

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

PROCEDURAL ORDER NO. 1

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. Martina Polasek

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Introduction

The first session of the Arbitral Tribunal was held on 30 October 2015, from 7:10 a.m. to 8:25 a.m. Washington D.C. time, by telephone conference.

Participating in the conference were:

Members of the Tribunal:

Makhdoom Ali Khan	President of the Tribunal
Yves Fortier	Arbitrator
Claus von Wobeser	Arbitrator

ICSID Secretariat:

Martina Polasek	Secretary of the Tribunal
Celeste Mowatt	Legal Associate

Participating on behalf of the Claimant:

Patrick Jefferys	Independent Counsel
Rui Marto	Counsel, Marto Lafitte & Associates Inc

Participating on behalf of the Respondent:

Juan Basombrio	Counsel, Dorsey & Whitney LLP
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The Tribunal and the parties considered the following:

- The Draft Agenda circulated by the Tribunal Secretary on 10 February 2015;
- The Draft Procedural Order circulated by the Tribunal Secretary on 10 February 2015;
and
- The parties' comments on the Draft Agenda and the Draft Procedural Order received on 14 October 2015, indicating the items on which they agreed and their respective positions regarding the items on which they did not agree.

The session was adjourned at 8:25 a.m.

An audio recording of the session was made and deposited in the archives of ICSID. The recording was subsequently made available to the Members of the Tribunal and the parties.

Following the session, the Tribunal now issues the present order:

Order

Pursuant to Articles 27 and 28 of the ICSID Arbitration (Additional Facility) Rules, this first Procedural Order sets out the Procedural Rules that govern this arbitration. The timetable is attached as Annex A.

1. Applicable Arbitration Rules

Additional Facility Rules, Article 6; Arbitration (AF) Rules, Articles 1, 28(2) and 35

1.1. These proceedings are conducted in accordance with the ICSID Additional Facility Rules in force as of 10 April 2006.

2. Constitution of the Tribunal and Tribunal Members' Declarations

Arbitration (AF) Rules, Article 13

2.1. The Tribunal was constituted on 16 January 2015, in accordance with the ICSID Arbitration (Additional Facility) Rules. The parties confirmed that the Tribunal was properly constituted and that no party has any objection to the appointment of any Member of the Tribunal.

2.2. The Members of the Tribunal timely submitted their signed declarations in accordance with Article 13(2) of the ICSID Arbitration (Additional Facility) Rules. Copies of these declarations were distributed to the parties by the ICSID Secretariat on 26 January 2015.

3. Fees and Expenses of Tribunal Members

Additional Facility Rules, Article 5; Administrative and Financial Regulation 14; ICSID Schedule of Fees; Memorandum on the Fees and Expenses of ICSID Arbitrators

3.1. The fees and expenses of each Tribunal Member shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.

3.2. Under the current Schedule of Fees, each Tribunal Member receives:

3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and

3.2.2. Subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.

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- 3.3. Each Tribunal Member shall submit his claims for fees and expenses to the ICSID Secretariat on a quarterly basis.
- 3.4. Non-refundable expenses incurred in connection with a hearing as a result of a postponement or cancellation of the hearing shall be reimbursed.
4. Presence and Quorum
Arbitration (AF) Rules, Articles 22(2) and 28(1)(a)
 - 4.1. The presence of all Members of the Tribunal constitutes a quorum for its sittings, including through any appropriate means of communication, except that Tribunal Members must be present in person at all non-procedural hearings.
5. Decisions and Procedural Rulings of the Tribunal
Arbitration (AF) Rules, Article 24
 - 5.1. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal, and decisions shall be issued in writing.
 - 5.2. Article 24(2) of the ICSID Arbitration (Additional Facility) Rules applies to decisions taken by correspondence except that where the matter is urgent, the President may issue procedural decisions without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.
 - 5.3. For the avoidance of doubt, the President is authorized to issue Procedural Orders and Procedural Decisions – subject to what is decided in 5.2 – on behalf of the Tribunal.
 - 5.4. The Tribunal’s rulings on procedural matters may be communicated to the parties by the Tribunal Secretary in the form of a letter or email.
6. Delegation of Power to Fix Time Limits
Arbitration (AF) Rules, Article 33
 - 6.1. The President has the power to fix and extend time limits for the completion of the various steps in the proceeding after consultation with the parties to the extent possible.

