

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Daniel W. Kappes and Kappes, Cassiday & Associates

(Claimant)

v.

Republic of Guatemala

(Respondent)

ICSID Case No. ARB/18/43

PROCEDURAL ORDER NO. 9

Members of the Tribunal

Ms. Jean E. Kalicki, President of the Tribunal

Mr. John M. Townsend, Arbitrator

Prof. Zachary Douglas QC, Arbitrator

Secretary of the Tribunal

Mr. Francisco Grob

Ms. Daniela Argüello

Assistant to the Tribunal

Dr. Joel Dahlquist

12 January 2022

I. PROCEDURAL HISTORY

1. On 10 November 2021, the Tribunal communicated to the Parties that, in light of World Bank restrictions on large group gatherings in force at the time, and believed likely to remain in force in February 2022, the Tribunal considered it “unlikely” that the February-March 2022 hearing (the “**Hearing**”) could take place in person. The Tribunal invited the Parties to confer and share their views by 19 November 2021 on the organization of the modality of the hearing, with the alternatives in principle being in-person but with severe restrictions on the number of participants, “hybrid,” or fully remote.
2. On 19 November 2021, the Tribunal further communicated to the Parties that “without prejudice to any eventual determinations about safety, travel and other in-person restrictions related to COVID-19 in general,” the Tribunal had been informed of certain loosening in World Bank restrictions, resulting in permission for a larger number of participants in the hearing rooms available at its premises. The Tribunal also extended the deadline for the Parties to submit their initial views to 22 November 2021.
3. On 22 November 2021, the Parties submitted their separate initial views on the modality of the Hearing. Both Parties expressed a preference for an in-person hearing. The Claimants proposed that non-Party participants attend remotely to the extent possible in order ensure that a maximum of Party attendees could be present in the hearing room, a proposal with which the Respondent agreed. The Claimants also proposed that “relatively minor witnesses be cross-examined remotely,” a proposal on which the Respondent did not express a view. The Respondent requested further time to discuss this and other logistical arrangements with the Claimants.
4. The Tribunal thanked the Parties for their initial reactions in an email on 24 November 2021, taking note of the Parties’ shared preference for some kind of hybrid modality. In the same communication, the Tribunal nonetheless expressed some continuing concerns relating to (i) travel restrictions that might be imposed on some key participants (including possibly members of the Tribunal), and (ii) the still relatively limited hearing room capacity at the World Bank, which at most would leave a total of eight in-person hearing room slots to be shared between the Parties’ representatives and counsel. Given these concerns, the Tribunal communicated that it considered it necessary to plan not only for a possible hybrid hearing, but also as a contingency for a fully remote hearing, with a final decision to be taken in early January 2022. Consequently, the Tribunal requested that the Parties seek to agree within two weeks on an appropriate hearing manager for a remote hearing. The Tribunal also welcomed any further comments from the Parties by 1 December 2021.
5. On 1 December 2021, the Parties communicated jointly that they continued to confer with respect to hearing logistics, exploring “all options.” One potential option considered by the Parties was to conduct the Hearing in person at a Washington, D.C. venue different from the World Bank headquarters, with fewer restrictions in place as to the number of participants.

The Parties stated that they wished to “gauge whether the Members of the Tribunal would be willing (circumstances permitting) to attend the hearing” under those circumstances, and whether the Tribunal had any thoughts on the number of participants it would be comfortable attending any such gathering. The Parties also sought the Tribunal’s permission to provide further comments by 6 December 2021.

