available in real-time using LiveNote or similar software and an electronic transcript shall be provided to the parties and the Tribunal on a same-day basis.

21.4. The parties shall agree on any corrections to the transcripts within 15 days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the court reporter in the transcripts (“revised transcripts”). The Tribunal shall decide upon any disagreement between the parties and any correction adopted by the Tribunal shall be entered by the court reporter in the revised transcripts.

35. ICSID will liaise with the Parties regarding the specifics of the provision of realtime transcripts, including with respect to the number of laptops for the realtime transcripts required by each Party, and the email distribution list for daily transcripts. There shall be realtime transcript terminals for each Member of the Tribunal and the Tribunal Secretary.

C. INTERPRETATION

36. The Parties have indicated that English-Portuguese interpretation is required for the following witnesses/experts:

37. Respondent’s witnesses (both giving evidence in person):

a. F. Manhica

b. T.Muenda

38. Claimant's witnesses (both called to give evidence via video link):

c. J. Mossugueja;

d. H. Matlaba.

D. VIDEO LINK FOR WITNESSES

39. ICSID shall liaise with the Parties regarding the use of video link for the evidence of the witnesses designated in para. 19 above (the "remote witnesses"). In anticipation of this, the Parties are directed to consider their views on logistical matters such as (i) the provision to the remote witness of documents which a party may wish to examine the witness on; (ii) the reliability of the internet connection in the remote witnesses' respective locations and whether it would be preferable to have witnesses attend a local venue for a video conference, etc. The party producing a witness will be responsible for ensuring connectivity during the examination, cross-examination and redirect of the witness. Should that prove impossible the Tribunal may give such weight to the evidence as it may consider appropriate.

[signed]

On behalf of the Tribunal
Makhdoom Ali Khan
President of the Tribunal
Date: February 12, 2018

ANNEX A
ELECTRONIC FILE NAMING GUIDELINES

Please follow these guidelines when naming electronic files. The examples provided (in *italics*) are for demonstration purposes only and should be adapted to the relevant phase of the case. For cases with a single procedural language, the “LANGUAGE” designation may be omitted, except for documents in a language other than the procedural language and the corresponding translations.

SUBMISSION TYPE	ELECTRONIC FILE NAMING GUIDELINES
MAIN PLEADINGS	Title of Pleading–LANGUAGE
	<i>Memorial on Jurisdiction-FR</i>
	<i>Counter-Memorial on the Merits and Memorial on Jurisdiction-SPA</i>
	<i>Reply on Annulment-FR</i>
	<i>Rejoinder on Quantum-ENG</i>
SUPPORTING DOCUMENTATION Exhibits	C-####–LANGUAGE R-####–LANGUAGE To be produced sequentially throughout the case.
	CLAIMANT’S FACTUAL EXHIBITS
	<i>C-0001-ENG</i>
	<i>C-0002-SPA</i>
	RESPONDENT’S FACTUAL EXHIBITS
	<i>R-0001-FR</i>
	<i>R-0002-SPA</i>
Legal Authorities	CL-####–LANGUAGE RL-####–LANGUAGE To be produced sequentially throughout the case.
	CLAIMANT’S LEGAL AUTHORITIES
	<i>CL-0001-ENG</i>
	<i>CL-0002-FR</i>
	RESPONDENT’S LEGAL AUTHORITIES
	<i>RL-0001-SPA</i>
	<i>RL-0002-ENG</i>
Witness Statements	Witness Statement-Name of Witness-Name of Submission-LANGUAGE
	<i>Witness Statement-Maria Jones-Memorial on Jurisdiction-SPA</i>
	<i>Witness Statement-Maria Jones-Reply on Jurisdiction-[Second Statement]-ENG</i>
Expert Reports	Expert Report-Name of Expert-Type-Name of Submission-LANGUAGE
	<i>Expert Report-Lucia Smith-Valuation-Memorial on Quantum-ENG</i>
	<i>Expert Report-Lucia Smith-Valuation-Reply on Quantum-[Second Report]-ENG</i>
Legal Opinions	Legal Opinion-Name of Expert-Name of Submission-LANGUAGE
	<i>Legal Opinion-Tom Kaine-Counter-Memorial on the Merits-FR</i>
	<i>Legal Opinion-Tom Kaine-Rejoinder on the Merits-[Second Opinion]-FR</i>
Exhibits to Witness Statements, Expert Reports,	WITNESS/EXPERT INITIALS-###
	<i>For exhibits filed with the Witness Statement of [Maria Jones]</i>
	<i>MJ-0001</i>

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Legal Opinions	<i>MJ-0002</i>
	<i>For exhibits filed with the Legal Opinion of [Tom Kaine]</i>
	<i>TK-0001</i>
	<i>TK-0002</i>
	<i>For exhibits filed with the Expert Report of [Lucia Smith]</i>
	<i>LS-0001</i>
	<i>LS-0002</i>
INDICES	Consolidated Hyperlinked Index
	Index of Exhibits-C-#### to C-####
	<i>Index of Exhibits-C-0001 to C-0023</i>
	Index of Legal Authorities-RLA-### to RLA-###
	<i>Index of Legal Authorities-RLA-0001 to RLA-0023</i>
OTHER APPLICATIONS	Name of Application-[Party]-LANGUAGE
	<i>Preliminary Objections under Rule 41(5)-SPA</i>
	<i>Request for Bifurcation-ENG</i>
	<i>Request for Provisional Measures-[Respondent]-SPA</i>
	<i>Request for Production of Documents-[Claimant]-SPA</i>
	<i>Request for Stay of Enforcement-FR</i>
	<i>Request for Discontinuance-[Claimant]-ENG</i>
	<i>Post-Hearing Brief-[Claimant]-SPA</i>
	<i>Costs Submissions-[Respondent]-ENG</i>
<i>Observations to Request for [XX]-[Claimant]-SPA</i>	