

# International Centre for Settlement of Investment Disputes

1818 H Street, N.W., Washington, D.C. 20433, U.S.A.  
Telephone: (202) 458-1534 Faxes: (202) 522-2615 / (202) 522-2027  
Website: <http://www.worldbank.org/icsid>

**Biwater Gauff (Tanzania) Ltd.**

**v.**

**United Republic of Tanzania**

**(ICSID Case No. ARB/05/22)**

## CERTIFICATE

I hereby certify that the attached document is a true copy of the Minutes of the First Session of the Arbitral Tribunal held in Paris, France, on March 23, 2006.



Martina Polasek  
Secretary of the Tribunal

Washington, D.C., June 1, 2006.

**Biwater Gauff (Tanzania) Ltd.**

**v.**

**United Republic of Tanzania**

**(ICSID Case No. ARB/05/22)**

**Minutes of the First Session of the Arbitral Tribunal  
March 23, 2006 at 5 p.m. in Paris, France**

The first session of the Arbitral Tribunal was held on March 23, 2006 from 5 p.m. to 8.45 p.m. at the offices of the World Bank in Paris, France.

Present at the session were:

Members of the Tribunal

Mr. Bernard Hanotiau	President of the Tribunal
Mr. Gary B. Born	Arbitrator
Mr. Toby T. Landau	Arbitrator

ICSID Secretariat

Ms. Martina Polasek	Secretary of the Tribunal
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Attending on behalf of Biwater Gauff (Tanzania) Ltd. ("Claimant")

Ms. Judith Gill	Allen & Overy LLP
Mr. Matthew Gearing	Allen & Overy LLP
Ms. Autumn Ellis	Allen & Overy LLP
Mr. Trevor Taylor	Biwater Gauff (Tanzania) Ltd.

Attending on behalf of the United Republic of Tanzania ("Respondent")

Hon. Nimrod E. Mkono, MP	Mkono & Co.
Dr. Wilbert B. Kapinga	Mkono & Co.
Mr. Bart Wilms	Mkono & Co.
Mr. Julius Mallaba	Attorney General's Chambers Acting Assistant Director for Civil and International Law
Mr. D. Brian King	Freshfields, Bruckhaus Deringer
Mr. Jonathan. J. Gass	Freshfields, Bruckhaus Deringer

The session considered the matters listed on the Agenda, circulated by the Secretary of the Tribunal ("Secretary") on February 28, 2006 and attached to these Minutes as Annex 1, as well as the parties' joint and separate proposals of March 22, 2006 and March 23, 2006 regarding these matters, attached to these Minutes as Annex 2.

## I. Procedural Matters

### Opening of the Session

The President of the Tribunal (the President) opened the session and welcomed the participants. The President then introduced the co-arbitrators and asked the parties to introduce their respective teams.

The President proposed to go over the Agenda circulated to the parties by the Secretary and the parties' joint and separate proposals, focusing on the items where an agreement had not been reached. He asked the parties whether they had any other additional observations or items to be discussed. The Respondent wished to make a notification that it is seeking information regarding the Claimant's financial capacity in connection with a potential application for security for costs. The Respondent also made certain introductory remarks, to which the Claimant responded. These remarks included observations as to the validity of the Amended Request for Arbitration, and its registration by the Secretary-General under Article 36 of the ICSID Convention. It was agreed that these points could not be taken further for the time being, and that it was for the Respondent, if it considered it appropriate, to pursue them in subsequent submissions.

### 1. Constitution of the Tribunal and the Tribunal Members' Declarations

#### *Arbitration Rule 6*

The President noted that the parties had no comment on or objection to the proper constitution of the Tribunal or to any of its Members. Further copies of the declarations required under Rule 6(2) of the ICSID Arbitration Rules were distributed at the first session.

### 2. Representation of the Parties

#### *Arbitration Rule 18*

It was noted that the Claimant is represented by and all notifications and communications addressed to the Claimant in connection with the proceedings are to be sent to:

Allen & Overy  
One New Change  
London EC4M 9QQ  
United Kingdom  
+44 207 330 3000 (tel)  
+44 207 330 9999 (fax)

Judith Gill  
+44 207 330 3779  
judith.gill@allenoverly.com

Matthew Gearing  
+44 207 330 3745  
matthew.gearing@allenoverly.com

Autumn Ellis  
+44 207 330 3718  
autumn.ellis@allenoverly.com

Michelle de Kluyver  
+44 (0) 20 7330 3884  
michelle.dekluyver@allenoverly.com

It was further noted that the Respondent is represented by, and that all notifications and communications addressed to the Respondent in connection with the proceeding are to be sent to:

Mkono & Co  
9<sup>th</sup> Floor PPF Tower  
P.O. Box 4369  
Dar es Salaam  
Tanzania  
+255 (22) 211 8789 (tel)  
+255 (22) 211 3247 (fax)

Hon. Nimrod E. Mkono, MP  
nimrod.mkono@mkono.com

Dr. Wilbert B. Kapinga  
wilbert.kapinga@mkono.com

Bart Wilms  
bart.wilms@mkono.com

Attorney General's Chambers  
Kivukoni Front  
P.O. Box 9050  
Dar es Salaam  
Tanzania  
+255 (22) 212 9737 (tel)  
+255 (22) 211 3236 (fax)

Julius B. Mallaba  
jmallaba@hotmail.com

Freshfields Bruckhaus Deringer  
Apollolaan 151  
1077 AR Amsterdam  
Netherlands  
+31 20 485 7000 (tel)  
+31 20 485 7001 (fax)

D. Brian King  
+31 20 485 7625 (tel)  
+31 20 572 7625 (fax)  
brian.king@freshfields.com

J. J. Gass  
+31 20 485 7638 (tel)  
+31 20 572 7638 (fax)  
jonathan.gass@freshfields.com

Jan Paulsson  
+33 1 44 56 44 80 (tel)  
+33 1 44 56 44 00 (fax)  
jan.paulsson@freshfields.com

It was noted that counsel for the Claimant had provided by letter of September 1, 2005 a letter from the Claimant authorizing the request and confirming its counsel's engagement to act on its behalf. Counsel for the Respondent had provided on February 23, 2006 an authorization from the Respondent to act on its behalf.

3. Apportionment of Costs and Advance Payments to the Centre

*Convention Article 61; Administrative and Financial Regulation 14; Arbitration Rule 28*



It was noted that Administrative and Financial Regulation 14(3)(d) requires each Party to pay one-half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of the arbitration proceedings to be made by the Tribunal pursuant to Article 61(2) of the Convention. It was agreed that the Tribunal's assessment of the various costs set forth in Convention Article 61(2), and its decision pursuant to that Article as to how and by whom those costs should be paid, may be set forth at the Tribunal's discretion in an Award or Decision subsequent to a Decision resolving some or all of the Parties' claims or elements thereof (e.g., liability). It was further agreed that the Parties will present, as directed by the Tribunal, their positions as to how and by whom costs should be paid.