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- 6.2. In exercising this power, the President shall consult with the other Members of the Tribunal. If the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.

7. Secretary of the Tribunal

Additional Facility Rules, Article 5; Administrative and Financial Regulation 25

- 7.1. The Tribunal Secretary is Ms. Martina Polasek, Legal Counsel, ICSID, or such other person as ICSID may notify the Tribunal and the parties from time to time.

- 7.2. To send copies of communications by email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Ms. Martina Polasek
Ms. Celeste Mowatt
ICSID
MSN J2-200
1818 H Street, N.W.
Washington, D.C. 20433
USA
Tel.: + 1 (202) 473-5467
Fax: + 1 (202) 522-2615
Email: mpolasek@worldbank.org, cmowatt@worldbank.org
Paralegal email: cferguson2@worldbank.org

- 7.3. For local messenger deliveries, the contact details are:

Ms. Martina Polasek
Ms. Celeste Mowatt
701 18th Street, N.W. (“J Building”)
2nd Floor
Washington, D.C. 20006
Tel.: + 1 (202) 473-5467

8. Representation of the Parties

Arbitration (AF) Rules, Article 26

- 8.1. Each party shall be represented by its respective counsel listed below and may designate additional agents, counsel, or advocates by notifying the Tribunal and the Tribunal Secretary promptly of such designation.

For Claimant

Mr. H.P. Jefferys SC
6 First Avenue
Umdloti Beach
Umhlanga Rocks, 4350
South Africa
Tel: + 031 5681505
Fax: +27 864021077
Email: p.jefferys@icloud.com and
jeffreys.pat@gmail.com

Mr. Rui Marto
% Marto Lafitte & Associates Inc
11 Smith Street, Bedfordview
Johannesburg, 2007
South Africa
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Fax: none
Email: rui@martolafitte.co.za

Mr. Armando David Chissaque
Armando Tivane Avenue, Number 1984
Maputo, Republic of Mozambique
Email: adchissaque@gmail.com

For Respondent

H.E. Beatriz Buchili
c/o Mr. Angelo Matusse
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Procuradoria Geral da República de
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No. 121 Av. Vladimir Lenine
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600 Anton Boulevard, Suite 2000
Costa Mesa, CA 92626
USA
Tel: +1 714 800 1405
Fax: +1 714 800 1499
Email: Basombrio.Juan@dorsey.com

9. Apportionment of Costs and Advance Payments to ICSID
Additional Facility Rules, Article 5; Administrative and Financial Regulation 14;
Arbitration (AF) Rules, Articles 28(1)(f) and 58

9.1. The parties shall defray the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.

9.2. By letter of 26 January 2015, ICSID requested that each party pay US\$150,000 to defray the initial costs of the proceeding. ICSID received the Claimant's payment on 4 September 2015, and the Respondent's payment on 25 June 2015.

- 9.3. ICSID shall request further advances as needed. Such requests shall be accompanied by an interim statement of account providing details of the direct costs of the proceeding, including the total fees and expenses of all arbitrators. At the end of the case, the financial statement will include a breakdown of each arbitrator's fees and expenses.
10. Place of Arbitration
Arbitration (AF) Rules, Articles 19 and 20
- 10.1. Washington D.C. shall be the place (legal seat) of the arbitration.
- 10.2. The Tribunal may hold hearings at any place that it considers appropriate with the agreement of the parties. As the parties have not been able to agree on the location of the hearing scheduled for March 2017, the issue of the location of that hearing will be revisited by the end of November 2016.
- 10.3. The Tribunal may deliberate at any place it considers convenient.
11. Procedural Language, Translation and Interpretation
Additional Facility Rules, Article 5; Administrative and Financial Regulations 30(3) and (4); Arbitration (AF) Rules, Articles 28(1)(b) and 30
- 11.1. English is the procedural language of the arbitration.
- 11.2. Documents filed in any other language must be accompanied by a translation into English.
- 11.3. If the document is lengthy and relevant only in part, it is sufficient if only the relevant parts are translated, provided that the Tribunal may require a fuller or a complete translation at the request of any party or on its own initiative.
- 11.4. Translations need not be certified unless there is a dispute as to the content of a translation provided and the party disputing the translation specifically requests a certified version.
- 11.5. Documents exchanged between the parties in a language other than English under §15 (Production of Documents) need not be translated.
- 11.6. The testimony of a witness called for examination during the hearing who prefers to give evidence in a language other than English shall be interpreted consecutively.

