

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mabco Constructions SA

v.

Republic of Kosovo

(ICSID Case No. ARB/17/25)

PROCEDURAL ORDER NO. 13

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 Minguez Almeida

December 27, 2022

1. In Procedural Order No. 12, dated October 20, 2022, the Tribunal, among other things, granted Claimant's request for an opportunity to comment on the documents from the criminal investigation file that Respondent made available to Ms. Shkodra on May 17, 2022 in preparation of her May 27, 2022 Expert Report (i.e., the "Shkodra Documents"). These are documents that Respondent had told the Tribunal on June 29, 2022 that it did not have in its possession, but that in compliance with the Tribunal's request, Respondent had produced to Claimant on July 27, 2022.
2. On November 17, 2022, the Tribunal adopted the following schedule of submissions by the parties in connection with the Shkodra Documents:

Dec. 9, 2022: Claimant's comments on the Shkodra Documents (15 pages max)
Jan. 13, 2022: Respondent's comments on the Shkodra Documents (15 pages max)
Jan. 18, 2023: Claimant's reply comments on the Shkodra Documents (10 pages max)
Jan. 23, 2023: Respondent's reply comments on the Shkodra Documents (10 pages max)
Feb. 20, 2023: Post-hearing briefs (50 pages max)
3. On December 9, 2022, Claimant duly submitted its comments on the Shkodra Documents along with supporting exhibits C-123 to C-136 of its own. Claimant's comments contained the following assertions on Claimant's part:
 - (a) Claimant maintains that the Shkodra Documents confirm the compatibility between the statements made by Claimant's witnesses to the Kosovo police in the context of the bribery investigation of 2012 and the testimony of Claimant's witnesses at the hearing in this case. Claimant further maintains that when the witnesses gave their testimony at the hearing they did not have access to the transcripts of the 2012 interviews with the Kosovo police.
 - (b) Claimant set out in chart form its understanding of the allegedly confirmatory witness statements given to the Kosovo police in 2012.
 - (c) Claimant describes the interview given by journalist Baton Hazhiu to the Kosovo police in 2012 which allegedly support the facts as pled by Claimant, in particular Claimant's allegations against Mr. Asanaj and his wife Ms. Recica.
 - (d) The Shkodra Documents allegedly confirm (i) the inadequacy of the investigative measures taken by the Kosovo police and the Prosecution and (ii) the prematurity of, and lack of legal basis for, the closing of the investigation.

In addition, Claimant, believing the criminal file provided to it was incomplete, requested and obtained from the Direction for Serious Crimes Investigation on November 30, 2022 a November 27, 2012 Report authored by prosecutor Paskal Persoons. That Report allegedly establishes the following:

- (a) Prosecutor Paskal Persoons concluded that the suspicion that the suspects (Messrs Osmani, Haraqija, Rugova, Gashi and Ms. Recica) had committed the charged criminal offenses was grounded and credible and, on that basis, applied for authorization to intercept messages among the suspects between January 1, 2012 and September 18, 2012. (It appears, though it is not clearly established, that the interception actually took place.)
- (b) After the November 27, 2012 Report was issued, Mr. Persoons was removed from office and abruptly replaced by a new prosecutor, Ms. Natasha Vicary, who on February 1, 2013 allegedly prematurely and without justification proceeded to terminate the investigation.
- (c) The November 27, 2012 Report allegedly confirms the testimony given at the hearing in this case by Messrs Pacoli, Ejupi and Lluka, to the effect that the decision to postpone and withdraw the shares was exclusively linked to Claimant's refusal to pay a bribe.

Claimant further reports in its comments that it had previously requested the Basic Prosecution Office to give it access to all records and files in connection with the bribery investigation, but was at that time denied such access on the ground that the records and files contained sensitive and confidential documents. In her expert opinion dated May 27, 2022, Ms. Shkodra testified that the Prosecution was justified in denying Claimant access to the file "based on public interests." (Claimant maintains that, on the contrary, it had a statutory right under Kosovo law of access to the entire file.) Claimant observes that the records and files, though allegedly sensitive and confidential, were nevertheless shared with the State Advocacy Office, handling the arbitration for Respondent, as well as with Ms. Shkodra. More important, the Shkodra Documents reveal that on January 2 and January 9, 2013, Ms. Vicary granted access to the entire file to counsel for suspects Mr. Abrashi and Ms. Recica.

Claimant asks the Tribunal to draw adverse inferences from the Basic Prosecution Office's denial to Claimant of access to the file, without however specifying the precise inferences sought to be drawn.

Claimant finally maintains that, in light of the content of the Shkroda Documents and Respondent's failure to give Ms. Shkroda access to the entire criminal file on which she based her conclusions (including transcripts of the intercepted conversations), her Report and testimony lack credibility.

- 4. On December 13, 2022, Respondent complained to the Tribunal that in its December 9, 2022 submission, Claimant introduced new evidence (Exhibits C-130, C-131, C-135, and C-136) not among the Shkodra Documents and not already in the record. Claimant thereby allegedly violated (i) Procedural Order No. 1 (para. 16.3) which forbade the introduction of new evidence without leave of the Tribunal, (ii) Procedural Order No. 12 which confined

Claimant to commenting on the Shkodra Documents, and (iii) Respondent's due process rights.