The President recalled that the Centre had requested each party to pay an amount of US\$60,000 to defray the costs of the proceeding during its first three to six months and confirmed that the Centre had received the Claimant's payment of US\$59,970 on March 8, 2006. Subsequently, the Centre received the Respondent's payment of US\$59,975 on March 28, 2006.

4. Fees and Expenses of Tribunal Members

*Convention Article 60; Administrative and Financial Regulation 14*

It was noted that, in addition to receiving reimbursement for any direct expenses reasonably incurred, each member of the Tribunal would receive:

- a fee of US\$3,000, or such other fee as may be set forth from time to time in the Centre's Schedule of Fees, for each day of meetings or other work performed in connection with the proceeding or pro rata; and
- subsistence allowances and reimbursement of travel (in business class) and other expenses within the limits set forth in Regulation 14 of the ICSID Administrative and Financial Regulations and the Memorandum on the Fees and Expenses of ICSID Arbitrators.

5. Applicable Arbitration Rules

*Convention Article 44*

It was agreed that the proceedings would be conducted in accordance with the ICSID Arbitration Rules in force since January 1, 2003 up until the date of entry into force of the amended ICSID Arbitration Rules on April 10, 2006, which replace the old Rules on a prospective basis.

6. Place of Proceedings

*Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)*

It was agreed that the place of proceedings would be at the Permanent Court of Arbitration in The Hague, the Netherlands.

7. Procedural Language

*Arbitration Rules 20(1)(b) and 22*

It was agreed that, in accordance with Rule 22 of the ICSID Arbitration Rules, the language of the proceeding would be English.

In accordance with Administrative and Financial Regulation 30(3), any document which is not in English shall be accompanied by a translation into English. If the document is lengthy and relevant only in part, it is sufficient if only the relevant parts, which must be precisely specified, are translated. The parties also agreed that any translations submitted need not be certified as set forth in Regulation 30(3) of the ICSID Administrative and Financial Regulations, unless the translation concerned proves controversial.

8. Records of Hearings

*Arbitration Rule 20(1)(g)*

It was agreed that verbatim transcripts will be made of each day's proceedings during any hearing (not including the First Session or any pre-hearing procedural conferences unless otherwise directed by the Tribunal). It is further agreed that:

- (a) Transcripts shall be prepared by a professional service selected by ICSID or by agreement of the Parties.
- (b) Provisional transcripts shall be provided to the Parties and the Tribunal in electronic form on the same day as the proceedings they record.
- (c) There will be an opportunity to suggest corrections to the transcripts as first presented, with the Tribunal to consider (in the event of disagreement between the Parties) whether or not such corrections are to be adopted.
- (d) Final edited and corrected transcripts of each day's proceedings during any hearing will follow in due course.

It was further agreed that complete sound recordings shall be made of all sessions, conferences, and hearings (including this First Session), and that the sound recordings shall be provided to the Parties.

It was also agreed that the Secretary would prepare summary minutes of this first session and any other procedural sessions.

9. Means of Communication and Copies of Instruments

*Arbitration Rules 20(1)(d) and 23; Administrative and Financial Regulations 24 and 30*

It was agreed that:



- (a) Administrative and Financial Regulation 24 (communications through the Secretary-General of ICSID) shall apply generally. It is further agreed that in urgent situations the Parties shall send procedural communications as usual to the Secretary but may also send copies directly to the Tribunal and the other Party.
- (b) Together with the original of any written submission (with the exception of routine, administrative, or procedural correspondence), each Party shall submit to the Secretary by courier six copies. The Secretary should deliver any copy intended for the Claimant to its counsel in London and any copy intended for the Respondent to its counsel in Dar es Salaam and Amsterdam.
- (c) Routine, administrative, or procedural correspondence shall be transmitted to the Secretary by fax or email only and copied to the other Party.
- (d) A written submission will be considered to have been submitted in timely fashion if the submission is transmitted in electronic form (see (f) below) and sent in hard copy on or before the applicable deadline.
- (e) Simultaneously with the written submissions, each Party shall transmit via e-mail directly to the other Party and to the Secretary at the email address [mpolasek@worldbank.org](mailto:mpolasek@worldbank.org) an electronic version (which may be in pdf format) of:
- (i) the submission itself (not including exhibits); and
  - (ii) any witness statements and expert reports accompanying the submission.
- (f) For purposes of paragraph (d), electronic versions shall be sent to the following e-mail addresses:
- (i) To counsel for the Claimant at: [judith.gill@allenoverly.com](mailto:judith.gill@allenoverly.com), [matthew.gearing@allenoverly.com](mailto:matthew.gearing@allenoverly.com), [autumn.ellis@allenoverly.com](mailto:autumn.ellis@allenoverly.com) and [michelle.dekluyver@allenoverly.com](mailto:michelle.dekluyver@allenoverly.com).
  - (ii) To counsel for the Respondent at: [jmallaba@hotmail.com](mailto:jmallaba@hotmail.com), [nimrod.mkono@mkono.com](mailto:nimrod.mkono@mkono.com), [wilbert.kapinga@mkono.com](mailto:wilbert.kapinga@mkono.com), [bart.wilms@mkono.com](mailto:bart.wilms@mkono.com), [brian.king@freshfields.com](mailto:brian.king@freshfields.com), and [jonathan.gass@freshfields.com](mailto:jonathan.gass@freshfields.com).

The new delivery instructions for the Centre are attached to these Minutes as Annex 3.

10. Presence and Quorum

*Arbitration Rules 14(2) and 20(1)(a)*

It was agreed that the presence of all Members of the Tribunal shall be required at its sittings.

11. Decisions of the Tribunal by Correspondence or by any Other Appropriate Means of

Communication*Arbitration Rule 16(2)*

It was agreed that:

- (a) The Tribunal shall take its decisions by a majority of votes and that its decisions shall be issued in writing.
- (b) The Tribunal may take decisions by correspondence among its Members, or by any other appropriate means, provided that all Members are consulted.
- (c) Decisions so taken shall be certified by the President.

12. Delegation of Power to Fix Time Limits*Arbitration Rule 26(1)*

It was agreed that, pursuant to ICSID Arbitration Rule 26(1), the Tribunal may delegate its power to fix time limits to the President.

13. Written and Oral Procedures*Arbitration Rules 20(1)(e) and 29*

In accordance with Arbitration Rule 29, it was agreed that the proceeding would consist of a written and oral procedure.

