

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mabco Constructions SA

v.

Republic of Kosovo

(ICSID Case No. ARB/17/25)

PROCEDURAL ORDER NO. 9

Members of the Tribunal

Professor George A. Bermann, President of the Tribunal

Mr. Gianrocco Ferraro, Arbitrator

Professor Dr. August Reinisch, Arbitrator

Secretary of the Tribunal

Jara Mínguez Almeida

June 15, 2022

I. PROCEDURAL BACKGROUND

1. On November 15, 2021, after consultation with the Parties, the Tribunal confirmed that the hearing on the merits in this case would take place between June 28 and 30, with July 1, 2022 being held in reserve (the “Hearing”). By letter of November 5, 2021, the Tribunal had advised the Parties that whether the Hearing would be held in-person would be determined at a later date.
2. On March 15, 2022, the Tribunal wrote to the Parties informing them that “as things stand it considers the Hearing on the Merits should be held in-person.” As the World Bank facilities were not available for the Hearing, ICSID had reserved a hearing room at the IDRC in London and the Parties were invited to indicate their agreement to hold the Hearing at those facilities in accordance with paragraph 10.2 of Procedural Order No. 1. Further to several exchanges between the Parties and the Tribunal, on April 27, 2022, both Parties confirmed that they had agreed that the Hearing would take place instead at the Hilton Geneva Hotel and Conference Centre, in Geneva.
3. Pursuant to paragraph 19.1 of Procedural Order No. 1, a pre-hearing conference between the Parties and the President of the Tribunal was held by videoconference on June 13, 2022, to discuss procedural, administrative, and logistical matters in preparation for the forthcoming Hearing. Participating were:

President of the Tribunal:

Professor George A. Bermann, President of the Tribunal

ICSID Secretariat:

Ms. Jara Mínguez Almeida, Secretary of the Tribunal

On behalf of the Claimant:

Ms Sandra De Vito Bieri

Ms Elisa Aliotta

Mr. Sami Salihu

Mr. Korab Toplica

Mr. Khairie Gedal

Mr. Valon Lluka

On behalf of the Respondent:

Dr. Florian Dupuy

Mr. Petrit Elshani

Ms. Fitore Gajtani

4. During the Pre-Hearing Conference, the Parties and the Tribunal discussed the draft of this Procedural Order that had been circulated to the Parties on May 9, 2022 and the Parties’ comments on it.

5. An audio recording of the pre-Hearing conference was deposited in the archives of ICSID. The recording was made available to the Members of the Tribunal and the Parties that same day.

II. ORGANIZATION OF THE HEARING

A. DATE AND VENUE

6. The Hearing will take place between June 28 and 30, 2022.
7. The Hearing will take place at the Hilton Geneva Hotel & Conference Centre, located at Route Francois-Peyrot 34, Geneva, 1218, Switzerland. A hearing room and break out rooms for each Party and the Tribunal will be made available at the venue.

B. ORDER OF PROCEEDINGS AND SCHEDULE

8. The Hearing shall commence at 9:30 (CET) and proceed until approximately 18:15 (CET) each day, subject to any adjustment required by the course of the examinations, with a one-hour lunch break and at least two 15-minute breaks.
9. The order of proceedings and structure of the Hearing will follow a basic schedule in the format incorporated as Annex A (the “Hearing Schedule”). While that schedule does not assign specific time periods for each stage of the Hearing, the sequence of stages will be as follows

Opening of the Hearing by the Tribunal

- Claimant’s opening presentation
- Respondent’s opening presentation
- Claimant’s witnesses
- Respondent’s witnesses
- Claimant’s experts
- Respondent’s experts

The Parties may agree to present closing statements of no more than 10 minutes per side. The Tribunal, upon consultation of the Parties, shall decide on whether post-hearing briefs shall be required and, if so, the due date, the length and other specifications.

10. The Hearing Schedule (**Annex A**) shall be subject to the modifications the Tribunal deems necessary or appropriate in the course of the Hearing, in particular, on account of any delay or interruption due to technical difficulties.

