

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Suffolk (Mauritius) Limited, Mansfield (Mauritius) Limited and Silver Point
Mauritius**

v.

Portuguese Republic

(ICSID Case No. ARB/22/28)

**PROCEDURAL ORDER No. 2
On Transparency and Confidentiality**

Members of the Tribunal

Mr. Jeremy K. Sharpe, President of the Tribunal
Prof. Dr. Stephan Schill, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Ella Rosenberg

July 13, 2023

I. PROCEDURAL BACKGROUND

1. On 23 May 2023, the Tribunal circulated a draft of this order (“Draft PO2”) for discussion by the Parties.
2. On 21 June 2023, the Parties commented on Draft PO2.
3. On 27 June 2023, the first session was held. During the first session, the Parties and the Tribunal discussed the Parties’ comments on Draft PO2 and the Draft Procedural Order No. 1.
4. This Procedural Order No. 2 contains the Parties’ agreements and the Tribunal’s decisions concerning the transparency regime governing this case.

II. LEGAL FRAMEWORK

5. The legal framework applicable to these proceedings is determined by the Mauritius-Portugal BIT, the ICSID Convention, and the 2022 ICSID Arbitration Rules. ICSID Arbitration Rules 62-66 contain provisions concerning the publication of the award, orders and decisions, other documents filed in the proceedings, transcripts and recordings of hearings, open hearings and the definition of confidential or protected information.
6. In accordance with ICSID Arbitration Rule 1(2), the Parties may agree on other rules governing transparency and confidentiality of this proceeding.
7. In this case, the Mauritius-Portugal BIT is silent with respect to transparency and confidentiality. Therefore, the applicable provisions are those set out in Article 48(5) of the ICSID Convention and ICSID Arbitration Rules 62-66 as amended/supplemented by Section III of this Order.
8. In accordance with ICSID Arbitration Rule 66 confidential or protected information is information which is protected from public disclosure:
 - (a) by the instrument of consent to arbitration;
 - (b) by the applicable law or applicable rules;
 - (c) in the case of information of a State party to the dispute, by the law of that State;
 - (d) in accordance with the orders and decisions of the Tribunal;
 - (e) by agreement of the parties;
 - (f) because it constitutes confidential business information or protected personal information;
 - (g) because public disclosure would impede law enforcement;
 - (h) because a State party to the dispute considers that public disclosure would be contrary to its essential security interests;
 - (i) because public disclosure would aggravate the dispute between the parties; or
 - (j) because public disclosure would undermine the integrity of the arbitral process.

III. TRANSPARENCY RULES

9. The Tribunal adopts the following transparency and confidentiality rules governing the proceedings.
10. The publication of the documents mentioned in sections C, D and E, below will be revisited by the Parties and the Tribunal at the case management conference.

A. AWARD (ICSID ARBITRATION RULE 62)

11. For the purposes of Article 48(5) of the ICSID Convention and ICSID Arbitration Rule 62, the Parties consent to publication of the Award by ICSID on its website, with any redactions agreed by the Parties.¹ The Parties shall provide ICSID with their jointly redacted text within 60 days after the dispatch of the Award.
12. If the Parties do not agree on a jointly redacted text, they shall, within 60 days after the dispatch of the Award, inform ICSID and provide their respective proposals for redaction.
13. In accordance with ICSID Arbitration Rule 62(4), if the Parties disagree on redactions, ICSID shall prepare excerpts of the Award within 60 days after receipt of the Parties' notice under paragraph 11, taking into account each Party's proposed redactions as far as possible. The Parties may comment on the proposed excerpts within 60 days after their receipt, including whether any information in the proposed excerpts is confidential or protected. ICSID shall consider any comments received on the proposed excerpts and publish the excerpts within 30 days after the expiry of the time limit for the Parties' comments on the proposed excerpts.

B. ORDERS AND DECISIONS (ICSID ARBITRATION RULE 63)

14. ICSID shall publish the orders and decisions of the Tribunal, with any redactions agreed by the Parties or decided by the Tribunal, in accordance with Section G below.

C. WRITTEN SUBMISSIONS (ICSID ARBITRATION RULE 64)

15. ICSID shall not publish the Parties' main written submissions (request for arbitration, memorial, counter-memorial, reply and rejoinder).
16. The Parties may agree that ICSID will publish other written submission not falling within paragraph 14 above within 45 days from the filing of the relevant submission. These submissions will be published with any redactions agreed by the Parties or decided by the Tribunal in accordance with Section G below.

D. SUPPORTING DOCUMENTS (ICSID ARBITRATION RULE 64)

17. Supporting documents, including exhibits, legal authorities, witness statements and expert reports (including annexes, appendices or exhibits thereto) shall not be published by ICSID, unless the Parties agree otherwise.

¹ Pursuant to ICSID Arbitration Rule 72(2) this procedural 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.

E. OPEN HEARINGS (ICSID ARBITRATION RULE 65(1)-(2))

18. Hearings shall not be open to the public. The Parties may agree to the observation of hearings by duly identified persons, subject to prior notice and consent by the Parties.

F. TRANSCRIPTS AND RECORDINGS OF HEARINGS (ICSID ARBITRATION RULE 65(3))

19. ICSID shall not publish transcripts or recordings.

G. PROCEDURE FOR REDACTIONS - NON-DISCLOSURE OF CONFIDENTIAL OR PROTECTED INFORMATION (ICSID ARBITRATION RULE 66)

20. In the event that the Parties agree to the publication of documents pursuant to Sections B, C, D and F above, any confidential or protected information as defined in ICSID Arbitration Rule 66 or any additional definition agreed by Parties that is submitted to the Tribunal shall be protected from disclosure and publication in accordance with the procedure set forth below:
21. Within 30 days from the date of a decision or order, a written submission, or the date of transmittal of a final transcript or recording, a Party shall give written notice (in the form of the Transparency Schedule set out in Annex A to this Order) to the Tribunal and the other Party that it requests the non-disclosure of certain information it considers confidential or protected. Absent such a notice within the 30 day timeline, 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 or recording without redactions from the Parties.
22. Within 30 days of receipt of the notice referred to in paragraph 21, the other Party may raise objections to the proposed redactions by completing the Reply row of the Transparency Schedule set out in Annex A to this Order.
23. If no objections are raised within the deadline established in paragraph 22, the Tribunal will authorize ICSID to publish the document or recording at issue with the requested redactions.
24. If objections are raised within the deadline established in paragraph 22, the Tribunal shall decide the request for redactions.
25. In deciding a dispute, the Tribunal shall ensure that publication does not disclose any confidential or protected information as defined in Rule 66.
26. If information is to be redacted from a document or recording in accordance with paragraphs 21, 22 or 23, the Parties shall provide a redacted version of the document. Upon receipt of the redacted document, the Tribunal will ask ICSID to publish the document.

On behalf of the Tribunal,

[Signature]

Jeremy K. Sharpe
President of the Tribunal
Date: July 13, 2023

ANNEX TO PROCEDURAL ORDER NO. 2
TRANSPARENCY SCHEDULE

[insert Party]	Request [1]
Information sought to be protected from disclosure	
Legal basis for protection	
Comments	
Reply by opposing Party	
Decision	