

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

EMS Shipping & Trading GmbH

v.

Republic of Albania

ICSID Case No. ARB/23/9

PROCEDURAL ORDER No. 2
On Transparency and Confidentiality

Members of the Tribunal

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Prof. Stanimir Alexandrov, Arbitrator
Prof. Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal

Ms. Izabela Chabinska

Assistant to the Tribunal

Ms. Laura Zinnerman

5 January 2024

I. PROCEDURAL BACKGROUND

1. On 25 July 2023, the Tribunal circulated a draft Procedural Order No. 1 (“PO1”) for discussion by the Parties and invited the Parties to provide their input about the transparency/confidentiality of these proceedings in advance of the Tribunal’s First Session.
2. On 14 August 2023, the Parties provided their initial comments on transparency/confidentiality to the Tribunal. On 23 August 2023, having considered the Parties’ comments, the Tribunal circulated a draft Procedural Order No. 2 (“PO2”) on transparency/confidentiality for the Parties’ discussion.
3. On 25 August 2023, the Respondent provided comments on draft PO2, noting that it “d[id] not consent to / withdr[ew] any consent previously given” to the publication of documents pursuant to ICSID Arbitration Rule 62(1).
4. On 4 September 2023, the Claimant confirmed its agreement with draft PO2, as circulated by the Tribunal on 23 August 2023.
5. On 18 September 2023, the Tribunal held the First Session. Following exchanges during the session, the Parties agreed to confer and discuss draft PO 2 and provide the Tribunal with their joint proposal at a later date.
6. On 20 September 2023, the Tribunal issued PO1, which provided at paragraph 24 that matters of transparency/confidentiality would be addressed in PO2. The Tribunal also noted its understanding that the Parties had agreed to extend the 60-day time limit set out in ICSID Arbitration Rule 63. The Tribunal invited the Parties to submit their joint proposal on draft PO2 by 27 September 2023.
7. On 27 September 2023, the Parties informed the Tribunal of their agreement to extend the deadline for submitting their joint proposal on draft PO2 until 8 November 2023. On 3 October 2023, the Tribunal approved the time extension agreed to by the Parties.
8. On 7 November 2023, the Respondent requested a further extension of time for submitting the Parties’ joint proposal on draft PO2. On the same date, the Claimant indicated that it maintained the position communicated on 4 September 2023 and had no further comments on draft PO2 circulated by the Tribunal on 23 August 2023. Later that day, the Tribunal, having considered the Parties’ messages, invited them to confer and revert with a joint proposal for the due date for the filing of the Parties’ comments on draft PO2.
9. On 7 December 2023, not having heard further from the Parties on draft PO2, the Tribunal invited them to submit their comments on draft PO2 or a request for extension by 12 December 2023.
10. On 12 December 2023, the Claimant confirmed that its position on draft PO2 as set out in its correspondence of 4 September and 7 November 2023 remained unchanged. On the same date, the Respondent’s newly appointed counsel provided the Respondent’s comments on draft PO2, confirming the position communicated on 25 August 2023.
11. This Order contains the Parties’ agreements and the Tribunal’s decisions concerning the transparency/confidentiality regime governing this case.

II. LEGAL FRAMEWORK

12. The legal framework applicable to these proceedings is determined by the Treaty on the Reciprocal Promotion and Protection of Investments between the Federal Republic of Germany and the Republic of Albania, dated 31 October 1991 (the “BIT”), the ICSID Convention, and the 2022 ICSID Arbitration Rules (the “ICSID Arbitration Rules”).
13. The BIT is silent with respect to transparency/confidentiality. Therefore, the applicable rules are those found in Article 48(5) of the ICSID Convention, which provides that ICSID shall not publish the award without the disputing parties’ consent, and ICSID Arbitration Rules 62-66.
14. ICSID Arbitration Rules 62-66 contain provisions on the publication of the award, orders and decisions; the publication of documents filed in the proceedings, transcripts and recordings of hearings; open hearings, and on the definition of confidential or protected information. Some of these rules expressly require the disputing parties’ consent, or allow them to depart from the rule by agreement, or object to the application of the rule.
15. In addition, pursuant to ICSID Arbitration Rule 1(2), the Tribunal is bound by an agreement reached by the disputing parties on a procedural matter, provided the agreement is consistent with the ICSID Convention and the ICSID Administrative and Financial Regulations.

