

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER CHAPTER 10 OF THE DOMINICAN
REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT AND
THE UNCITRAL ARBITRATION RULES (2010)**

DAVID AVEN ET AL. V. THE REPUBLIC OF COSTA RICA
(UNCT/15/3)

PROCEDURAL ORDER NO. 5

On the organization of the hearings

Eduardo Siqueiros T., Presiding Arbitrator
C. Mark Baker, Arbitrator
Pedro Nikken, Arbitrator

Secretary of the Tribunal
Francisco Grob, ICSID

November 25, 2016

A. Background

1. The parties have agreed to hold an evidentiary hearing in December 2016 and a hearing for the examination of *quantum* experts in February 2017. This Procedural Order attempts to address the organization of both.

B. Pre-Hearing Conference Call

2. Pursuant to Section 24.1 of Procedural Order No. 1, the Tribunal held a pre-hearing conference call with the parties on **Tuesday, November 22, 2016** at 2 p.m. EST in preparation for the December hearing.
3. If necessary, another pre-hearing meeting will be convened in January 2017 to resolve any outstanding procedural, administrative or logistical matters prior to the February hearing. The exact date will be set after consultation with the parties.

C. Hearing Dates, Schedule and Location

4. The December hearing will be held, as scheduled, on **Monday, December 5, 2016** through **Monday, December 12, 2016**. The examination of both *quantum* experts, Dr. Abdala and Mr. Hart, will be done at the hearing currently scheduled for **Tuesday, February 7, 2017**.
5. The daily schedule of these hearings shall be as follows:
 - Start: 9:00 a.m.
 - Breaks: mid-morning and mid-afternoon, each 15 minutes in duration
 - Lunch: around 12.30 p.m., 60 minutes in duration
 - End: no later than 6:00 p.m.
6. The Tribunal may extend the hearing hours if necessary.
7. The hearings will be held at the ICSID facilities at the World Bank Headquarters in Washington, D.C. Further logistical details will be provided in due course.

D. Transparency

8. Pursuant to Section 24.1 of Procedural Order No. 1 and Article 10.21.2 of the DR-CAFTA, the hearings will be open to the public.
9. The hearings will be made accessible to the public in real time via live webcast on ICSID's website. An announcement has been posted on ICSID's website.

10. If either party intends to use Protected Information during the hearings, that party should provide prior notice to the Secretary, who will have the video feed discontinued until that party confirms that it does not intend to use further Protected Information anymore.
11. If Protected Information is inadvertently introduced during the hearings, either party shall immediately notify the President of the Tribunal. Upon such notice, the Secretary will immediately have the video feed discontinued. The party making the notification will have the opportunity to identify the Protected Information, and the other party will have the opportunity to respond.
12. In case of disagreement between the parties, the Tribunal will make a determination.

E. Allocation of Time Between the Parties

13. The parties shall be allocated an equal amount of hearing time.
14. Each party shall have a total time allocation for the December hearing of no more than 18 hours,¹ inclusive of Opening and Closing Statements. In addition, the parties will have 3.0 hours each for the February hearing.
15. The parties will broadly allocate their time in accordance with the schedule attached to this order as **Annex A**.
16. The parties agree to adopt a chess-clock method of time allocation. The parties also agree that, to the extent possible, the timetable shall be adapted when required to allow the most efficient use of the time available (for example, by making a fact or expert witness available for cross-examination earlier than planned if the timetable allows it, provided always that the parties shall endeavour not to split cross-examination of a particular fact or expert witness over two days if that would not otherwise have been the case).
17. The Secretary will maintain hearing time using the chess clock method.

F. Opening Statements

18. The parties shall each be permitted to make Opening Statements of up to 3.0 hours. The amount of time that each party decides to allocate to their Opening Statements will be deducted from the total time allocation (18 hours) for the December hearing.

¹ 6 Hearing Days x 6 hours of party time each day = 36 hours/2 = 18 hours each.

