

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC

v.

Democratic Republic of Timor-Leste

(ICSID Case No. ARB/15/2)

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PROCEDURAL ORDER NO. 5  
HEARING ORGANIZATION

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***Members of the Tribunal***

Professor Gabrielle Kaufmann-Kohler, President  
Mr. Stephen Jagusch, Arbitrator  
Professor Campbell McLachlan QC, Arbitrator

***Secretary of the Tribunal***

Ms. Lindsay Gastrell

***Assistant to the Tribunal***

Mr. Rahul Donde

7 February 2017

## I. PROCEDURAL BACKGROUND

1. On 3 February 2017, in accordance with Section 20 of Procedural Order No. 1 (“PO1”), the procedural calendar as last updated on 3 December 2016 (“Procedural Calendar”) and the Tribunal’s communication of 13 December 2016, the President of the Tribunal (by delegation of her co-arbitrators) and the Parties held a pre-hearing telephone conference (PHTC or the “conference”) to discuss the preparation of the forthcoming hearing scheduled on 23 and 24 February 2017 (the “Hearing”).

2. The following persons participated in the conference:

### The Tribunal

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal

Ms. Lindsay Elizabeth Gastrell, Secretary

Mr. Rahul Donde, Assistant

### The Claimants

Dr. Gavan Griffith QC<sup>1</sup>

Professor Chester Brown

Mr. Tony Johnson, Johnson Winter & Slattery

Mr. Nicholas Briggs, Johnson Winter & Slattery

Mr. Albert Jacobs, Lighthouse Corporation Pty Limited and Lighthouse Corporation Limited, IBC (Director)

### The Respondent

Mr Jonathan Kay Hoyle, 11th Floor St James Hall Chambers

Mr Liam Prescott, DLA Piper Australia

Mr Joel Borgeaud, DLA Piper Australia

His Excellency, Ambassador Abel Guterres Ambassador Extraordinary and Plenipotentiary of Timor-Leste to Australia

3. The conference started at 09:00 (CET) (17:00 in Dili / 18:00 in Brisbane / 19:00 in Sydney).
4. The Tribunal and the Parties discussed the items set out in the draft of this procedural order circulated on 1 February 2017, and other matters raised by the Parties during the conference call.

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<sup>1</sup> On 2 and 3 February 2017, the Respondent commented on the engagement of Dr. Griffith as the Claimants’ lead counsel in the arbitration. The Respondent agreed to Dr. Griffith’s participation in the PHTC but reserved all of its rights, particularly “its right to later obtain some order adverse to Dr Griffith’s continued involvement in the case before the presently constituted Tribunal.”

5. An audio recording of the conference was made and deposited in the archives of ICSID. The recording was subsequently uploaded to the case folder in the electronic file sharing system (“BOX”) established for the case for access by the Members of the Tribunal and the Parties.
6. On this basis, the Tribunal now issues this order in final form.

## **II. DATE, VENUE AND SCHEDULE OF THE HEARING**

7. Pursuant to Sections 11 and 21 of PO1 and the Procedural Calendar, the Hearing will take place on **23 and 24 February 2017** with the morning of 25 February 2017 being held in reserve for the purposes of answering questions that the Tribunal may wish to put to counsel at the end of the preceding day.
8. The Hearing will be held in the Large Hearing Room (16<sup>th</sup> floor) of the Australian Disputes Centre, Level 16, 1 Castlereagh Street, Sydney NSW 2000 (the “Hearing Room”).
9. ICSID has reserved breakout rooms for the Parties and for the Tribunal. The room assignments will be communicated to the Parties by the ICSID Secretariat in due course.
10. The Hearing will start each day at 09:00 to finish at approximately 18:30, subject to any adjustment required by the course of the examinations, with one-hour lunch breaks and one 15 minute break during each half day.

## **III. DOCUMENTATION**

11. Each Party shall provide to the Tribunal (3 copies), the Secretary of the Tribunal (1 copy), the Assistant of the Tribunal (1 copy), the court reporters (2 copies), the interpreters (1 copy), the opposing Party (2 copies), and the relevant witness or expert (1 copy):
  - a. *Examination Bundles*: Witness and expert examination bundles to be provided at the beginning of examination by the Party cross-examining the witness or expert (see paragraph 23 below). The witness or expert bundle should contain (i) the witness or experts’ statement(s), and (ii) in principle, any documents that the witness or expert will be examined on. It is not expected that the witness bundle contains the documents to which the witness written statement or the expert’s report refers (to the extent no question is intended to be put to the witness in connection with such documents).
  - b. Each document in the Examination Bundles shall be separated with a numbered tab, and the bundle shall be accompanied with an index that cross-references to the corresponding Exhibit (C-or R-) or Legal Authority number (CL- or RL-). During the Hearing, the Parties shall refer to the documents by their corresponding Exhibit (C- or R-) or Legal Authority number (CL- or RL-).