14. Number and Sequence of Pleadings, Time Limits*Arbitration Rules 20(1)(c) and 31*

Following deliberations regarding the parties' separate proposals and arguments in respect of the number and sequence of pleadings and time limits for their submission, the President consulted with the parties regarding the procedural time table. It was thus agreed that:

1. A first round joint submission requesting production of documents (see item 17) is to be submitted by April 28, 2006;
2. The Claimant shall file its memorial on the merits by July 7, 2006;
3. The Respondent shall file its counter-memorial by October 27, 2006;
4. A second round joint submission requesting production of documents (see item 17) is to be submitted by November 17, 2006;
5. The Claimant shall file its reply by January 19, 2007;
6. The Respondent shall file its rejoinder by March 19, 2007;



7. Each Party shall submit a list of all witnesses and experts whom it wishes to cross-examine by March 30, 2007;
8. A pre-hearing conference is to be held on a date to be fixed by the Tribunal in due course; and
9. An oral hearing will be held in The Hague from April 16 to April 20, 2007, and, if necessary, on April 21 and 22, 2007.

In view of the Tribunal's Procedural Order No. 1 of March 31, 2006, the parties noted that they may require an extension of time for the filing of the submission under point 1 of this item.

15. Pre-Hearing Conference

*Arbitration Rule 21*

It was agreed that:

- (a) In accordance with Article 21 of the Arbitration Rules, pre-hearing conferences may be arranged between the Tribunal and the Parties.
- (b) At the discretion of the Tribunal, pre-hearing conferences may be conducted by telephone or video conference.
- (c) There should be a pre-hearing conference, on a date to be fixed by the Tribunal after submission of the final memorial before a hearing, to discuss any outstanding procedural or logistical aspects of the hearing.
- (d) At the conference referred to in paragraph (c), the Parties and the Tribunal will discuss, among other subjects, whether it would be preferable to have written post-hearing submissions in lieu of (or in addition to) oral closing arguments and whether such submissions should exclusively or specifically address particular issues.

16. Witnesses and Experts; Written Statements and Reports

*Convention Article 43; Administrative and Financial Regulation 30; Arbitration Rules 24 and 33-37*

It was agreed that:

- (a) Without prejudice to the power of the Tribunal to request the Parties to produce further evidence at any stage of the proceeding, signed witness statements and expert reports submitted together with the memorials which they support shall in principle constitute the evidence-in-chief of each factual or expert witness.
- (b) The Tribunal may, due to extraordinary circumstances, allow a Party to submit evidence other than simultaneously with the Party's pleadings.

- (c) Each Party shall, on a date to be fixed by the Tribunal, submit a list of all witnesses and experts whom it wishes to cross-examine from among those witnesses and experts whose statements or reports have been submitted by the other Party. A witness need not testify at the hearing unless called by the other Party or by the Tribunal, except if authorized by the Tribunal on application of a Party for good cause. The fact that a Party does not call a witness or expert for cross-examination does not imply that the Party accepts the substance of the witness's statement or report.
- (d) Subject to the agreement that written witness statements and expert reports shall in principle constitute the evidence-in-chief of each factual or expert witness, the Parties may at any hearing conduct brief direct examinations of their own factual or expert witnesses if they so choose.
- (e) Insofar as they are not inconsistent with the foregoing, the Tribunal may be guided by Articles 4 through 6 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

## 17. Production of Documents

### *Arbitration Rule 34*

It was agreed that the following procedure would apply to requests for production of documents:

The parties may request documents from each other at any time during the proceedings. Correspondence or documents exchanged in the course of this process should not be sent to the Arbitral Tribunal.

To the extent that the totality of these requests is not satisfied, the parties are allowed to submit for decision by the Arbitral Tribunal one request for production of documents before the first round of memorials and one request after the first round.

After the parties have exchanged their respective demands as outlined above, these requests shall take the form of a joint submission in tabular form (what is usually called in England a "Redfern schedule"), divided into two sections:

- A) the Claimant's request for the production of documents; and
- B) the Respondent's request for the production of documents.

Each section shall identify:

- (i) the documents or categories of documents that have been requested;
- (ii) the reasons for each request; and
- (iii) a summary of the objections by the other party to the production of the documents requested.



For its decision, the Tribunal will be guided by Article 3 of the IBA Rules of Evidence. On this basis, the Tribunal considers that the following standards should guide its reasoning:

- (i) The request for production must identify each document or specific category of documents sought with precision;
- (ii) The request must establish the relevance of each document or of each specific category of documents sought in such a way that the other party and the Arbitral Tribunal are able to refer to factual allegations in the submissions filed by the parties to date. (This shall not prevent a party from referring to prospective factual allegations intended to be made in subsequent memorials provided such factual allegations are made or at least summarized in the request for production of documents). In other words, the requesting party must make it clear with reasonable particularity what facts / allegations each document (or category of documents) sought is intended to establish.
- (iii) The Arbitral Tribunal will only order the production of documents or category of documents if they exist and are within the possession, power, custody or control of the other party. If this is contested, the requesting party will have to satisfy the Arbitral Tribunal that the document is indeed within the possession, power, custody or control of the other party.
- (iv) If necessary, the Tribunal shall also balance the request for production against the legitimate interests of the other party, including any applicable privileges, unreasonable burden and the need to safeguard confidentiality, taking into account all the surrounding circumstances.

If, beyond the two possible rounds of requests for production of documents, additional documents are needed by a party, leave to submit a further disclosure request to the Arbitral Tribunal must first be sought.

18. Dates of Subsequent Sessions

*Arbitration Rule 13(2)*

As noted in item 14, it was agreed that a hearing be held in The Hague from April 16 to April 20, 2007. It was agreed that April 21 and 22, 2007 would be kept as a reserve.

19. Publication of the Decisions Relating to the Proceedings and of the Award

*Article 48(5) of the Convention; Administrative and Financial Regulation 22*

It was agreed that the Centre may publish the item listed in Administrative and Financial Regulation 22(2)(b) (the award), at such time and in such manner as it deems fit.

The parties will consider, on a case by case basis, the publication of other items listed in Administrative and Financial Regulation 22(2)(b) and (c), and of any other order or decision of the Tribunal.



The parties subsequently agreed on the publication of the Tribunal's Procedural Order No. 1 of March 31, 2006.

20. Attendance at Hearings and Amicus Curiae Procedure

The Claimant will consider in due course the Respondent's proposal to open oral hearings to the public.