C. TIME ALLOCATION

11. Presumptively, the Parties shall have equal time for the combination of counsel presentation and witness and expert examination. However, this division of time shall be applied flexibly in light of the circumstances.
12. The total time available during the hearing is 21 hours of which 3 hours will be reserved for Tribunal questions and housekeeping, leaving 18 hours to be split between the Parties. Each Party will therefore have 9 hours to present its case and each Party will be free to utilize its time as it sees fit. However, the Parties shall use no more than 45 minutes for their opening presentations, thus enabling opening presentations to end by the morning coffee break.
13. Time spent on direct and re-direct examination shall be counted toward the time of the Party presenting the witness or expert. Time spent on cross-examination shall be counted toward the time of the Party conducting the cross-examination. The allocation of time in the Hearing Schedule (Annex A) is estimated. The Parties are permitted to spend less or more time on a particular item than envisaged in the Hearing Schedule, subject to the Parties' respective total time allocation and the maximum time permitted for opening statements under paragraph 12.
14. Time spent responding to Tribunal questions, other than minor questions such as requests to specify the document to which reference is made, shall not be counted toward either Party's time allocation unless the Tribunal decides otherwise. Time spent dealing with objections from a Party shall also not be counted against that Party's time, subject to the control of the Tribunal. Time spent on housekeeping matters shall not be counted toward either Party's time allocation
15. The Secretary of the Tribunal shall keep a record of each Party's use of time in accordance with the chess clock method and shall report the time used by each Party at the end of each day.

D. ATTENDANCE

16. The Parties have provided their respective List of Hearing Participants as reflected in Annex B. Each Party shall inform the Tribunal and the ICSID Secretariat **by June 20, 2022** of any additional members of their delegation that will attend the Hearing.
17. The ICSID Secretariat will communicate any COVID-19 related restrictions regarding in-person attendance at the Hearing to the Parties and Tribunal; all Hearing Participants are expected to abide by any applicable rules in this regard. The ICSID Secretariat will liaise with the Parties in this respect. The Tribunal expects that all individuals who will be attending the hearing in-person will be fully vaccinated against COVID-19 and asks that the Parties inform it and the ICSID Secretariat as soon as possible should this not be correct. All participants are urged to take self-administered Covid 19 antigen tests each morning prior to the start of the Hearing and report any positive results to the Tribunal and the ICSID Secretariat. Should any participant test positive on a day when he or she is expected to be present, the Tribunal, in consultation with counsel and the ICSID Secretariat, will determine the adaptations that shall be necessary.

E. DOCUMENTS FOR USE AT THE HEARING

18. At the set-up for the Hearing, the Parties shall provide the Tribunal, the Tribunal Secretary, the court reporter, and the interpreters a unified USB (PC and Mac compatible) which shall contain all pleadings, expert reports, exhibits, legal authorities and Tribunal's orders or decisions on file to date, with a consolidated hyperlinked index. It shall not contain any document not previously filed. It shall be organized as follows:

01. Pleadings

- A. Claimant
- B. Respondent

02. Witness Statements

- A. Claimant
- B. Respondent

03. Expert Reports (including supporting documents)

- A. Claimant
- B. Respondent

04. Exhibits

- A. Claimant
- B. Respondent

05. Legal Authorities

- A. Claimant
- B. Respondent

06. Tribunal's Rulings

07. Correspondence

1. Electronic Hearing Bundle for Cross-Examination

19. At the start of each cross-examination, the cross-examiner shall provide a cross-examination bundle (i) in electronic format to the opposing Party, each Member of the Tribunal, the Secretary, and the court reporter via the BOX folder created for this case, and (ii) in paper copy to the witness or expert, the interpreters, and each Member of the Tribunal.

2. Demonstrative Exhibits

20. The Parties may use demonstrative exhibits (such as charts, tabulations, etc. compiling information which is on record but not presented in such form), provided that they (i) identify the source in the record from which the information is derived and (ii) do not contain information not in the record, subject to the below rule on demonstrative exhibits.

