

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mabco Constructions SA

v.

Republic of Kosovo

(ICSID Case No. ARB/17/25)

PROCEDURAL ORDER NO. 8

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

1. The Tribunal has reviewed with care Claimant's statement of Procedural Requests dated June 8, 2022 and Respondent's Comments thereto dated June 10, 2022.
2. Having studied these communications and conferred, the Tribunal hereby issues Procedural Order No. 8 resolving as follows the issues that Claimant has raised. Before doing so, the Tribunal wishes Counsel to know that its decisions reflect, to some degree, the reality that the last stages of this proceeding have been exceptionally compressed, particularly in regard to the interval between Rejoinder and hearings.

I. NEW WITNESSES

3. Claimant observes that, in its Rejoinder, Respondent presents witness statements in connection with a second memorial from persons who had presented no such statement in connection with Respondent's first memorial. In the Tribunal's experience, there is nothing unusual for counsel to proffer in connection with its second memorial a statement from a witness who offered no statement in connection with the first memorial.
4. In any event, the Tribunal will, as is customary, give Claimant considerable latitude in seeking to impeach the witnesses' credibility in the course of cross-examination. In the Tribunal's view, this opportunity should suffice.

II. MR. QERIMI'S SECOND REPORT

5. Claimant objects that Mr. Qerim Qerimi filed in connection with Respondent's Rejoinder a Second Expert Report despite the fact that there was no rebuttal report to which to respond and, on that ground, asks the Tribunal to declare that Report inadmissible, failing which to postpone the hearing and allow Claimant to file a Rebuttal Expert Opinion in response to Mr. Qerimi's Second Report.
6. The Tribunal cannot grant Claimant's request that Mr. Qerimi's Second Report be denied admission into the record. First, though it could conceivably have done so, the Tribunal in fact never issued a ruling barring an expert from proceeding as Mr. Qerimi has done and it is not prepared to do so retroactively. Moreover, Respondent, not Claimant, has the

presumptive right to file the last submission at the merits stage in the proceedings and that presumption cannot, other than in exceptional circumstances, be overcome.

7. However, Claimant further objects to Mr. Qerimi having addressed “new” issues that go beyond the scope of Claimant’s Reply in violation of Section 16.1 of Procedural Order No. 1. To the extent this is so, the Tribunal sees some merit in Claimant’s concern. Had Claimant’s expert filed a Rebuttal Report, Mr. Qerimi would be expected in his Second Opinion to confine himself to matters addressed in that Report.
8. Though the Tribunal, as stated, understands Claimant’s concern, it considers postponement of the upcoming hearings to be a highly disproportionate remedy. Finding new hearing dates in the near future that would be convenient to all concerned would greatly undermine the efficiency desired of arbitration.
9. That said, the Tribunal believes that some adjustment may reasonably be made. It therefore invites Claimant, by way of exception, to specifically identify, and notify both to the Tribunal and opposing counsel, as succinctly as possible, the matters in Mr. Qerimi’s Second Report Claimant that in its view exceed the scope Claimant’s Reply. Claimant may do so if it wishes by no later than **Thursday, June 16, 2022**. Respondent may then comment (using no more than the number of pages used by Claimant) on that submission if it wishes to do so, by **Saturday, June 18, 2022**. The Tribunal will then endeavor to issue by **Monday, June 20, 2022** a ruling as to the admissibility of a brief reply by Claimant’s expert to Mr. Qerimi’s Second Report. If the Tribunal rules in favor of admissibility, Claimant will have the period between **June 20** and **June 27, 2022** to produce that reply (though it could by way of precaution begin preparation as of June 16, 2022). That reply may not exceed 8 pages.
10. This is admittedly a short period of time. However, counsel should bear in mind that Claimant’s expert will only be allowed to address matters raised by Mr. Qerimi’s Second Report that the Tribunal deems to be “new,” i.e., to lie beyond the scope of the matters addressed in Claimant’s Reply. This should be a very limited number of matters. As a further safeguard, should Claimant be able to show that it has been seriously prejudiced by this manner of proceeding, the Tribunal will consider the possibility in due course of

exceptionally allowing Claimant a further opportunity to respond in a suitable way after the close of the hearing.

III. ALLEGEDLY DEFAMATORY EXHIBITS

11. Claimant objects to Respondent's having introduced with its Rejoinder new factual exhibits of an allegedly defamatory character. Claimant does not request the Tribunal to take any particular measure in this regard. But the Tribunal can assure Claimant that it will in no measure take as true or established any of the assertions about Mr. Pacolli in Respondent's submissions that Claimant deems defamatory. They do not represent evidence in this case.
12. That said, in light of the seriousness of the allegedly defamatory material, the Tribunal will allow Claimant, as requested, a very limited period of time – up to 15 minutes – to raise these matters in direct examination of Mr. Pacolli, to be counted against its time allocation. The Tribunal considers nothing more than that necessary in the interest of fairness.
13. The Tribunal takes note of Claimant's indication that it may eventually institute proceedings on account of those allegedly defamatory exhibits. There is no need at this time for any Tribunal action on this point.

IV. THE UNMIK POLICE REPORT

14. As for the UNMIK Police Report itself, Claimant calls its accuracy, authenticity and probative value seriously into question and seeks an opportunity to respond to it.
15. The Tribunal notes the following. First, though the Police Report had not previously been entered into evidence, Claimant has long had possession of it and knowledge of its content. Moreover, Claimant itself states that the Report "has a near-to-zero evidentiary value," suggesting that its entry into the record would occasion it little harm. Claimant will also have time both at the hearing and in post-hearing submission to refute the accuracy, authenticity and probative value of the Report.

16. That said, given the lateness of the Police Report's entry into the Record, the Tribunal will allow Claimant to submit by **Friday, June 24, 2022** a brief written submission (no more than 8 pages) to comment directly and specifically on the Police Report and the use made of it in Respondent's Rejoinder.

V. ALLEGATIONS CONCERNING THE RELATIONSHIP BETWEEN THE KTA AND THE PAK

17. Claimant objects to arguments made in Respondent's Rejoinder suggesting that the KTA's knowledge of facts cannot be attributed to the PAK and asks that it be allowed to make a written submission on the matter.
18. The Tribunal does not see sufficient need for a further submission by Claimant on this subject. Claimant will in all likelihood have an opportunity to enter into the matter in its examination and cross-examination of witnesses. It will also be able to fully address the matter in its post-hearing brief. The Tribunal will go no further than allow to Claimant to produce, *without any written submission on its part*, documents not already in the record that *squarely* address what it calls "the structure scheme between the KTA and the PAK." These documents must be furnished to Respondent and the Tribunal by no later than **Wednesday, June 22, 2022**.

VI. ENGLISH AND ALBANIAN TRANSLATIONS

19. It appears from the Parties' submissions that Claimant, has made available the English translation of a certain number of documents identified by Respondent (Exhs. C-095, C-096, C-097, C-098). In the absence of any showing of prejudice for not filing the translations earlier, the Tribunal finds no basis for disregarding the factual allegations contained in those exhibits.
20. On the other hand, Claimant has apparently not as yet furnished a full English translation of Exhibit C-103, or the Albanian original of Exhibit C-103, but offers to do so. The Tribunal requests that this be done by no later than **Wednesday, June 22, 2022**. If done

by then, there will be no warrant for disregarding the factual allegations contained in those exhibits.

VII. COSTS AND EXPENSES

21. The Tribunal reserves judgment on the matter.

On behalf of the Tribunal,

[Signed]

George A Bermann
President of the Tribunal
June 15, 2022