The Claimant reserved its position regarding the Respondent's proposal to allow *amicus curiae* in the proceeding, and to the amended Arbitration Rules setting out a procedure in this respect. The President stated that, under the Arbitration Rules currently in force, the parties would need to make submissions on the Tribunal's powers to allow *amicus curiae* in the proceeding. If the parties agree on the application of the amended Arbitration Rules upon their entry into force, the procedure set out in such amended Rules will apply to the question of *amicus curiae*.

**II. Request for Provisional Measures**

The parties made oral submissions on the Claimant's request for provisional measures and the Tribunal asked questions.

**III. Other Matters**

The President asked the parties if they wished to raise any other issues to be discussed during the session. Neither party had any other matter to discuss.

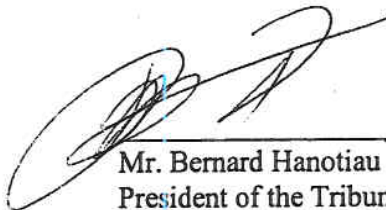
Closing of the Session

There being no further business, the President thanked the participants for their cooperation on behalf of the Tribunal. The session was adjourned at 8.45 p.m. Sound recordings were made of the session, and deposited in the archives of the Centre.



Martina Polasek  
Secretary of the Tribunal

Date: May 30, 2006



Mr. Bernard Hanotiau  
President of the Tribunal

Date: 20. 4. 2006

**Annex 1  
(Agenda)**

**Biwater Gauff (Tanzania) Limited**

v.

**United Republic of Tanzania**

**(ICSID Case No. ARB/05/22)**

AGENDA

First Session of the Arbitral Tribunal  
March 23, 2006, Paris, France

I. Procedural Matters

1. Constitution of the Tribunal and Tribunal Members' Declarations (Arbitration Rule 6).
2. Representation of the Parties (Arbitration Rule 18).
3. Apportionment of Costs and Advance Payments to the Centre (Convention Article 61; Administrative and Financial Regulation 14; Arbitration Rule 28).
4. Fees and Expenses of the Tribunal Members (Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees).
5. Applicable Arbitration Rules (Convention Article 44).
6. Place of Proceeding (Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)).
7. Procedural Language (Arbitration Rules 20(1)(b) and 22).
8. Records of Hearings (Arbitration Rule 20(1)(g)).
9. Means of Communication and Copies of Instruments (Arbitration Rules 20(1)(d) and 23; Administrative and Financial Regulations 24 and 30).
10. Presence and Quorum (Arbitration Rules 14(2) and 20(1)(a)).
11. Decisions of the Tribunal by Correspondence (Arbitration Rule 16(2)).
12. Delegation of Power to Fix Time Limits (Arbitration Rule 26(1)).
13. Written and Oral Procedures (Arbitration Rules 20(1)(e) and 29).
14. Number and Sequence of Pleadings, Time Limits, Supporting Documentation (Arbitration Rules 20(1)(c) and 31).
15. Pre-Hearing Conference (Arbitration Rule 21).
16. Witnesses and Experts; Written Statements and Reports, (Arbitration Rules 35 and 36).
17. Production of Documents (Arbitration Rule 34). SEE ANNEX
18. Dates of Subsequent Sessions (Arbitration Rule 13(2)).
19. Publication of the Award (Arbitration Rule 48(4)).

II. Request for Provisional Measures



17. Production of Documents (Arbitration Rule 34).

1. The parties may request documents from each other at any time during the proceedings. Correspondence or documents exchanged in the course of this process should not be sent to the Arbitral Tribunal.

2. To the extent that the totality of these requests is not satisfied, the parties are allowed to submit for decision by the Arbitral Tribunal one request for production of documents before the first round of memorials and one request after the first round.

3. After the parties have exchanged their respective demands as outlined above, these requests shall take the form of a joint submission in tabular form (what is usually called in England a "Redfern schedule"), divided into two sections:

- A) the Claimant's request for the production of documents; and
- B) the Respondent's request for the production of documents.

Each section shall identify:

- (i) the documents or categories of documents that have been requested;
- (ii) the reasons for each request; and
- (iii) a summary of the objections by the other party to the production of the documents requested.

For its decision, the Tribunal will be guided by Article 3 of the IBA Rules of Evidence. On this basis, the Tribunal considers that the following standards should guide its reasoning:

(i) The request for production must identify each document or specific category of documents sought with precision;

(ii) The request must establish the relevance of each document or of each specific category of documents sought in such a way that the other party and the Arbitral Tribunal are able to refer to factual allegations in the submissions filed by the parties to date. (This shall not prevent a party from referring to prospective factual allegations intended to be made in subsequent memorials provided such factual allegations are made or at least summarized in the request for production of documents). In other words, the requesting party must make it clear with reasonable particularity what facts / allegations each document (or category of documents) sought is intended to establish.

(iii) The Arbitral Tribunal will only order the production of documents or category of documents if they exist and are within the possession, power, custody or control of the other party. If this is contested, the requesting party will have to satisfy the Arbitral Tribunal that the document is indeed within the possession, power, custody or control of the other party.

(iv) If necessary, the Tribunal shall also balance the request for production against the legitimate interests of the other party, including any applicable privileges, unreasonable burden and the need to safeguard confidentiality, taking into account all the surrounding circumstances.

If, beyond the two possible rounds of requests for production of documents, additional documents are needed by a party, leave to submit a further disclosure request to the Arbitral Tribunal must first be sought."

**Annex 2**  
**(Parties' joint and separate proposals of March 22 and March 23, 2006)**

**Biwater Gauff (Tanzania) Ltd**

v.

**United Republic of Tanzania**

**(ICSID Case No. ARB/05/22)**

**COMMENTS OF THE PARTIES ON THE PROVISIONAL AGENDA**

First Session of the Arbitral Tribunal  
March 23, 2006, Paris

**I. Procedural Matters**

**1. Constitution of the Tribunal and Tribunal Members' Declarations (Arbitration Rule 6).**

No comment.

**2. Representation of the Parties (Arbitration Rule 18).**

The Parties' representatives and their contact information are as follows.

