

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mabco Constructions SA

v.

Republic of Kosovo

(ICSID Case No. ARB/17/25)

PROCEDURAL ORDER NO. 12

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

October 20, 2022

The Tribunal has reviewed and considered Claimant's various procedural requests of August 24, 2022 and Respondent's responses thereto of September 29, 2022.

The Tribunal rules as follows on the requests:

1. Regarding the witness statement of Mr. Gazmend Abrashi, dated August 17, 2022, the Tribunal has already ruled on September 19, 2022, on the basis of submissions by the parties of August 8, 17 and 24, 2022, that that statement is admitted into the record.
2. Regarding Claimant's charge that on May 17, 2022, Respondent gave Ms. Shkodra access to the criminal investigation file for preparation of her Expert Report dated May 27, 2022 ("Shkodra Report"), while misleadingly stating to the Tribunal on June 29, 2022 that the material was not in its possession, the core question raised by Claimant's request remains whether Ms. Shkodra's testimony and the Shkodra Documents and their exhibits should be stricken from the record, and all references to this material stricken from Respondent's Rejoinder.
 - (a) The Tribunal sees no reason to address a number of party assertions, namely (a) that Respondent misled the tribunal, (b) that Respondent should be "blamed" for not producing the criminal investigation file at an earlier moment in time, (c) that Claimant should have sought access to the file during the discovery period and, since it did not, cannot now complain, (d) that Respondent in fact relied on documents from the criminal case file in its Rejoinder, (e) that Claimant has not complied with its own production obligations.
 - (b) The Tribunal considers that, even if most or all of these assertions were deemed to be established (and they may well have been), it would be highly disproportionate, on that basis, to grant the relief requested.
 - (c) Regarding Claimant's objection to the fact that, while Ms. Shkodra on July 1, 2022 (Exh. C-122) sent Respondent the documents upon which she relied in preparing her Report but to which she had not referred to in her Report, Respondent did not produce them to Claimant until July 27, 2022, the Tribunal is of the view that, given the potential importance of Claimant having these documents for use in preparing its post-hearing brief, Respondent ought not have waited 3 1/2 weeks to make them available to Claimant. That said, the Tribunal had set a specific deadline for production of those documents and Respondent accordingly had a right to wait until that deadline to produce them, which it did.
 - (d) What is essential at this stage is to ensure that, as throughout these proceedings, each party has had and continues to have a full and fair opportunity to present its case and refute its opponent's case. It is in light of this basic concern that the Tribunal addresses Claimant's further requests.
3. Claimant next requests that it have an opportunity to comment on the Shkodra Documents. (It does not appear that Claimant is seeking an opportunity to further examine Ms.

Shkroda). The fact that giving Claimant that opportunity would affect the date by which the Tribunal would receive the parties' post-hearing briefs has of course become an academic matter, due to the fact that the deadline for filing those briefs has long passed.

- (a) Respondent urges that we deny Claimant's request, arguing that it should suffice for Claimant to register its comments on the Shkodra Documents in its post-hearing brief. The Tribunal disagrees. We cannot know what the tenor of Claimant's comments will be and Respondent must be given an opportunity to comment on Claimant's comments. It will not have any such opportunity if those comments are postponed to Claimant's post-hearing brief. More generally, given the course of these proceedings to date, we cannot exclude the possibility that the comments Claimant makes will raise further questions that warrant consideration by counsel and the Tribunal.
 - (b) The Tribunal accordingly grants Claimant's request for an opportunity, before post-hearing briefs are filed, to comment on the Shkodra Documents.
4. Claimant places considerable emphasis on the list of investigative measures that were taken in connection with the criminal investigation. It is not entirely clear to the Tribunal whether Claimant believes that it already has access to that list and wishes only to comment on it, or whether it is requesting such a list. The Tribunal seeks clarification from Claimant.
5. Claimant's final request is that the parties be allowed to call upon expert witnesses to testify on the relevant rules of investigative procedure in Kosovo. The Tribunal believes that it would be premature to allow the parties at this time to call upon expert witnesses to testify on the relevant rules of investigative procedure in Kosovo. Not only would this entail an immediate and substantial reopening of the evidentiary record, but the Tribunal has not thus far been given any basis for doubting the adequacy of the investigative procedures followed.

The Tribunal accordingly refrains at this time from issuing any such order.

6. The Tribunal believes that the above rulings equip the parties to confer in good faith on a schedule of activity going forward. The elements of that schedule include at the least:
- (a) an opportunity for Claimant, before post-hearing briefs are filed, to comment on the Shkodra Documents, as well as an opportunity for Respondent to comment on Claimant's comments on the Shkodra Documents;
 - (b) the possibility, should the parties so wish, to engage in one further round of comments; and
 - (c) a date for the simultaneous filing of post-hearing briefs.

The Tribunal asks counsel to engage in this exercise with the utmost of good faith and in an effort not to delay these proceedings any more than is absolutely necessary in the interest of procedural fairness

On behalf of the Tribunal,

[Signed]

George A Bermann
President of the Tribunal
October 20, 2022