21. Demonstrative exhibits shall be used in accordance with paragraph 16.7 of Procedural Order No. 1 (reproduced below), with certain adjustments indicated in paragraph 22 below:

16.7. Demonstrative exhibits (such as Power Point slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence or pleadings. 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(s) and interpreter(s) at the hearing. Demonstrative exhibits shall be delivered to the Tribunal Members, the Tribunal Secretary, the court reporter(s) interpreter(s) and the other party at least 48 hours in advance of their use at a time to be decided at the pre-hearing organizational meeting.

22. Paragraph 16.7 of Procedural Order No. 1 is amended such that:

- i. an electronic copy of each demonstrative, other than PowerPoint slides used for the opening presentation, shall be distributed by the Party intending to use it via an electronic mail sent to the entire case email distribution for each Party, the Secretary of the Tribunal, the Members of the Tribunal, to the court reporter and to the interpreters as necessary at least 48 hours prior to its use;
- ii. an electronic copy of any PowerPoint slides used for the opening presentation shall be distributed by the Party intending to use it via an electronic mail sent to the entire case email distribution for each Party, the Secretary of the Tribunal, the Members of the

Tribunal, to the court reporter and to the interpreters as necessary no later than 2 hours prior to its use; and

iii. Hard copies of demonstrative exhibits and PowerPoint slides shall be provided immediately before their use to the Members of the Tribunal and the other Party.

23. In addition, promptly after the conclusion of the Hearing day on which the corresponding PowerPoint slides or demonstrative exhibit are used, the Parties shall upload such demonstrative to the case folder in the BOX filesharing platform, designating each with the corresponding CD-__ or RD-__ number, in numerical sequence.

24. The display of PowerPoint presentations, including demonstrative exhibits, and exhibits being presented to a witness or expert during their examination shall be made by the Party presenting the document.

25. Documents that do not form part of the record may not be presented at the Hearing, unless otherwise agreed by the Parties or authorized by the Tribunal.

F. WITNESS AND EXPERT EXAMINATION

26. Paragraphs 18.8, 18.10, 18.11, 18.12 and 18.13 of Procedural Order No. 1 shall govern the examination of witnesses and experts during the Hearing.

27. Pursuant to paragraph 18.8 of Procedural Order No. 1, the direct examination is given in the form of witness statements and expert reports. However, the party presenting the witness may conduct a brief direct examination, to be limited as the Tribunal may hereafter order. Subject to the direction of the Tribunal, there shall be no limitation on the scope of the cross-examination to the contents of the witness statement or expert report. Re-direct examination shall be limited to the subject of cross-examination. Experts shall be subject to at most 10 minutes of direct examination, but may use up to 30 minutes to make a presentation of their expert report.

28. Pursuant to paragraph 18.10 of Procedural Order No. 1, The Tribunal shall have the right to organize joint examinations.

29. Pursuant to paragraph 18.11 of Procedural Order No. 1, witnesses shall not be allowed in the hearing room before giving their testimony or after their testimony. Mr. Lluca (Claimant's party representative) and Mr. Limani, may stay in the hearing room after their testimony

30. Pursuant to paragraph 18.12 of Procedural Order No. 1, unless the Tribunal otherwise orders upon request of a party, experts shall be allowed in the hearing room throughout the hearing.
31. Pursuant to paragraph 18.13 of Procedural Order No. 1, unless the Tribunal otherwise orders upon request of a party, party representatives shall be allowed in the hearing room throughout the hearing.
32. The Parties have called for examination the following witnesses and experts:
 - i. The Respondent has called the following witnesses and experts produced by the Claimant:
 - i. Mr. Behgjet Pacolli
 - ii. Mr. Remzi Ejupi
 - iii. Mr. Valon Lluka
 - iv. Mr. Taulant Hodaj
 - v. Dr. Artan Qerkini
 - ii. The Claimant has called the following witnesses and experts produced by the Respondent:
 - i. Mr. Behgjet Pacolli
 - ii. Mr. Remzi Ejupi
 - iii. Mr. Valon Lluka
 - iv. Mr. Taulant Hodaj
 - v. Dr. Artan Qerkini
33. In order to prevent any down time during the Hearing, each witness and expert shall be available for examination half a day before and after their scheduled examination time.

