

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Klesch Group Holdings Limited and Raffinerie Heide GmbH

v.

Federal Republic of Germany

(ICSID Case No. ARB/23/49)

PROCEDURAL ORDER NO. 2
On Transparency and Confidentiality

Members of the Tribunal

Mr. Cavinder Bull S.C., President of the Tribunal
Judge O. Thomas Johnson, Arbitrator
Prof. Jorge E. Viñuales, Arbitrator

Secretary of the Tribunal

Ms. Aurélia Antonietti

June 14, 2024

I. PROCEDURAL BACKGROUND

1. On April 10, 2024, the Tribunal circulated a draft of this order (“**Draft PO2**”) for discussion by the Parties.
2. On May 23, 2024, the Parties commented on Draft PO2.
3. On May 28, 2024, 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 this proceeding is determined by the Energy Charter Treaty, 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 proceeding, 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 Energy Charter Treaty is silent with respect to transparency/confidentiality of this proceeding. 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;

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- (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.
9. For the avoidance of doubt, the term “confidential business information” (as employed in §8(f) above) describes:
- (a) Commercial business and trade secrets;
 - (b) Financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the Party or third party to which it relates, including, but not limited to, information on prices, costs, strategic and marketing plans, market share data, accounting or financial records not otherwise disclosed in the public domain;
 - (c) Information the disclosure of which could result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, the Party to which it relates; and
 - (d) Information the disclosure of which could interfere with contractual or business negotiations of the Party to which it relates.

III. TRANSPARENCY RULES

10. The Tribunal adopts the following transparency and confidentiality rules governing the proceeding.

A. AWARD (ICSID ARBITRATION RULE 62)

11. The Tribunal notes the Claimants’ position that ICSID shall not publish the Award or any excerpts of the Award, any supplementary decision, rectification or interpretation of an Award unless the Parties jointly agree otherwise in writing, and the Respondent’s position that the Award, Orders and Decisions should be published with appropriate redactions. The Tribunal orders that any publication shall be in accordance with ICSID Arbitration Rule 62. The Parties shall provide ICSID with their jointly redacted text within 60 days after the dispatch of the Award.¹
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.

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.

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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 §12, 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. The Tribunal notes that the Parties disagree as to the publication by ICSID of the Parties' written submissions. As a result of that disagreement, ICSID shall not publish the Parties' written submissions, unless the Tribunal renders a decision pursuant to ICSID Arbitration Rule 64(2) and 64(3) and in accordance with Section G below.

D. SUPPORTING DOCUMENTS (ICSID ARBITRATION RULE 64)

16. 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))

17. Hearings shall not be open to the public unless the Parties agree otherwise at the latest by two months before the hearing. If the Parties agree that the hearings shall be open to the public, the Tribunal shall establish a protocol governing public access to a hearing and the non-disclosure of confidential and protected information discussed during the hearing at the latest at the pre-hearing organizational conference.

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

18. Transcripts and recordings of hearings shall not be published by ICSID, unless both Parties agree otherwise no later than 30 days from the time limit for corrections to a transcript.

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

19. 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 and in this Procedural Order that is submitted to the Tribunal shall be protected from disclosure and publication in accordance with the procedure set forth below:
20. Within 60 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

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and the other Party that it requests the non-disclosure of certain information it considers confidential or protected. Absent such a notice within the 60-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.

21. Within 30 days of receipt of the notice referred to in §20, the other Party may raise objections to the proposed redactions.
22. If no objections are raised within the deadline established in §21, the Tribunal will authorize ICSID to publish the document or recording at issue with the requested redactions.
23. If objections are raised within the deadline established in §21, the Parties shall confer and seek to agree on redactions within 30 days of receipt of the objections to the proposed redactions. If the Parties reach an agreement, the Tribunal will authorize ICSID to publish the document at issue with the agreed redactions.
24. If objections remain unresolved, the disputed redaction requests and the objections thereto shall be submitted to the Tribunal in the form of the Transparency Schedule set out in Annex A to this Order.
25. If information is to be redacted from a document or recording in accordance with §§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.

H. CONFIDENTIALITY

26. The Parties agree that the Parties, ICSID, the Tribunal, the Assistant to the President and the Secretary of the Tribunal shall keep confidential all confidential or protected information as defined in ICSID Arbitration Rule 66 and in this Section.
27. Notwithstanding §26, confidential or protected information may be disclosed (i) pursuant to a legal obligation which cannot be deviated from; (ii) in order to enforce or pursue a legal right or legal claim; (iii) in order to obtain expert reports and/or witness statements, provided that the recipients are subject to strict confidentiality obligations similar to that set out herein; or (iv) for the purpose of enforcing the Award before any domestic court or other public or legal authority.
28. The obligations in §§26 and 27 above also encompass any document or information about or in relation to the parallel arbitral proceedings against the European Union (ICSID Case No. ARB(AF)/23/1) and against the Kingdom of Denmark (ICSID Case No. ARB/23/48), which the Parties and/or their representatives may be or become aware of.

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On behalf of the Tribunal,

[signed]

Cavinder Bull S.C.
President of the Tribunal
Date: June 14, 2024

**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	