12. Pursuant to section 17.6 of PO 1, the Parties may use demonstrative exhibits, i.e. exhibits that compile information that is in the record but present it in a different manner (such as charts, tabulations, etc.), provided that such exhibits (i) identify the source in the record from which they are derived, (ii) contain no information that is not in the record, and (iii) are filed in electronic format by **21 February 2018, 09:00 (AEST)** if they are part of the opening presentations, or by **20:00 (AEST)** on the eve of the day of their use if they are to be used in the course of the Hearing. The electronic transmission shall be done both by email and by upload to the case folder in the BOX electronic file sharing system, assigning the demonstrative exhibits a consecutive exhibit number. Hard copies shall be distributed to the persons and in the numbers specified in the preceding paragraph immediately prior to their use.
13. The Parties may use PowerPoint presentations or other visual aids for their oral statements. Hard copies of these presentations or visual aids shall be distributed to the persons and in the numbers specified in paragraph 11 immediately prior to the commencement of the oral statement. Electronic copies shall be filed later the same day, both by email and by upload to the case folder in the BOX electronic file sharing system. If the Parties' slides contain demonstrative exhibits as defined above, the relevant parts of those presentations shall be subject to the rules on content and timing set out in paragraph 12 above.
14. 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 in exceptional circumstances.

#### **IV. ORAL ARGUMENTS**

15. The first day of the Hearing will start with the Parties' opening arguments, starting with the Respondent and followed by the Claimants. Opening arguments shall not exceed one hour per Party, which will be computed against their overall time allocation.
16. The Parties may use PowerPoint presentations or other visual aids during their oral arguments, subject to the rules set out in paragraph 13 above.
17. The Parties will not make closing arguments. The Tribunal reserves the possibility of asking questions to counsel at the end of the hearing.

#### **V. EXAMINATION OF WITNESSES AND EXPERTS**

18. *Confirmation of the witnesses and experts to be examined:* The following witnesses and experts have been called for cross-examination by the Claimants:
  - Witnesses: Mr. Kay Rala Xanana Gusmao; Ambassador Abel Guterres; Mr. Liam Thomas Prescott; and,

- Experts: Mr. Nuno Miguel Dos Santos Marrazes; Mr. Darren Hopkins.
19. The following witnesses and experts have been called for cross-examination by the Respondent:
- Witnesses: Mr. Albert Jacobs; Mr. Sean Magee; and
  - Experts: Mr. Craig Macaulay; Mr. Filipe Alfaiate.
20. *Sequence of examinations:* The witnesses and experts will be examined in the following order:
- Respondent's fact witnesses: Mr. Kay Rala Xanana Gusmao; Ambassador Abel Guterres; Mr. Liam Thomas Prescott;
  - Claimants' fact witnesses: Mr. Albert Jacobs; Mr. Sean Magee;
  - Forensic experts: Mr. Darren Hopkins (Respondent's expert); Mr. Craig Macaulay (Claimants' expert);
  - Legal experts: Mr. Nuno Miguel Dos Santos Marrazes (Respondent's expert); Mr. Filipe Alfaiate (Claimants' expert; by video-link).
21. *Applicable rules:* The examination of witnesses and experts at the Hearing shall be conducted pursuant to the rules set forth in Sections 18 (Witnesses) and 19 (Experts) and 20.2 of PO1. For convenience, the rules relevant to the Hearing are reproduced here:

“18. Witnesses

*Convention Article 43(a); Arbitration Rule 24, 35 and 36*

[...]

- 18.7. It shall not be improper for counsel to meet witnesses and potential witnesses to establish the facts or to help prepare the witness statements and examinations.
- 18.8. Each Party shall be responsible for securing the appearance of its own witnesses to the hearing, except when the other Party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance.
- 18.9. The facts contained in the written statement of a witness whose cross-examination has been waived by the other Party shall not be deemed established by virtue of the fact that no cross-examination has been requested. Unless the Tribunal determines that the witness must be heard, it will assess the weight of the written statement taking into account the entire record and all the relevant circumstances.