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- 11.7. The parties will notify the Tribunal as soon as possible, and no later than at the pre-hearing organizational meeting (see §19 below), which witnesses or experts require interpretation.
- 11.8. The costs of the interpreter(s) will be paid from the advance payments made by the parties, without prejudice to the decision of the Tribunal as to which party shall ultimately bear those costs.
- 11.9. The Award, as well as any decisions and procedural orders, shall be rendered in English.

12. Routing of Communications

Additional Facility Rules, Article 5; Administrative and Financial Regulation 24

- 12.1. The ICSID Secretariat shall be the channel of written communications between the parties and the Tribunal.
- 12.2. Each party's written communications shall be transmitted by email or other electronic means to the opposing party and to the Tribunal Secretary, who shall send them to the Tribunal.
- 12.3. Electronic versions of communications ordered by the Tribunal to be filed simultaneously shall be transmitted to the Tribunal Secretary only, who shall send them to the opposing party and the Tribunal.
- 12.4. The Tribunal Secretary shall not be copied on direct communications between the parties when such communications are not intended to be transmitted to the Tribunal.

13. Number of Copies and Method of Filing of Parties' Pleadings

Additional Facility Rules, Article 5; Administrative and Financial Regulation 30; Arbitration (AF) Rules, Articles 28(1)(d) and 31

- 13.1. By the relevant filing date, the parties shall submit by email to the Tribunal Secretary and the opposing party an electronic version of the pleading with witness statements, expert reports and a list of documents,¹ and upload the pleading with the supporting documentation to the file sharing platform that will be created by ICSID for purposes of this case. They shall also:

13.1.1. courier to the Tribunal Secretary by the following business day:

¹ Please note that the World Bank server does not accept emails larger than 10 MB.

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- 13.1.1.1. One unbound hard copy in A4/Letter format² of the entire submission, including signed originals of the pleading, witness statements, and expert reports, together with documents (but not including legal authorities);
- 13.1.1.2. One hard copy in A5 of the entire submission including the pleading as well as the witness statements, expert reports, and documents (but not including legal authorities); and
- 13.1.1.3. Two USB drives, or CD-ROMs or DVDs, with full copies of the entire submission, including the pleading, the witness statements, expert reports, documents, and legal authorities.
- 13.1.2. At the same time, courier to the opposing party at the addresses indicated at §8.1 above and to each Member of the Tribunal at the addresses indicated at §13.2 below:
- 13.1.2.1. One hard copy in A5 of the entire submission including the pleading, the witness statements, expert reports, and documents (but not including legal authorities); and
- 13.1.2.2. Minimum one USB drive, or CD-ROMs or DVDs, with a full copy of the entire submission, including the pleading, the witness statements, expert reports, documents, and legal authorities.

13.2. The Tribunal Members' addresses are as follows:

Mr. Makhdoom Ali Khan
Fazleghani Advocates
F-72/1, Block 8
KDA Scheme No. 5, Clifton
Karachi, 75600
Islamic Republic of Pakistan
Tel: +92 21 5879511

The Hon. L. Yves Fortier
PC, CC, OQ, QC
Cabinet Yves Fortier
1 Place Ville-Marie,
Bureau 2822,
H3B 4R4 Montréal (Québec)
Canada
Tel: +1 514 286 2012

Mr. Claus von Wobeser
Von Wobeser y Sierra S.C.
Guillermo González Camarena 1100
Piso 7, Col. Santa Fe, Centro de
Ciudad
Delegación Álvaro Obregón
México, D.F., C.P. 01210
México
Tel: + 52 (55) 5258-1011

13.3. Legal authorities shall be submitted in electronic format only, unless a hard copy is specifically requested by the Tribunal.