G. AUDIO RECORDING AND TRANSCRIPTION

34. In accordance with paragraph 21.1 of Procedural Order No. 1, an audio recording of the Hearing will be made, and the Tribunal Secretary will provide the Parties and the Tribunal with access to the audio file following the Hearing. Except for the court reporter, who will make his own audio

recording of the Hearing for the purposes of preparing the transcript, the Hearing Participants will not record the Hearing or any part of it.

35. Real time court reporting services will be provided by Ms. Anne-Marie Stallard, with same day transcript delivery to the Tribunal and the Parties via email. The verbatim transcripts will be available in real-time using LiveNote or similar software.
36. Paragraph 21.4 of Procedural Order No. 1, shall govern the process of correcting the hearing transcript:

The parties shall agree on any corrections to the transcripts within **seven** 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.

37. Testimony given in Albanian will be transcribed from the English translation and sound recorded in both Albanian and English.

H. INTERPRETATION

38. The ICSID Secretariat has arranged for interpretation between Albanian and English for the testimony of the witnesses and experts mentioned immediately below on the day of the hearing at which they are scheduled to testify,
39. The Parties confirm that the following witnesses and experts require interpretation when testifying: Mr. Remzi Ejupi; Mr. Valon Lluka; Mr. Astrit Haraqija; Mr. Haxhi Arifi
40. The interpreters, Mr. Genc Lamani and Ms. Elvana Moore, will provide the interpretation in person (using interpretation booths).
41. The Hearing Participants being interpreted should speak slowly, one person at a time, and should pause briefly when handing the floor to another Hearing Participant.

I. POST-HEARING BRIEFS AND STATEMENTS OF COST

42. In addition to determining whether post-hearing briefs shall be required and, if so, their specifications (see paragraph 9 above), the Tribunal shall, at the end of the Hearing, fix the modalities for submissions of statements of costs.

J. GENERAL PROVISIONS

i. CONFIDENTIALITY

43. All Hearing Participants providing services shall be expected to (i) keep confidential all documents and information coming to their knowledge as a result of their participation in the Hearing; (ii) not use, or authorize any other person to use, such documents and information other than for the purpose of performing their work at the Hearing; and (iii) dispose all documents if printed, and delete all electronic copies that might be stored on personal devices when their Hearing-related work has been completed. The Parties/ICSID Secretariat shall inform all Hearing Participants of these obligations.

ii. DATA PRIVACY

44. The List of Participants will contain personal data provided to ICSID in the context of the Hearing, including names and contact information such as business email addresses and telephone numbers. This data will be processed for the legitimate interests of the Parties in resolving their dispute efficiently and, in particular, to ensure that procedural documents and Hearing arrangements are properly communicated to the Hearing Participants.

E. LOGISTICAL ITEMS

45. The logistical details (e.g., confirmation of room number assignments, list of Hearing participants, set up details, details on court reporting and interpretation services, internet access, audio-visual equipment and catering orders) will be handled through correspondence directly by the ICSID Secretariat.

46. The set up for the Hearing is currently scheduled for **Monday, June 27, 2022**.

On behalf of the Tribunal,

[Signed]

George A Bermann
President of the Tribunal
Date: June 15, 2022

ANNEX A**Mabco Constructions SA****v.****Republic of Kosovo**

(ICSID Case No. ARB/17/25)

ESTIMATED HEARING SCHEDULE

Times indicated for examination are only indicative, parties can use the 9 hours of allocated time to each as they see fit

DAY 1, TUESDAY, JUNE 28, 2022

9:30 – 9:45	Housekeeping
9:45 – 10:30	Claimant’s Opening Statement (max. 45 minutes)
10:30 – 11:15	Respondent’s Opening Statement (max. 45 minutes)
11:15 – 11:30	<i>Coffee Break (15 minutes)</i>
11:30 – 13:15	Examination Mr. Lluca (<i>with interpretation</i>)
13:15 – 14:15	<i>Lunch (1 hour)</i>
14:15 – 16:00	Examination Mr. Pacolli
16:00 – 16:15	<i>Coffee Break (15 minutes)</i>
16:15 – 18:00	Examination of Mr. Ejupi (<i>with interpretation</i>)
18:00 – 18:15	Housekeeping
18:00	Hearing adjourns