For the Claimant:

Allen & Overy  
One New Change  
London EC4M 9QQ  
United Kingdom  
+44 207 330 3000 (tel)  
+44 207 330 9999 (fax)

Judith Gill  
+44 207 330 3779  
judith.gill@allenoverly.com

Matthew Gearing  
+44 207 330 3745  
matthew.gearing@allenoverly.com

Autumn Ellis  
+44 207 330 3718  
autumn.ellis@allenoverly.com



For the Respondent:

Mkono & Co  
9<sup>th</sup> Floor PPF Tower  
P.O. Box 4369  
Dar es Salaam  
Tanzania  
+255 (22) 211 8789 (tel)  
+255 (22) 211 3247 (fax)

Attorney General's Chambers  
Kivukoni Front  
P.O. Box 9050  
Dar es Salaam  
Tanzania  
+255 (22) 212 9737 (tel)  
+255 (22) 211 3236 (fax)

Freshfields Bruckhaus Deringer  
Apollolaan 151  
1077 AR Amsterdam  
Netherlands  
+31 20 485 7000 (tel)  
+31 20 485 7001 (fax)

Hon. Nimrod E. Mkono, MP  
nimrod.mkono@mkono.com

Dr. Wilbert B. Kapinga  
wilbert.kapinga@mkono.com

Bart Wilms  
bart.wilms@mkono.com

Julius B. Mallaba  
jmallaba@hotmail.com

D. Brian King  
+31 20 485 7625 (tel)  
+31 20 572 7625 (fax)  
brian.king@freshfields.com

J. J. Gass  
+31 20 485 7638 (tel)  
+31 20 572 7638 (fax)  
jonathan.gass@freshfields.com

Jan Paulsson  
+33 1 44 56 44 80 (tel)  
+33 1 44 56 44 00 (fax)  
jan.paulsson@freshfields.com

**3. Apportionment of Costs and Advance Payments to the Centre (Convention Article 61; Administrative and Financial Regulation 14; Arbitration Rule 28).**

The Parties note that Administrative and Financial Regulation 14(3)(d) requires each Party to pay one-half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of the arbitration proceedings to be made by the Tribunal pursuant to Article 61(2) of the Convention. It is agreed that the Tribunal's assessment of the various costs set forth in Convention Article 61(2), and its decision

pursuant to that Article as to how and by whom those costs should be paid, may be set forth at the Tribunal's discretion in an Award or Decision subsequent to a Decision resolving some or all of the Parties' claims or elements thereof (e.g., liability). It is further agreed that the Parties will present, as directed by the Tribunal, their positions as to how and by whom costs should be paid.

**4. Fees and Expenses of the Tribunal Members (Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees).**

Subject of course to the views of the Tribunal, the Parties agree that the fees and expenses of the Tribunal Members shall be determined and paid in accordance with the ICSID Schedule of Fees dated July 6, 2005 and the Memorandum on Fees and Expenses of ICSID Arbitrators also dated July 6, 2005.

**5. Applicable Arbitration Rules (Convention Article 44).**

It is agreed that the ICSID Arbitration Rules currently in force (and any amendments made during the course of the proceedings) are applicable.

**6. Place of Proceedings (Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)).**

Subject to the approval of the Tribunal in consultation with the Secretary-General of ICSID:

- (a) the Claimant has proposed that future proceedings should be held at the World Bank's offices in Paris, or, failing that, at another appropriate venue in Europe to be agreed by the Parties; and
- (b) the Respondent has proposed that future proceedings should be held in Nairobi, or, failing that, at another appropriate venue in Africa to be agreed by the Parties.

The Parties intend to hold further discussions before the First Session concerning the place of proceedings and will advise the Secretary of any agreement that may be reached. Failing agreement, the parties recognize that future hearings will take place in Washington D.C.

**7. Procedural Languages (Arbitration Rules 20(1)(b) and 22).**

It is agreed that the procedural language shall be English.

**8. Records of Hearings (Arbitration Rule 20(1)(g)).**

It is agreed that verbatim transcripts will be made of each day's proceedings during any hearing (not including the First Session or any pre-hearing procedural conferences unless otherwise directed by the Tribunal). It is further agreed that:

- (a) Transcripts shall be prepared by a professional service selected by ICSID or by agreement of the Parties.
- (b) Provisional transcripts shall be provided to the Parties and the Tribunal in electronic form on the same day as the proceedings they record.
- (c) There will be an opportunity to suggest corrections to the transcripts as first presented, with the Tribunal to consider (in the event of disagreement between the Parties) whether or not such corrections are to be adopted.
- (d) Final edited and corrected transcripts of each day's proceedings during any hearing will follow in due course.

It is further agreed that complete sound recordings shall be made of all sessions, conferences, and hearings (including this First Session), and that the sound recordings shall be provided to the Parties.

**9. Means of Communications and Copies of Instruments (Arbitration Rules 20(1)(d) and 23; Administrative and Financial Regulations 24 and 30).**

It is agreed that:

- (a) Administrative and Financial Regulation 24 (communications through the Secretary-General of ICSID) shall apply generally. It is further agreed that in urgent situations the Parties shall send procedural communications as usual to the Secretary but may also send copies directly to the Tribunal and the other Party.



- (b) Together with the original of any written submission (with the exception of routine, administrative, or procedural correspondence), each Party shall submit to the Secretary by courier six copies. The Secretary should deliver any copy intended for the Claimant to its counsel in London and any copy intended for the Respondent to its counsel in Dar es Salaam and Amsterdam.
- (c) Routine, administrative, or procedural correspondence shall be transmitted to the Secretary by fax or email only and copied to the other Party.
- (d) A written submission will be considered to have been submitted in timely fashion if the submission is transmitted in electronic form (see (e) below) and sent in hard copy on or before the applicable deadline.
- (e) Simultaneously with the written submissions, each Party shall transmit via e-mail directly to the other Party and to the Secretary an electronic version (which may be in pdf format) of:
  - (i) the submission itself (not including exhibits); and
  - (ii) any witness statements and expert reports accompanying the submission.
- (f) For purposes of the foregoing paragraph, electronic versions shall be sent to the following e-mail addresses:
  - (i) To counsel for the Claimant at: [judith.gill@allenoverly.com](mailto:judith.gill@allenoverly.com), [matthew.gearing@allenoverly.com](mailto:matthew.gearing@allenoverly.com), and [autumn.ellis@allenoverly.com](mailto:autumn.ellis@allenoverly.com)
  - (ii) To counsel for the Respondent at: [jmallaba@hotmail.com](mailto:jmallaba@hotmail.com), [nimrod.mkono@mkono.com](mailto:nimrod.mkono@mkono.com), [wilbert.kapinga@mkono.com](mailto:wilbert.kapinga@mkono.com), [bart.wilms@mkono.com](mailto:bart.wilms@mkono.com), [brian.king@freshfields.com](mailto:brian.king@freshfields.com), and [jonathan.gass@freshfields.com](mailto:jonathan.gass@freshfields.com).

**10. Presence and Quorum (Arbitration Rules 14(2) and 20(1)(a)).**

It is agreed that the presence of all Members of the Tribunal shall be required at its sittings.

**11. Decisions of the Tribunal by Correspondence (Arbitration Rule 16(2)).**

It is agreed that:

- (a) The Tribunal shall take its decisions by a majority of votes and that its decisions shall be issued in writing.
- (b) The Tribunal may take decisions by correspondence among its Members, or by any other appropriate means, provided that all Members are consulted.
- (c) Decisions so taken shall be certified by the President.