G. Witness and Expert Examinations

Notification of witnesses

19. Pursuant to Section 23.2 of Procedural Order No. 1 and the Amended Timetable, each party was required to notify the other party, with a copy to the Secretary who would then forward these communications to the Tribunal, of the witnesses and non-*quantum* experts offered by the other party which it intended to cross-examine at the December hearing. The parties sent these notifications on **November 4, 2016**.
20. Pursuant to the Tribunal's order of November 17, 2016, the claimants submitted on November 18, 2016: (i) new exhibits C- 282 to C- 294 with an accompanying index; and (ii) a witness statement made by Jorge Antonio Briceño Vega in its Spanish original text along with an English translation. By letter of the same date, the Respondent confirmed that it would call Mr. Briceño for cross examination for the February hearing. The Respondent also informed that it would take the opportunity to respond to the new evidence on the record and new witness statement by **January 9, 2017**.
21. By communication of November 16, 2016, the Claimants informed that Dr. Robert Langstroth would not attend the December hearing. During the pre-hearing conference, however, the Claimants confirmed that they would make Dr. Langstroth available for the December hearing.
22. Parties have agreed that neither of them shall add any witness or experts to this list after the exchange on November 4, 2016, without the agreement of the other party or permission from the Tribunal.
23. Either party can withdraw any witnesses or experts from their list for cross-examination after November 18, 2016, but shall do so as soon as possible.
24. Pursuant to Section 23.3 of Procedural Order No. 1, the Tribunal shall notify the parties of any witness not scheduled to attend the December hearing and provide oral testimony which the Tribunal wishes to examine shortly after receiving the parties' notifications and, in any event, no later than by **Wednesday, November 23, 2016**. Any cross-examination or re-direct examination of any such witness called by the Tribunal will be limited to matters arising out of the Tribunal's questions. The Tribunal confirms that it does not intend to examine any witness not yet called by the parties.
25. Pursuant to Section 10.12 of Procedural Order No. 1, simultaneous interpretation from and into English and Spanish will be available during the hearings. Pursuant

to Section 10.13 of Procedural Order No. 1 and the Amended Timetable, if a witness or expert needs to give testimony in a language other than English or Spanish the party that offered the witnesses or expert shall notify the Tribunal, as soon as possible, and in any event no later than **at the pre-hearing conference**, and such party shall be responsible for costs of interpretation into both English and Spanish. On November 17, 2016, the parties informed the Tribunal of the languages in which their respective witnesses and experts would testify. No witness or expert is expected to give testimony in a language other than English or Spanish.

Order and format of witness and expert examination

26. In accordance with the Amended Timetable, the parties were invited to agree on and inform the Tribunal of a tentative schedule for witness and expert examination, which shall include the anticipated length of time. By communication of November 22, 2016, the Claimants submitted a draft hearing schedule, which has preliminary been agreed upon by the parties. As indicated above, this schedule is attached to this order as **Annex A**.
27. As a general rule, each witness/expert shall be available for examination half a day before and after the time at which his/her examination is scheduled.
28. Pursuant to Section 23.5 of Procedural Order No. 1, witnesses other than the parties to this arbitration will be excluded from the hearing room until they have provided their testimony in full. The party offering the affected witness shall instruct him or her, and take other steps as may be appropriate, to ensure that the witnesses should not watch the webcast of the hearing prior to his or her testimony. There will be no sequestration of expert witnesses.
29. The Tribunal will administer ICSID's standard witness and expert admonitions.
30. Pursuant to Section 23.4 of Procedural Order No. 1, the procedure for direct examination, cross-examination, re-direct examination and re-cross examination shall be as follows:
 - 26.1. Witnesses giving oral testimony may first be briefly examined in direct examination.
 - 26.2. Experts giving oral evidence shall first give a brief summary of their report, followed by a brief direct examination.
 - 26.3. The direct examination of witnesses shall be followed by examination by the other party ("cross-examination"), and subsequently by the party producing the witness ("redirect examination").

- 26.4. The redirect examination shall be limited to matters raised in cross-examination.
31. The Tribunal can ask any witness, factual or expert, questions at any time during the witnesses examination or redirect.
32. Mr. Julio Jurado Fernández submitted witness statements on behalf of Respondent, although on issues that deal exclusively with the interpretation of Costa Rican law. The Tribunal will allow Mr. Jurado to testify as if his statement was that of an expert .
33. Cross-examination bundles (exhibits or legal authorities on the record to which the fact or expert witness is to be referred) are to be provided immediately before the cross-examination. The party examining the witness will provide a copy of the cross-examination bundle to the witness or expert, to the other party and to each arbitrator, the Secretary, the court reporters (2) and the interpreters (2). Neither party may introduce a document during the examination or cross-examination of a witness that is not already on the record.