- 18.10. Each Party shall be responsible for the practical arrangements, costs, and availability of the witnesses it offers. The Tribunal will decide upon the appropriate allocation of any related costs in the final award.
- 18.11. The Tribunal may call upon a Party to produce as a witness or invite to appear as a witness any person who may have knowledge of relevant facts and has not been offered as a witness by the Parties.
- 18.12. If appropriate, the Tribunal may in its discretion allow a witness to be examined by videoconference and will issue directions to that effect.
- 18.13. The Tribunal may consider the written statement of a witness who provides a valid reason for failing to appear when summoned to a hearing, having regard to all the surrounding circumstances, including the fact that the witness was not subject to cross-examination. The Tribunal shall not consider the witness statement of a witness who fails to appear and does not provide a valid reason. For these purposes, it shall be understood that a witness who was not called to testify in person has a valid reason not to appear and that a witness whom the Tribunal has allowed to testify by videoconference has appeared at the hearing.
- 18.14. As a rule and subject to other arrangements during the pre-hearing telephone conference, fact witnesses shall be examined prior to expert witnesses, and the Claimants' fact (expert) witnesses shall be examined prior to the Respondent's fact (expert) witnesses.
- 18.15. At the hearing, the examination of each witness shall proceed as follows:
  - 18.15.1. The witness shall make the declaration specified at Arbitration Rule 35(2).
  - 18.15.2. The Party who presents the witness may briefly examine the witness (in principle no more than 10 minutes) for purposes of asking introductory questions, including to confirm and/or correct that witness's written statement, and to address facts which have arisen after such statement was drafted ("direct examination").
  - 18.15.3. The adverse Party may then cross-examine the witness on facts which are relevant and of which the witness has direct knowledge but not limited to facts addressed in that witness's written statement ("cross-examination").
  - 18.15.4. The Party who has presented the witness may then re-examine the witness with respect to any

matters arising out of the cross-examination (“redirect examination”).

18.15.5. The Tribunal may examine the witness at any time, either before, during or after examination by one of the Parties.

18.15.6. The Tribunal may order two or more witnesses to be examined concurrently (“witness conferencing”).

18.16. Subject to a different agreement by the Parties or a different ruling by the Tribunal, a fact witness shall not be present in the hearing room during oral testimony and arguments, or read transcripts of oral testimony or argument, prior to his or her examination.

18.17. The Tribunal shall, at all times, have complete control over the procedure for hearing a witness and expert. The Tribunal may in its discretion refuse to hear a witness or expert when it appears that the facts on which he or she is to testify are already proven by other evidence or are irrelevant. It may also order that a witness or expert be recalled for further examination at any time. Any witness or expert may only be recalled by the Tribunal (of its own motion or on request) if such intention is announced in time to assure the availability of the witness and expert during the hearing.

## 19. Experts

*Convention Article 43(a); Arbitration Rules 24, 35 and 36*

[...]

19.7. The rules set forth in §[18] above shall apply by analogy to the evidence of Party- and Tribunal-appointed experts, with the following specifications:

19.7.1. Before giving oral evidence, the expert shall make the declaration specified at Arbitration Rule 35(3).

[...]

19.7.3. Subject to a different agreement by the Parties or a different ruling by the Tribunal, the limitation at §18.16 shall not apply to expert witnesses.

## 20. Organization of the Hearing

*Arbitration Rule 13*

[...]

20.2. A Party’s witness or expert who has not been called for cross-examination by the other Party or as a result of an order from the Tribunal shall not testify at the hearing,

except upon approval of Tribunal on the basis of a reasoned request from the relevant Party.”