**12. Delegation of Power to Fix Time Limits (Arbitration Rule 26(1)).**

The Parties note that, pursuant to ICSID Arbitration Rule 26(1), the Tribunal may delegate its power to fix time limits to the President.

**13. Written and Oral Procedures (Arbitration Rules 20(1)(e) and 29).**

It is agreed that the proceedings shall consist of two distinct phases, written and oral.

**14. Number and Sequence of Pleadings, Time Limits, Supporting Documentation (Arbitration Rules 20(1)(c) and 31).**

The Parties have not been able to reach any agreements respecting this item and will transmit their separate proposals to the Secretary. For the Tribunal's convenience, the Parties' proposals are summarized here:

Submission	Claimant's Proposal	Respondent's Proposal
Reply to Request	Fri 7 April 06	None
Statement of Agreed Facts	Fri 21 April 06 (service of draft)	None
First-round Redfern Schedule	None	Fri 9 June 06
Memorial	Fri 30 June 06	Fri 14 July 06
Counter-Memorial	Fri 15 Sept 06	Fri 3 Nov 06
Sole/Second-round Redfern Schedule	Fri 6 Oct 06	Fri 1 Dec 06
Reply	Fri 8 Dec 06	Fri 5 Jan 07
Rejoinder	Fri 12 Jan 07	Fri 2 March 07

Pre-hearing conference	Not specified	March/April 07
Hearing	after Fri 16 Feb 07 (2-3 days)	April/May 07 (2 weeks)

**15. Pre-Hearing Conference (Arbitration Rule 21).**

It is agreed that:

- (a) In accordance with Article 21 of the Arbitration Rules, pre-hearing conferences may be arranged between the Tribunal and the Parties.
- (b) At the discretion of the Tribunal, pre-hearing conferences may be conducted by telephone or video conference.
- (c) There should be a pre-hearing conference, on a date to be fixed by the Tribunal after submission of the final memorial before a hearing, to discuss any outstanding procedural or logistical aspects of the hearing.
- (d) At the conference referred to in paragraph (c), the Parties and the Tribunal will discuss, among other subjects, whether it would be preferable to have written post-hearing submissions in lieu of (or in addition to) oral closing arguments and whether such submissions should exclusively or specifically address particular issues.

**16. Witnesses and Experts; Written Statements and Reports (Arbitration Rules 35 and 36).**

It is agreed that:

- (a) Without prejudice to the power of the Tribunal to request the Parties to produce further evidence at any stage of the proceeding, signed witness statements and expert reports submitted together with the memorials which they support shall in principle constitute the evidence-in-chief of each factual or expert witness.
- (b) The Tribunal may, due to extraordinary circumstances, allow a Party to submit evidence other than simultaneously with the Party's pleadings.



- (c) Each Party shall, on a date to be fixed by the Tribunal, submit a list of all witnesses and experts whom it wishes to cross-examine from among those witnesses and experts whose statements or reports have been submitted by the other Party. A witness need not testify at the hearing unless called by the other Party or by the Tribunal, except if authorized by the Tribunal on application of a Party for good cause. The fact that a Party does not call a witness or expert for cross-examination does not imply that the Party accepts the substance of the witness's statement or report.
- (d) Subject to the agreement that written witness statements and expert reports shall in principle constitute the evidence-in-chief of each factual or expert witness, the Parties may at any hearing conduct brief direct examinations of their own factual or expert witnesses if they so choose.
- (e) Insofar as they are not inconsistent with the foregoing, the Tribunal may be guided by Articles 4 through 6 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

**17. Production of Documents (Arbitration Rule 34).**

The Parties have not yet been able to reach any agreements respecting this item and will transmit to the Secretary their separate proposals and/or any agreements they may reach in further discussions.

**18. Dates of Subsequent Sessions (Arbitration Rule 13(2)).**

The Parties have not been able to reach any agreements respecting this item and will transmit their separate proposals to the Secretary. The Parties' positions regarding the date and length of the hearing are summarized in the table under item 14.

**19. Publication of the Decisions Relating to the Proceedings and of the Award (Article 48(5) of the Convention; Administrative and Financial Regulation 22).**

It is agreed that the Centre may publish the item listed in Administrative and Financial Regulation 22(2)(b) (arbitral awards), at such time and in such manner as it deems fit.

The Respondent has proposed that the Parties consent to publication of all items listed in Administrative and Financial Regulation 22(2)(b) and (c), and of any other order or decision of the Tribunal. The Claimant does not agree to this proposal. The Parties recognize that Administrative and Financial Regulation 22 requires the consent of both Parties for publication and agree that such consent has been given only as stated in the preceding paragraph.

## **II. Request for Provisional Measures**

No further written comment.

## **III. Other Matters**

The Parties have agreed that, with the Tribunal's consent, the following items should be added to the agenda.

### **1. Attendance at Hearing (Arbitration Rule 32(2)).**

The Respondent has proposed that, except as may be required for reasons of security and logistical constraints, the oral proceedings should be open to the public. The Claimant does not agree to this proposal. The Parties recognize that persons other than those listed in Arbitration Rule 32(2) cannot attend the hearings without the consent of both Parties and that such consent has not been given.

### **2. Submissions by Third Parties.**

The Respondent made the proposal set forth below regarding written submissions by third parties. The Claimant does not agree to such proposal. The Claimant considers that such a proposal is premature and that the Tribunal and the Parties should discuss the subject only if and when a third party seeks to make a written submission or requests permission to do so.

The Respondent's proposal is as follows:

- (a) The Tribunal may accept submissions from third parties who the Tribunal finds, after soliciting the Parties' views, are in a position to provide the Tribunal with

expertise, arguments, or perspectives that will assist the Tribunal in deciding any issue presented in this proceeding.

- (b) No third party may make such a submission unless the Tribunal has first granted a petition for leave to do so.
- (c) Such petition must include:
  - (i) the petitioner's identity and, if it is an organization, its purpose and the nature of its membership;
  - (ii) the petitioner's relationship (if any) to the Parties, including any financial or other material support received from the Parties or any person or entity connected to the Parties;
  - (iii) the nature of the petitioner's interest in the case;
  - (iv) the basis on which the petitioner believes it is in a position to provide the Tribunal with expertise, arguments, or perspectives that will assist the Tribunal in deciding any issue presented in this proceeding;
  - (v) a summary of the matters that the petitioner proposes to address in its submission; and
  - (vi) any other reasons the petitioner believes should lead the Tribunal to grant the petition.
- (d) After soliciting the Parties' views and, in its discretion, calling for any clarification, response, or further information from the petitioner, the Tribunal shall decide whether to grant leave to the petitioner to make a submission.
- (e) If such leave is granted, the Tribunal shall determine the appropriate procedure, including the schedule, governing the third party's submission, giving due regard to the Parties' ability to comment upon or respond to the submission in their main



written submissions, additional submissions directed specifically to the third party's submission, at the hearing, or in post-hearing submissions.