13.4. Electronic versions of a pleading shall be text searchable (i.e., OCR PDF or Word).

² The A4/Letter format is required for ICSID's archiving.

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- 13.5. Pleadings shall contain a table of contents and be accompanied by a list of exhibits and legal authorities.
- 13.6. The official date of receipt of a pleading or communication shall be the day on which the electronic version is sent to the Tribunal Secretary.
- 13.7. A filing shall be deemed timely if sent by a party by midnight, Washington, D.C. time, on the relevant date.
14. Number and Sequence of Pleadings
Arbitration (AF) Rules, Articles 28(1)(c), 38 and 45
- 14.1. The issues of jurisdiction and liability (Stage I) shall be bifurcated from the issue of damages (Stage II), however, the parties shall include in their initial Memorials on jurisdiction and liability their respective estimates of damages, and shall address the other party's estimate in their responsive Memorials. . The parties are not required to file supporting expert opinions and documentary evidence in respect of the estimate of the damages, and their submissions on damages may subsequently be amended if the Tribunal upholds jurisdiction and liability and proceeds to a proceeding on quantum.
- 14.2. The procedural timetable is attached hereto as Annex A.
15. Production of Documents
Arbitration (AF) Rules, Articles 40 and 41
- 15.1. A requesting Party may serve requests for production of documents on the answering Party. The answering Party shall respond in writing, stating any objections and whether the Party is producing and/or withholding documents in response to each individual request, as well as produce non-objectionable documents. If the requesting Party is not satisfied with the response and/or production, it shall first confer with the answering Party to attempt to reach a reasonable resolution of the production disputes. If the Parties are unable to reach a resolution, the requesting Party may file a motion with the Tribunal requesting it to order a further response and/or production. The answering Party will be provided an opportunity to file a response to the motion, and the requesting party will be provided an opportunity to file a reply. The Tribunal shall then rule on the motion and order any further response and/or production, if any, as the Tribunal deems appropriate. The time table for the foregoing is set forth in Annex A as to Stage I and will be determined later as to Stage II.

16. Submission of Documents

Additional Facility Rules, Article 5; Arbitration (AF) Rules, Articles 32 and 40-41; Administrative and Financial Regulation 30

16.1. The Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the parties, with the exception that the parties are not required to file evidence in respect of the estimate of damages in Stage I. Further documentary evidence relied upon by the parties may be submitted in rebuttal with the Reply and Rejoinder.

16.2. The documents shall be submitted in the manner and form set forth in §13 above.

16.3. Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, save under exceptional circumstances at the discretion of the Tribunal upon a reasoned written request followed by observations from the other party.

16.3.1. Should a party request leave to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request.

16.3.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other party is afforded sufficient opportunity to make its observations concerning such a document.

16.4. The Tribunal may call upon the parties to produce documents or other evidence in accordance with ICSID Arbitration (Additional Facility) Rule 41(2).

16.5. The documents shall be submitted in the following form:

16.5.1. Exhibits shall be numbered consecutively throughout these proceedings.

16.5.2. The number of each Exhibit containing a document produced by Claimant shall be preceded by the letter "C-" for factual exhibits and "CL-" for legal exhibits containing authorities etc. The number for each Exhibit containing a document produced by Respondent shall be preceded by the letter "R-" for factual exhibits and "RL-" for legal exhibits containing authorities etc.

16.5.3. Each Exhibit shall have a divider with the Exhibit identification number on the tab.

16.5.4. A party may produce several documents relating to the same subject matter within one Exhibit, numbering each page of such Exhibit separately and consecutively.