22. *Examination of Mr. Alfaiate by videoconference:* Pursuant to paragraph 18.12 of PO 1, the Claimants requested the Tribunal to allow Mr. Alfaiate to be examined by videoconference and the Respondent agreed to this request at the PHTC. Accordingly, the Tribunal issues the following directions in respect of Mr. Alfaiate’s examination:
- a. The Claimants shall liaise with the ICSID Secretariat to organize the videoconference;
  - b. At least one day before the video-examination, the Claimants and ICSID shall run a test between the location of the video-link in Washington D.C. or Boston (the “Witness Room”) and the Hearing Room;
  - c. During the examination, technician(s) shall be available in the Witness Room and in the Hearing Room to assist in case of difficulties;
  - d. A representative of the ICSID Secretariat will attend the examination in the Witness Room and present documents to Mr. Alfaiate if he is cross-examined on documents;
  - e. One representative of the Claimants and one representative of the Respondent may also attend Mr. Alfaiate’s examination in the Witness Room, if any of the Parties wish to be present;
  - f. Mr. Alfaiate may have with him his witness statement (with exhibits), but no other documents;
  - g. The ICSID Secretariat shall ensure that the full record of the arbitration is available in the Witness Room;
  - h. The ICSID Secretariat shall advise the Tribunal of its progress in respect of these arrangements on **15 February 2017**.
23. *Witness and expert bundles:* Before the cross-examination of a witness or expert, the Party who has called the witness or expert will provide the witness or expert with a witness or expert bundle as specified in paragraph 11.a above.
24. *Sequestration:* Paragraph 18.16 of PO 1 contains the rule on sequestration of witnesses:
- “subject to a different agreement by the Parties or a different ruling by the Tribunal, a fact witness shall not be present in the hearing room during oral testimony and arguments, or read transcripts of oral testimony or argument, prior to his or her examination.”
25. At the PHTC, the Claimants waived this rule for the Respondent’s witnesses Ambassador Abel Guterres and Mr. Liam Thomas Prescott.

26. The Respondent, however, insisted that the rule should apply to the Claimants' witness Mr. Albert Jacobs. The Tribunal does not agree. Mr. Albert Jacobs is the Director of Lighthouse Corporation Pty Limited and Lighthouse Corporation Limited, IBC, i.e. the Claimants in this case. His presence may be needed in the hearing room to provide instructions to counsel.
27. It follows that the rule on sequestration will not apply to Ambassador Abel Guterres, Mr. Liam Thomas Prescott or Mr. Albert Jacobs.

## **VI. TIME ALLOCATION**

28. Each Party will have an equal time allocation of 5.5 hours for oral argument and to examine witnesses and/or experts at the Hearing. The Tribunal may grant short extensions if circumstances so require and the remaining time allows it.
29. Time spent during witness examinations will be allocated in the following manner:
  - a. Time spent on direct and re-direct examination shall be counted toward the time allocation of the Party presenting the witness or expert.
  - b. Time spent on cross-examination shall be counted toward the time allocation of the Party conducting the cross-examination.
  - c. Time spent on witness/expert conferencing (if any) shall be split evenly between the Parties.
  - d. Questions from the Tribunal (subject to witness/expert conferencing), answers to those questions, and procedural interventions by the Tribunal shall not be counted against each Party's time.
30. 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 at the end of each day.

## **VII. CLOSED HEARING**

31. Pursuant to Section 21.6 of PO1, the Hearing will be closed to the public.

## **VIII. LOGISTICAL MATTERS**

### **A. Attendees**

32. On 6 February 2017, the Parties provided a list of the persons who will attend for each side (including counsel, party representatives and witnesses/experts).

### **B. Language**

33. Pursuant to Section 12.1 of PO1, the Hearing will be conducted in English.

34. Mr. Gusmao will give evidence in Portuguese. His testimony shall be interpreted simultaneously into English.
35. The ICSID Secretariat will arrange for the necessary interpretation services.

**C. Transcripts and Sound Recordings**

36. Pursuant to Section 22 of PO1, the Hearing shall be audio recorded and transcribed verbatim in real time using LiveNote or similar software.
37. Pursuant to Section 22.2 of PO 1, electronic transcripts shall be provided to the Parties and the Tribunal on a same-day basis. Sound recordings shall be provided by **3 March 2017**.
38. Pursuant to Section 22.3 of PO1, the Parties shall attempt to agree on any corrections to the transcripts within 2 weeks of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the Parties 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 Parties in the revised transcripts.
39. The ICSID Secretariat has arranged for sound recording and for court reporting services, details of which have been communicated to the Parties.

**D. Other logistical matters**

40. The ICSID Secretariat will liaise with the Parties on other logistical aspects.

**IX. POST-HEARING PROCEEDINGS**

41. Subject to a different agreement or direction at the end of the Hearing, there will be post-hearing briefs. The Tribunal will consult with the Parties at the end of the Hearing in respect of the time limits for, and the length, format, and content of the post-hearing briefs. No additional evidence may be produced together with the post-hearing briefs, except with leave from or on the request of the Tribunal.
42. At the end of the Hearing, the Tribunal will issue directions on the Parties' statements of costs.

On behalf of the Tribunal,

[signed]

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Prof. Gabrielle Kaufmann-Kohler  
President of the Tribunal