Biwater Gauff (Tanzania) Ltd -v- United Republic of Tanzania

(ICSID Case No. ARB/05/22)

Claimant's separate proposals

Items Not Agreed between the Parties on the Draft Procedural Directions

I. Procedural Matters

6. **Place of Proceedings (Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)).**

Not agreed.

**Claimant's proposal:**

Subject to the convenience of the Tribunal, future hearings should be held at the World Bank's offices in Paris, or, failing that, at another appropriate venue in Europe to be agreed by the Parties. Failing agreement, the Claimant recognises that future hearings will take place in Washington D.C.

14. **Number and Sequence of Pleadings, Time Limits, Supporting Documentation (Arbitration Rules 20(1)(c) and 31); and Production of Documents (Arbitration Rule 34)**

Not agreed.

**Claimant's proposal:**

- 14.1 **Reply to Request:** Respondent to serve the Reply to the Request for Arbitration within 14 days of the First Hearing by Friday 7 April 2006.
- 14.2 **Statement of Agreed Facts:** Claimant to serve, and to the extent that the Claimant determines that it would be productive to do so and within 14 days of receipt of the Respondent's Reply (by Friday 21 April 2006), a draft Agreed Statement of Facts upon the Respondent. The Parties to endeavour to reach agreement upon this draft Agreed Statement of Agreed Facts within a further period of 14 days in order to narrow down the issues upon which detailed submissions need to be included in the parties' Memorials.
- 14.3 **Memorial:** Claimant to serve the Memorial dealing with all aspects of its Claim by Friday 30 June 2006. The Memorial to attach: (i) further documents upon which the Claimant wishes to rely (in addition to the attachments to the Request for Arbitration); (ii) witness statements; and (iii) expert report(s) (the Claimant currently envisages providing an expert report on valuation of damages).
- 14.4 **Counter-Memorial:** Respondent to serve the Counter-Memorial dealing with all aspects of its Defence by Friday 15 September 2006. The Counter-Memorial to attach: (i) documents upon which the Respondent wishes to rely; (ii) witness statements; and (iii) expert report(s).
- 14.5 **Production of Documents:** the Parties shall submit to the Tribunal for decision a joint submission in tabular form (a "Redfern schedule") setting out unsatisfied requests for

documents by Friday 6 October 2006. The Tribunal in making its decision shall follow the guidelines set out in the Annex to the draft Agenda. The Tribunal's decision in respect of production of documents shall be issued as soon as possible and any documents shall be produced within 14 days of the Tribunal's decision.

14.6 **Reply to Counter-Memorial:** Claimant to serve the Reply to the Counter-Memorial by Friday 8 December 2006 (on the assumption that any further documents will be produced by Friday 10 November 2006).

14.7 **Rejoinder to Reply:** Respondent to serve the Rejoinder within one month of receipt of Claimant's Reply (by Friday 12 January 2007).

17. **Production of Documents (Arbitration Rule 34).**

Not Agreed.

**Claimant's proposal:**

The Claimant's proposal is set out at item 14.5 above (copied below for ease of reference). In summary, and in the light of its application for provisional measures, the Claimant proposes a single Redfern Schedule jointly submitted by the parties after the first round of memorials.

14.5 **Production of Documents:** the Parties shall submit to the Tribunal for decision a joint submission in tabular form (a "Redfern schedule") setting out unsatisfied requests for documents by Friday 6 October 2006. The Tribunal in making its decision shall follow the guidelines set out in the Annex to the draft Agenda. The Tribunal's decision in respect of production of documents shall be issued as soon as possible and any documents shall be produced within 14 days of the Tribunal's decision.

18. **Dates of Subsequent Sessions (Arbitration Rule 13(2)).**

Not Agreed.

**Claimant's proposal:**

The Claimant considers that the disputed facts at issue in these proceedings are relatively discrete, and hopes that they can be narrowed further, whilst accepting that the parties disagree as to the weight to be attributed to those facts. The Claimant therefore proposes a period of approximately 2 to 3 consecutive days for an oral hearing in these proceedings. The parties ask the Tribunal to set aside such a period at the earliest convenient date after Friday 16 February 2007.

III. **Other Matters**

1./2. **Submission by Third Parties / Public access to hearings**

Not Agreed.

**Claimant's proposal:**

The Claimant considers that such a proposal is premature and that the Tribunal and the Parties should consider the matter only if and when a third party seeks to make a written submission or requests permission to do so and/or when a member of the public applies to ICSID to attend a hearing.





Mr. Bernard Hanotiau  
Mr. Gary B. Born  
Mr. Toby T. Landau  
c/o Martina Polasek, Secretary of the Tribunal  
International Centre for the Settlement of Investment Disputes  
Mail Stop No. U3-301  
1818 H Street, N.W.  
Washington DC 20433

AMSTERDAM  
Apollolaan 151  
1077 AR Amsterdam  
T+ 31 20 485 7000  
Direct T+ 31 20 485 7625 (DBK)  
31 20 485 7638 (JJG)  
F+ 31 20 485 7001  
Direct F+ 31 20 572 7625 (DBK)  
31 20 572 7638 (JJG)  
E brian.king@freshfields.com  
jonathan.gass@freshfields.com  
W freshfields.com  
DOC ID AM234641/3  
OUR REF DBK 128874-0002  
YOUR REF ARB/05/22

By E-mail

23 March 2006

Dear Members of the Tribunal,

**Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, Case No. ARB/05/22**

1. We write to set forth the Republic's further observations concerning the items on the draft agenda for the First Session.

**A. Item 6: Place of Proceedings**

2. The Republic believes the hearings should be held in Africa for several reasons, as follows. All of the Claimant's allegations concern events that occurred in Tanzania. The clear majority of likely witnesses of fact reside in Africa. Both of the Claimant's parent companies are active in various African States. Given that the condition of the Dar es Salaam water and sewerage system before, during, and after City Water's operation is of central importance in this case, an African venue would also be the most appropriate to facilitate site visits in conjunction with the hearing under Arbitration Rule 37. Finally, adequate facilities to meet with the Secretary-General's approval under Arbitration Rule 13(3) are available in many African venues.
3. The Republic finds it lamentable that the Claimant, which undertook a project in and greatly affecting the population of an African State, should find it difficult to identify a single country on the African continent in which to arbitrate a dispute concerning that project.