Respondent asks, in view of the prominence of the new documents in Claimant's comments on the Shkodra Documents, that those comments, along with the new exhibits, be excluded from the proceeding in their entirety. Alternatively, Respondent asks that Claimant be instructed to resubmit its comments without the new exhibits and without any reference to them. Should Respondent's request be denied, it asks that the procedural calendar previously agreed upon be amended.

Lastly, Respondent contends that the version of Exhibit C-131 proffered by Claimant contains markings inserted by Claimant's counsel which, were the Tribunal to examine the exhibit, might influence the Tribunal's reading of it. On that basis alone, Respondent asks that Exhibit C-131 be excluded from the record.

5. On December 19, 2022, Claimant replied, maintaining that its comments of December 9, 2022 were fully consistent with Procedural Order No. 12. Among other things, Claimant argues that it became aware of the November 27, 2012 Report only upon review of the Shkodra Documents, as authorized by Procedural Order No. 12. That review showed that Claimant had been denied access to the entire criminal file, thus justifying the request to the Basic Prosecution Office for additional documents, resulting in disclosure to Claimant of the November 27, 2012 Report. Moreover, Respondent showed bad faith in not introducing the November 27, 2012 Report in the first place and in not providing it to Ms. Shkodra. Had the Shkodra Documents been produced along with Ms. Shkodra's Opinion, and had the November 27, 2012 Report been among them, the latest round of submissions would not have been necessary.

Claimant adds that it received the Report only days before the deadline for submission of its comments on the Shkodra Documents. Moreover, Respondent has every opportunity to comment on the November 27, 2012 Report, thereby preserving its due process rights. Finally the markings on Exhibit C-131 complained of by Respondent are nothing more than translations of certain passages in the November 27, 2012 Report and therefore harmless.

6. Having reviewed the Parties' several submissions, the Tribunal rules as follows:
 - (a) It is true that the November 27, 2012 Report is not among, or referred to in, the Shkodra Documents. However, the Tribunal finds that it was Claimant's review of the Shkodra Documents that led it to suspect that the criminal investigation file was incomplete and to request further documentation from the Basic Prosecution Office, resulting in disclosure of the November 27, 2012 Report and related exhibits. Due to this close connection between the Shkodra Documents and the Report, the Tribunal cannot

conclude that Claimant exceeded the scope of the review and opportunity for comment laid out in Procedural Order No. 12.

- (b) Further, had Respondent furnished the November 27, 2012 Report to Ms. Shkroda along with the rest of the criminal investigation, as it ought to have, the Report would have figured among the Shkroda Documents and therefore been disclosed to Claimant as part of the production that Respondent was ordered to make in Procedural Order No. 11 and was in fact made on July 27, 2022.
- (c) Since Claimant was excusably unaware of the existence of Exhibits C-130, C-131, C-135, and C-136, and due to their high degree of relevance to the present case, their introduction into evidence at this time cannot be rejected as untimely.
- (d) Finally, as the schedule allows Respondent to comment freely on January 13, 2023 on the entirety of the comments submitted by Claimant on December 9, 2022, including the new exhibits, as well as to reply on January 23, 2023 to any further submission the Claimant may make on January 18, 2023, the Tribunal considers that the ruling herein is respectful of Respondent's procedural due process rights.
- (e) Accordingly, Claimant's request for, and receipt of, the November 27, 2012 Report was not a breach of Procedural Order No. 12. They do not therefore warrant striking Exhibits C-130, C-131, C-135, and C-136 from the record on that basis, as Respondent has requested.
- (f) It is true that, in submitting Exhibits C-130, C-131, C-135, and C-136 to the Tribunal, without requesting and receiving the Tribunal's leave in advance, Claimant failed to comply with its obligations under Procedural Order No. 1. However, this failure on Claimant's part does not, in the Tribunal's view, preclude entry of the several exhibits into evidence. Now that the Tribunal is aware of these documents' existence, it cannot – in view of the centrality of the alleged bribery attempt to the merits of the case and the importance of having as complete a factual record as possible on this issue – justify excluding them from consideration. Nor did Respondent suffer any harm as a result of the failure on Claimant's part since, had Claimant sought leave to introduce the documents into the record in advance, the Tribunal would assuredly have granted such leave.
- (g) There remains the question of the alleged adulteration by Claimant of Exhibit C-131. Even assuming the markings represent nothing more than a translation of portions of the November 27, 2012 Report, the Tribunal prefers that it receive the exhibit without any such translations unilaterally made by Claimant's counsel. Claimant is accordingly ordered to replace Exhibit C-131 as submitted to the Tribunal, to be replaced by a version of the Report that contains no such markings.

7. It may be that the rulings made herein require a change in schedule of the upcoming submissions in connection with the Shkroda documents. The Parties are accordingly invited to confer to consider whether a postponement of the deadlines going forward, starting with Respondent's comments on the Shkodra Documents due by January 13, 2023, is necessary. If so, the Parties shall seek to reach agreement on a revised schedule for all the submissions referred to in paragraph 2, *supra*, and report such agreement (or lack thereof) to the Tribunal by no later than **Wednesday, January 4, 2023**. (The Parties are on notice that, even though such agreement may be reached, the Tribunal cannot at this time exclude the possibility that the Tribunal may, in light of the submissions on the Shkodra Documents still to come, decide that further steps are called for before the filing of Post-hearing briefs, with the result that the date for filing of such briefs may possibly need to be postponed further.)

On behalf of the Tribunal:

[Signed]

George A. Bermann
Chair of the Tribunal

Date: December 27, 2022