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- 16.5.5. Exhibits shall also be submitted in PDF format and start with the number “C-0001” and “R-0001,” respectively.
- 16.5.6. Copies of documentary evidence shall be presumed to be authentic unless specifically objected to by a party, in which case the Tribunal will determine whether authentication is necessary.
- 16.6. To avoid duplicating submissions, the parties shall file all documents only once by attaching them to their pleadings. Documents so filed need not be resubmitted with witness statements even if referred to in such statements.
- 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.
17. Witness Statements and Expert Reports
Arbitration (AF) Rules, Articles 32, 40-41 and 43
- 17.1. Witness statements and expert reports shall be filed together with the parties’ pleadings.
- 17.2. The Tribunal shall not admit any testimony that has not been filed with the written submissions, unless the Tribunal determines that exceptional circumstances exist.
- 17.3. Each witness statement and expert report shall be signed and dated by the witness.
18. Examination of Witnesses and Experts
Arbitration (AF) Rules, Articles 42-43
- 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.

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19. Pre-Hearing Organizational Meetings

Arbitration (AF) Rules, Articles 21(2) and 29

19.1. Status conferences shall be held by telephone as appropriate.

19.2. A pre-hearing organizational meeting shall be held at a date determined by the Tribunal after prior consultation with the parties by telephone among the Tribunal and the parties in order to resolve any outstanding procedural, administrative, and logistical matters in preparation for the hearings in Stages I and II.

20. Hearings

Arbitration (AF) Rules, Articles 21(2) and 39

20.1. The Parties' memorials, attached documents, witness declarations and expert reports, subject to any objection by the opposing Party and resolution of said objections by the Tribunal, shall be admitted at the hearings on Stages I and II and shall constitute each Party's respective case in chief.

20.2. The oral procedure shall consist of a hearing for examination of witnesses and experts, if any, and for oral arguments.

20.3. The hearings shall be held at a place to be determined in accordance with §10 above.

20.4. A hearing on jurisdiction and liability shall be held during the week of March 6, 2017. The date of a potential hearing on damages will be determined after a Decision on Jurisdiction and Liability.

20.5. The order of proceeding at the hearings will be determined at a later stage.

20.6. At the hearings, the Tribunal will decide on the order and dates of submission of post-hearing memorials and submissions for fees and costs, as well as any other post-hearing matters.

20.7. The hearings will be open to the public.

21. Records of Hearings and Sessions

Arbitration (AF) Rules, Article 28(1)(g)

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.

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- 21.2. The Tribunal Secretary may prepare summary minutes of hearings and sessions upon request.
- 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.
22. Immunity from Suit
- 22.1. The arbitrators shall have immunity from suit consistent with the *lex loci arbitri* and any other applicable law (including, without limitation, immunity from any judicial process and liability).
23. Publication
Additional Facility Rules, Article 5; Administrative and Financial Regulation 22; Arbitration (AF) Rules, Article 53(3)
- 23.1. The parties consent to ICSID publication of any ruling issued in the present proceeding, subject to redaction of any confidential or other information that is not appropriate for disclosure as may be agreed to between the parties, or in the case of dispute as determined by the Tribunal.

[signed]

On behalf of the Tribunal
Makhdoom Ali Khan
President of the Tribunal
Date: 15 December 2015

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ANNEX A: TIME TABLE

STAGE I: JURISDICTION AND LIABILITY

Submission / Event	Date
Claimant's Memorial	31 December 2015
Respondent's Counter-Memorial	31 March 2016
First request(s) for production of documents by either party	6 April 2016
Response to first request(s) for production of documents	27 April 2016
Motion(s) to Tribunal regarding first request(s)	10 May 2016
Answering party's response to motion	17 May 2016
Requesting party's reply to motion	24 May 2016
Tribunal's Decision on first request(s) for production of documents	1 June 2016
Production of documents ordered by the Tribunal	15 June 2016
Claimant's Reply	15 September 2016
Tribunal's Decision on the Location of the March 2017 Hearing	By 30 November 2016
Respondent's Rejoinder*	15 December 2016
Witness notification	16 January 2017
Pre-hearing organizational meeting	20 January 2017
Pre-hearing skeleton	30 January 2017

* Rejoinder on jurisdiction/jurisdiction of any possible counter-claims may be allowed upon request.

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Submission / Event	Date
Hearing	6 to 10 March 2017 with 11 March 2017 held in reserve

STAGE II: DAMAGES

The time limits relevant to the second stage shall be determined after the decision has been delivered in respect of Stage I, if the Tribunal upholds jurisdiction and liability.