H. Closing Statements

34. The parties shall each be permitted to make Closing Statements of up to 45 minutes at the end of the December hearing, and at the end of the February hearing, in both cases limited to the matters addressed at each phase of the hearing.

I. Hearing Materials

35. The rules regarding additional documents and new evidence/exhibits are provided by Section 15.3 of Procedural Order No. 1, which states that neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, save under exceptional circumstances at the discretion of the Tribunal upon a reasoned written request followed by observations from the other party. Should a party request to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other party is afforded sufficient opportunity to make its observations concerning such a document.
36. The rules regarding the use of PowerPoint and demonstrative exhibits are provided by Section 15.8 of Procedural Order No. 1, which states that demonstrative exhibits (such as Power Point slides, charts, tabulations, etc.) may be used at the hearings provided that they contain no new evidence. Each party shall number its

demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. At the beginning of the respective presentation at the hearing, the party submitting such exhibits shall provide them in hard copy to the other party, the Tribunal Members, the Tribunal Secretary, the court reporters (2) and interpreter (2), and subsequently send them by email to the Secretary and the other party in electronic format.

37. As communicated in the Tribunal's letter of November 17, 2016, the parties are welcome to submit an agreed *dramatis personae*, chronology and list of issues, by no later than **November 30, 2016**.
38. Hard copies of the submissions made by the parties pursuant to section 16 of Procedural Order No. 1 will be available for the Tribunal Members at the hearing room. In addition, the parties agree to provide one set of hard copies of: (i) the translations of Memoranda, witness's statements, expert reports and exhibits, as applicable; (ii) all Procedural Orders; (iii) the preliminary hearing transcript and (iv) the Redfern Schedules.

J. Records of the Hearing

39. Pursuant to Section 26 of Procedural Order No. 1, sound recordings will be made of the hearings as well as verbatim transcripts in the two procedural languages.
40. English and Spanish verbatim transcripts will be available in real-time using LiveNote or similar software from Monday, December 5 through Friday, December 9, 2016. Electronic versions of the transcripts will be provided to the parties and the Tribunal on a same-day basis. On Monday, December 12, 2016, English transcripts will also be made available in real-time with electronic versions to follow the same day. Spanish transcripts, however, will only be made via audio recording and will therefore be provided to the parties later.
41. Any corrections to the transcripts shall be agreed by the parties and communicated to the tribunal as provided in Section 26.3 of Procedural Order No. 1.

K. Non-Disputing Party submissions

42. Upon consultation with the parties, on November 16, 2016, the Tribunal informed the DR-CAFTA Parties, through the ICSID Secretariat, of the December hearing dates and invite them to indicate whether they would wish to make written or oral submissions pursuant to DR-CAFTA Article 10.20.2.
43. On November 21, 2016, the United States replied proposing to inform no later than on December 1, 2016 whether it would make a submission under CAFTA-DR

Article 10.20.2. The United States also urged the Tribunal and the parties to consider allowing for a short allocation of hearing time for the event the United States decides to make an oral submission and requested the opportunity to attend the hearing in the hearing room.

44. During the pre-hearing conference, the parties confirmed that they have no objection to the requests made by United States and urged the Tribunal to set a suitable timetable for the parties' to comment on any submission made pursuant to CAFTA-DR Article 10.20.2.

L. Post-Hearing Procedural Steps

45. During the pre-hearing conference, the parties agreed to one round of post-hearing briefs, which shall be submitted simultaneously by **Friday, February 24, 2016**. The Tribunal shall thereafter, at an appropriate point, declare the hearings closed.

M. Logistics

46. The ICSID Secretariat, in consultation with the parties and the Arbitral Tribunal, will make the necessary logistical arrangements, including the designation of the hearings and breakout rooms, set-up details, list of participants and access badges, transcription, recording, other technology, catering, etc.

Date: November 25, 2016

For the Arbitral Tribunal



Mr. Eduardo Siqueiros
Presiding Arbitrator