6. On the next day, 2 December 2021, the Tribunal responded, thanking the Parties for exploring various options. The Tribunal explained that it considered it very difficult to relocate the Hearing venue away from the World Bank, given the various technical implications of such a shift. However, the Tribunal noted that a relocation no longer seemed necessary, given a 2 December 2021 announcement that the World Bank intended to move to ease certain restrictions on in-person hearings, allowing for larger groups to gather. This development, if ultimately borne out, the Tribunal noted, “should resolve reasonable concerns about the number of attendees.” However, the Tribunal also cautioned that “any in-person hearing in Washington, D.C. still remains subject to the over-arching question of whether it can be safely achieved, given that it would require international travel by a number of key participants, and also given increasing COVID-19 caseloads and now the latest developments about Omicron, which are leading a number of jurisdictions to re-impose restrictions on travel and/or mandatory quarantines when returning from travel.” The Tribunal therefore reiterated that, as a contingency pending a final decision on Hearing modality to be taken in January 2022, the Parties should work to retain a hearing manager for a remote hearing and report back by 15 December 2021 with the identity of the agreed provider. The Tribunal also invited further comments by the Parties by 8 December 2021.
7. On 8 December 2021, the Claimants reiterated their preference for an “in-person hearing at ICSID’s facilities in Washington, assuming that conditions at the time permit that to occur,” and informed the Tribunal that the Parties would report back with the identity of a retained hearing provider by 15 December 2021. On the same day, the Respondent echoed the Claimants’ preference and also confirmed that the Parties continued to confer about a provider for a remote hearing.
8. On 15 December 2021, the Parties informed the Tribunal that they had retained FTI Consulting as a remote hearing manager, if required, for the Hearing.
9. On 20 December 2021, the Tribunal circulated a draft hearing protocol for the Parties’ review, in advance of the pre-hearing conference (the “**PHC**”) on 21 January 2022. The draft hearing protocol included alternatives depending on the final decision regarding Hearing modality. The Tribunal asked the Parties to submit consolidated comments on the draft, in the form of a redline, no later than five days before the PHC. The Tribunal also requested that the Parties provide their updated views on the Hearing modality by 5 January 2022.
10. Before the Parties could provide their updated views, the Tribunal communicated on 4 January 2022 that, as of that day, the World Bank had announced the temporary closure of

its offices, in response to the worsening COVID-19 situation in Washington, D.C. and surrounding areas. As a consequence, it was unlikely that the World Bank would move to ease restrictions, as previously intended, in time for a hybrid hearing to take place by the end of February 2022. In the light of this recent development, the Tribunal invited the Parties to provide updated comments on the Hearing modality by 10 January 2022.

11. On 10 January 2022, the Claimants communicated that, in light of the recent developments, they were of the view that “regrettably, it is necessary to plan for a fully remote hearing.” The Claimants also reiterated that the Parties had retained FTI Consulting for these purposes. Later that day, the Respondent informed the Tribunal that it had “no further comments with regards to the modality of hearing beyond those comments it has previously shared with the Tribunal.”
12. On 11 January 2022, the Tribunal acknowledged the Parties’ 10 January 2022 communications. Furthermore, the Tribunal indicated that, for purposes of the Parties’ ongoing discussions concerning the draft hearing protocol in advance of the PHC, the Parties should assume, for reasons to be set forth soon in a procedural order, that the Tribunal and the Parties “(a) will likely have little choice but to proceed in a remote modality; and (b) will discuss details and any problems that this shift may cause at the pre-hearing conference call, based on the comments by then received.”
13. As indicated in the Tribunal’s 11 January 2022 communication, this Procedural Order sets out the reasons for the Tribunal’s decision that the Hearing will be conducted remotely.

II. THE TRIBUNAL’S ANALYSIS AND DECISION

14. For reasons related to restrictions stemming from the emergence of the new and exceptionally virulent Omicron variant of the COVID-19 virus in the Washington, D.C. area, the World Bank has indicated that it will not be able to accommodate an in-person or hybrid hearing of the size required for the Hearing in this case on the scheduled dates.
15. The Claimants have expressly confirmed that given this development, they accept with regret that the Hearing must necessarily be conducted remotely. The Respondent has not presented any principled objections to a remote modality, although it has noted (as have the Claimants) that this would not have been its preference. Notably, neither Party has proposed that the Hearing be rescheduled for a putative but uncertain future date when COVID-19 restrictions will again be lifted in Washington, D.C. and in the various jurisdictions from which participants would have to travel for an in-person session.
16. Given these developments, the Tribunal’s reluctant conclusion is that the Hearing must proceed remotely, for the safety of all participants and in the absence of any viable in-person alternative and any principled objections from the Parties.

17. The Tribunal understands that a Hearing by remote modality will require certain accommodations regarding sitting times and potentially other arrangements. As indicated in its communication of 11 January 2022, the Tribunal stands ready to discuss these issues, including practical solutions to any particular problems the Parties may identify, at the PHC scheduled for 21 January 2022.

[signed]

Ms. Jean Kalicki
President of the Tribunal
Date: 12 January 2022