

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Azienda Elettrica Ticinese

v.

Federal Republic of Germany

(ICSID Case No. ARB/23/47)

PROCEDURAL ORDER No. 3
On Transparency and Confidentiality

Members of the Tribunal

Sir Christopher Greenwood GBE, CMG, KC, President of the Tribunal

Mr. John Beechey CBE, Arbitrator

Prof. Campbell McLachlan KC, Arbitrator

Secretary of the Tribunal

Ms. Anna Holloway

12 September 2024

I. PROCEDURAL BACKGROUND

1. On 4 April 2024, the Tribunal circulated a draft of this order (“Draft PO3”) (originally designated draft Procedural Order No. 2) for discussion by the Parties.
2. On 17 April 2024, the Parties commented on Draft PO3.
3. On 19 April 2024, the first session was held. During the first session, the Parties and the Tribunal discussed the Parties’ comments on Draft PO3 and the draft Procedural Order No. 1 (“Draft PO1”).
4. On 24 April 2024 the Tribunal circulated revised versions of Draft PO1 and Draft PO3, inviting any further observations from the Parties by 1 May 2024 (subsequently extended to 3 May 2024).
5. On 3 May 2024, the Parties provided further revisions and comments to both drafts.
6. On 10 May 2024, the Tribunal issued Procedural Order No. 1 (reserving, for a subsequent Procedural Order No. 2, certain matters to be finalized following further discussions between the Parties). In the same communication, the Tribunal referenced the Draft PO3, stating that it had “taken note of the parties’ agreed changes to the draft” and indicating that it “understands that the effect of these changes is that, if a party wishes to redact a document in advance of publication there is no room [] for the other party to object.” The Tribunal stated that it “would be grateful for the parties’ confirmation that this is their intent, also by Friday May 17, 2024.”
7. The Parties’ subsequent correspondence focussed on the issues remaining to be addressed in Procedural Order No. 2 and, on 17 June 2024, the Tribunal issued that order. Neither Party reverted explicitly on the Tribunal’s request for confirmation of its understanding of the effect of Draft PO3, which the Tribunal takes to mean that neither party disagreed with this understanding.
8. Accordingly, the Tribunal now issues this Procedural Order No. 3, containing the Parties’ agreements and the Tribunal’s decisions concerning the transparency regime governing this case.

II. LEGAL FRAMEWORK

9. The legal framework applicable to these proceedings is determined by the Energy Charter Treaty (1998) (the “ECT”), 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.
10. In accordance with ICSID Arbitration Rule 1(2), the Parties may agree on other rules governing transparency and confidentiality of this proceeding.
11. In this case, the ECT is silent with respect to transparency / confidentiality in the context of arbitration proceedings. 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.
12. 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

13. The Tribunal adopts the following transparency and confidentiality rules governing the proceedings.

A. AWARD (ICSID ARBITRATION RULE 62)

14. 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 and by the ECT Secretariat 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.
15. 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.
16. 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 15, 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.

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.

B. ORDERS AND DECISIONS (ICSID ARBITRATION RULE 63)

17. ICSID shall publish the orders and decisions of the Tribunal, with any redactions made by any of the Parties, in accordance with Section G below.

C. WRITTEN SUBMISSIONS (ICSID ARBITRATION RULE 64)

18. ICSID shall publish the Parties' main written submissions (request for arbitration, memorial, counter-memorial, reply and rejoinder), with any redactions made by any of the Parties, in accordance with Section G below.
19. ICSID shall not publish the Parties' other written submissions unless the Parties agree otherwise no later than 28 days from the filing of the relevant submission. If the parties agree that such a written submission shall be published, the procedure for redactions in Section G below shall apply.

D. SUPPORTING DOCUMENTS (ICSID ARBITRATION RULE 64)

20. 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.

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

21. Hearings shall be open to the public through time-delayed video streaming. The Tribunal shall establish a protocol governing public digital access to a hearing and the non-disclosure of confidential and protected information addressed during the hearing at the latest at the pre-hearing organizational conference. No participants shall be present in the physical hearing room other than the Members of the Tribunal, the Parties, their representatives, the Secretary of the Tribunal, the witnesses and experts, the Court Reporter, the interpreters, the hearing technician and other hearing venue service staff, or any further persons whose physical presence in the hearing room is agreed between the Parties.

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

22. Transcripts and recordings of hearings shall not be published by ICSID, unless both Parties agree otherwise no later than 14 days from the time limit for corrections to a transcript. If the parties agree that the transcripts or recordings of the hearings shall be published, the procedure for redactions in Section G below shall apply.

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

23. With respect to publication pursuant to Sections B, C, D and F above, any confidential or protected information as defined in ICSID Arbitration Rule 66 that is submitted to the Tribunal shall be protected from disclosure and publication in accordance with the procedure set forth below.
24. Within 35 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 to the Tribunal and the other Party that it requests the non-disclosure of certain information it considers confidential or protected. It will specify the legal basis for each requested non-disclosure of information using e.g. the Schedule contained in the Annex to this Order. The Tribunal will authorise ICSID to publish the document or recording at issue with the requested redactions and specifying which

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- redaction was requested by which party on which legal basis. Such specification may be made on the document itself or in an attached transparency log.
25. Absent a notice pursuant to paragraph 24 above within the 35-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.

On behalf of the Tribunal,

[signed]

Sir Christopher Greenwood
President of the Tribunal
Date: 12 September 2024

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ANNEX TO PROCEDURAL ORDER NO. 3
TRANSPARENCY SCHEDULE

Part of the document to be protected from disclosure (specify page and paragraph)	Legal basis for protection