III. TRANSPARENCY RULES

16. In application of the legal framework set out in Section II, the Tribunal adopts the following rules.

A. AWARDS, AWARD-RELATED DECISIONS, AND DECISIONS ON ANNULMENT (ICSID ARBITRATION RULE 62)

17. In accordance with Article 48(5) of the ICSID Convention and ICSID Arbitration Rule 62(1), ICSID shall publish on its website, the award, any supplementary decision on the award, and decisions on rectification, interpretation, and revision of awards, and decisions on annulment, with the Parties’ consent, and with any redactions agreed by the Parties pursuant to ICSID Arbitration Rule 62(2).¹
18. In accordance with ICSID Arbitration Rule 62(3), the Parties’ consent to the publication of the award and the decisions listed in paragraph 17 shall be deemed to have been given if no Party objects to such publication in writing within 60 days after the dispatch of the relevant document.
19. It is noted that the Claimant consents to the publication of the award and decisions listed in paragraph 17 and the Respondent does not give its consent at present, but may do so in the course of the proceedings.
20. If the Parties consent to publication of a redacted version of the award or of a decision, they shall provide ICSID with their jointly redacted text within 60 days after dispatch. If the Parties do not agree on a jointly redacted text, they shall inform ICSID and provide their

¹ Pursuant to ICSID Arbitration Rule 72(2), this Order shall continue to apply to an interpretation, revision or annulment proceeding with necessary modifications, unless the Parties agree or the Tribunal or Committee orders otherwise.

proposals for redaction of confidential or protected information as defined in ICSID Arbitration Rule 66 within 60 days of dispatch.

21. In the event that the Parties do not consent to publication pursuant to ICSID Arbitration Rules 62(1) to 62(3), ICSID shall prepare and publish excerpts of the documents listed in paragraph 17 in accordance with the procedure contemplated in ICSID Arbitration Rule 62(4)(a) to 62(4)(c).

B. ORDERS AND DECISIONS (ICSID ARBITRATION RULE 63)

22. ICSID shall publish the orders and decisions of the Tribunal, with any redactions agreed by the Parties or decided by the Tribunal.
23. Within 30 days from the date of a decision or order, a Party shall give written notice to the Tribunal and the other Party that it requests the non-disclosure of certain information that it considers confidential or protected under ICSID Arbitration Rule 66. Absent such a notice and unless the Tribunal determines on its own initiative that certain information is not to be made public in accordance with ICSID Arbitration Rule 66, the Tribunal will authorize ICSID to publish the document without redactions.
24. Within 10 days of receipt of the notice referred to in paragraph 23, the other Party may object to the proposed redactions.
25. If no objections are raised within the time limit set in paragraph 24, the Tribunal will authorize ICSID to publish the order or decision with the requested redactions.
26. If objections are raised within the time limit set in paragraph 24, the Parties shall confer and seek to agree on redactions within 10 days of receipt of the objections. If the Parties reach an agreement, the Tribunal will authorize ICSID to publish the order or decision with the agreed redactions.
27. If objections remain unresolved, the disputed redaction requests and the objections thereto shall be submitted to the Tribunal in the form of the Transparency Schedule set out in Annex A to this Order and the Tribunal will decide over the disputed redactions.
28. If information is to be redacted from an order or decision under paragraphs 25, 26 or 27, the Parties shall provide a redacted version of the order or decision within 10 days from being requested to do so. Upon receipt of the redacted order or decision, ICSID will publish the document.

C. OTHER DOCUMENTS FILED IN THE PROCEEDINGS (ICSID ARBITRATION RULE 64)

29. ICSID shall not publish the Parties' written submissions and supporting documents, including exhibits, legal authorities, witness statements and expert reports (including annexes, appendices or exhibits thereto).

D. HEARINGS (ICSID ARBITRATION RULE 65)

30. Subject to a later agreement of the Parties, hearings shall not be open to the public and transcripts and recordings of hearings shall not be published.

On behalf of the Tribunal,

[signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 5 January 2024

ANNEX A – TRANSPARENCY SCHEDULE

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| Claimant/Respondent [Party seeking protection against publication] | |
| Identification of document and part(s) sought to be protected | [use one sheet per document/category of documents] |
| Legal basis for protection | |
| Comments | |
| Reply by opposing Party | |
| Decision | |