**B. Item 14: Number and Sequence of Pleadings, etc.**

4. Consistent with Arbitration Rule 31(1), the Republic submits that "the written procedure shall consist of the following pleadings . . . :

Freshfields Bruckhaus Deringer are regulated by the Law Society of England and Wales and other professional organisations. A list of the partners and their professional qualifications is open to inspection at the above address. Freshfields Bruckhaus Deringer's Amsterdam office includes attorneys, tax advisers and a civil law notary

Bank account Stichting Derdengelden Freshfields Bruckhaus Deringer 25.60.49.947

Amsterdam Barcelona Beijing Berlin Bratislava Brussels Budapest Cologne Dubai Düsseldorf Frankfurt am Main  
Hamburg Hanoi Ho Chi Minh City Hong Kong London Madrid Milan Moscow Munich New York Paris Rome  
Shanghai Singapore Tokyo Vienna Washington

- (a) a memorial by the requesting party;
  - (b) a counter-memorial by the other party;
- and, if the parties so agree or the Tribunal deems it necessary:
- (c) a reply by the requesting party; and
  - (d) a rejoinder by the other party.”

In the event that jurisdictional objections are made, Arbitration Rule 41 will govern.

5. The dates proposed by the Republic for the four pleadings permitted by Arbitration Rule 31(1) are set out under item 14 of the Parties’ joint submission. The Republic contends that those dates are reasonable and consistent with ICSID practice.
6. On the other hand, the sequence and dates proposed by the Claimant are unreasonable in that:
  - The Claimant has inserted pleadings (a Reply to Request and a Statement of Agreed Facts) that are not called for by the Arbitration Rules and whose utility is at best questionable.
  - The Claimant’s proposed schedule is grossly inequitable in that whereas the Claimant is given 14 weeks from the First Session to submit its Memorial, the Republic has only 11 weeks after the Memorial to submit its Counter-Memorial. Worse still, whereas the Claimant would have 12 weeks to submit its Reply, the Republic is given only 5 weeks to submit its Rejoinder.
  - The Claimant’s estimation of a two- or three-day merits hearing is likely to prove seriously insufficient, having regard to the potential witnesses to be called and the issues to be presented. The Republic suggests that two weeks should be set aside, especially because it will be more difficult later to increase than to decrease the planned length of the hearing given the schedules of the Members of the Tribunal and counsel.

**C. Item 17: Production of Documents**

7. The Republic has proposed adhering to the Tribunal’s proposal for two rounds of document production, one before each round of pleadings, as set out in the Annex to the Draft Agenda. The dates proposed by the Republic for the two Redfern Schedules are set out under item 14 of the Parties’ joint submission. That being said, and subject to the Tribunal’s views, the Republic has no objection to the Claimant’s proposal for a single round of discovery before the second round of pleadings.



**D. Item 19: Publication of Decisions**

8. While the Republic welcomes the Claimant's agreement to publication of the Award, it is still not clear why, if the Award is to be published, the Claimant objects to publication of other orders and decisions by the Tribunal.

**E. Additional Item 1: Attendance at Hearing**

9. The Republic favors transparency in the arbitral proceedings, and the Claimant's refusal to endorse public hearings is therefore greatly regretted.
10. This case is of large public significance to millions of people – involving as it does a major, publicly-funded project; a commodity essential to human life; and the conduct of public authorities. Indeed, the case has global importance given the involvement of the World Bank, the African Development Bank, and other international donors in the underlying project, as well as the ongoing public debate over water privatization projects around the world, often funded by the same donors. Public and press access to the proceeding is of the greatest importance, not least to enhance the perceived legitimacy of the proceeding in the eyes of those directly affected.

**F. Additional Item 2: Submissions by Third Parties**

11. As we have just explained, many individuals and organizations from around the globe and from different sectors of society will have an interest in this case. What is more, the subject matter is such that third parties may well have expertise or perspectives that the Parties cannot offer but that will assist the Tribunal in resolving the dispute. For example, other entities are in a position to provide a broader perspective on how similar projects have functioned in other countries, which may well assist the Tribunal by providing a point of comparison when hearing evidence concerning the Dar es Salaam project.
12. We disagree with the Claimant's suggestion that it would be premature to establish a procedure for third-party submissions. It is important for the Parties and third parties to know how the Tribunal would like applications for leave to participate to be presented and what issues the Tribunal will consider in determining whether to grant leave to make a submission. Without a framework in place in advance, time will be lost – and the pleading schedule possibly disrupted – when a third party requests permission to make a submission, and the Parties and the Tribunal must then work out a procedure.



13. The procedure we propose is set out under item III.2 of the Parties' joint submission and is modeled on the one adopted by the Tribunal in *Agua Argentinas, S.A., et al. v. Argentina*, ICSID Case No. ARB/03/19 (Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005), available at <http://www.worldbank.org/icsid/cases/ARB0319-AC-en.pdf>. It does not commit the Tribunal to accepting any submission, but merely establishes an orderly procedure and criteria for evaluating any proffered submission.

Very truly yours,

/s/

Mkono & Co  
Hon. Nimrod E. Mkono, MP  
Managing Partner

/s/

Freshfields Bruckhaus Deringer  
D. Brian King  
J. J. Gass

cc: Claimant's Counsel

**Annex 3**  
**(New Mailing and Delivery Instructions for the Centre)**

### New Mailing and Delivery Instructions

The ICSID Secretariat has recently moved to new premises, located at 1800 G Street, NW, 3rd Floor, Washington, D.C. 20433.

The official address of ICSID remains unchanged and general inquiries and requests for publications may still be directed to:

ICSID  
1818 H Street, N.W.  
Washington, D.C. 20433  
U.S.A.

Phone No. (202) 458-1534  
Fax No. (202) 522-2615

ICSID staff email addresses, fax and telephone numbers also remain unchanged. However, new mail and courier/parcel delivery procedure applying are as follows:

**1. All local messenger deliveries to ICSID should be made to:**

1800 G Street, NW (known within the World Bank as the U Building)  
3rd Floor  
Washington, D.C. 20433  
U.S.A.

Pre-arranged deliveries may be made between 9:00 a.m. – 5:00 p.m., Monday through Friday. Upon arrival, please call an ICSID staff member or ICSID's general number (202) 458-1534) in order for ICSID staff to accept delivery.

**2. All other mail and courier/ parcel deliveries to ICSID from outside Washington, D.C. area should be sent to the following address in order to expedite the receipt:**

[Name of the recipient]  
ICSID – The World Bank  
MSN U3-301  
Dulles Commerce Center, Bldg. 100  
23760 Pebble Run Drive  
Sterling, VA 20166  
U.S.A.

If you have any questions, please contact ICSID at (202) 458-1534.