DAY 2, WEDNESDAY, JUNE 29, 2022

9:30 – 9:35	Housekeeping
9:35 – 11:00	Examination of Mr. Limani
11:00 – 11:15	<i>Coffee Break (15 minutes)</i>
11:15 – 13:00	Examination of Mr. Haraqija (<i>with interpretation</i>)
13:00 – 14:00	<i>Lunch (1 hour)</i>
14:00 – 15:30	Examination of Mr. Arifi (<i>with interpretation</i>)
15:30 – 16:00	Examination of Mr. Hodaj
16:00 – 16:15	<i>Coffee Break (15 minutes)</i>
16:15 – 17:15	Examination of Mr. Hodaj
17:15 – 18:00	Examination of Prof. Qerimi

18:00 – 18:15	Housekeeping
18:15	Hearing adjourns

DAY 3, THURSDAY, JUNE 30, 2022

9:30 – 9:35	Housekeeping
9:35 – 10:35	Examination of Prof. Qerimi
10:35 – 11:00	Joint examination of Mr. Hodaj and Prof Qerimi (if applicable)
11:00 – 11:15	<i>Coffee Break (15 minutes)</i>
11:15 – 13:00	Examination of Mr. Qerkini
13:00 – 14:00	<i>Lunch (1 hour)</i>
14:00 – 15:30	Examination of Ms. Shkodra
15:30 – 16:00	Joint examination of Mr. Qerkini and Ms. Shkodra (if applicable)
16:00 – 16:15	<i>Coffee Break (15 minutes)</i>
16:15 – 18:00	Tribunal questions
18:00 – 18:15	Housekeeping
18:15	Hearing adjourns

ANNEX B**Mabco Constructions SA****v.****Republic of Kosovo**

(ICSID Case No. ARB/17/25)

LIST OF PARTICIPANTS

TRIBUNAL	
Professor George Bermann	President
Mr. Gianrocco Ferraro	Co-Arbitrator
Professor August Reinisch	Co-Arbitrator

ICSID SECRETARIAT	
Ms. Jara Mínguez Almeida	Secretary of the Tribunal

CLAIMANT	
Mr./Ms. First Name/ Last Name	Affiliation
<i>Counsel:</i>	
Ms. Sandra De Vito Bieri	Bratschi Ltd.
Ms. Elisa Aliotta	Bratschi Ltd.
Mr. Sami Salihu	Bratschi Ltd.
Mr. Khairie Gedal	Quartz Barristers
Mr. Robert C. O'Brien	Larson LLP
<i>Parties:</i>	
Mr. Valon Lluka	
Mr. Korab Toplica	
<i>Witness(es):</i>	
Mr. Valon Lluka	
Mr. Behgjet Pacolli	
Mr. Remzi Ejupi	

Expert(s):	
Mr. Taulant Hodaj	Hodaj & Partners
Mr. Artan Qerkini	Sejdiu & Qerkini G.P.

RESPONDENT	
Mr./Ms. First Name/ Last Name	Affiliation
Dr. Philipp K. Wagner	WAGNER Arbitration (Partner)
Dr. Florian Dupuy	WAGNER Arbitration (Partner)
Mr. Petrit Elshani	WAGNER Arbitration (Project Counsel)
Mr. Miguel Alberto Díaz	WAGNER Arbitration (Trainee)
Parties:	
Ms. Fitore Gajtani	Ministry of Justice of the Republic of Kosovo, State Advocate's Office
Mr. Arsim Zuka	Ministry of Justice of the Republic of Kosovo, State Advocate's Office
Ms. Ilire Aydogan	Ministry of Justice of the Republic of Kosovo, State Advocate's Office
Witness(es):	
Mr. Arben Limani	Privatization Agency of Kosovo
Mr. Haxhi Arifi	
Mr. Astrit Haraqija	
Expert(s):	
Prof. Qerim Qerimi	University of Prishtina, Faculty of Law
Ms. Vjosa Shkodra	Vjosa Shkodra & Associates Law Firm

COURT REPORTER	
Ms. Anne-Marie Stallard	
INTERPRETERS	
Ms. Elvana Moore	English/Albanian
Mr. Ragip Luta	English/Albanian