

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. 11

Members of the Tribunal

Ms. Jean 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

3 March 2022

I. PROCEDURAL HISTORY

1. In Procedural Order No. 9, the Tribunal determined that the Hearing in this case would proceed by remote modality, with the technical aspects managed by FTI Consulting (“**FTI**” or the “**Technical Operator**”), whom the Parties had jointly agreed to retain for these purposes.
2. At the Pre-Hearing Conference on 21 January 2022, the Parties and the Tribunal discussed the advantages of witnesses having access during their examinations to someone who could assist as needed with technical issues, to which neither Party objected. In addition to such technical assistance, the Respondent proposed that each Party be allowed to send a party representative to be present in the room together with each testifying witness. The Claimant objected to this proposal, with reference, *inter alia*, to the ongoing pandemic.¹
3. The Parties and the Tribunal also discussed using a 360-degree camera to monitor the room from which each witness was testifying, to be administered by the FTI, to which neither Party objected.²
4. Having considered the Parties’ positions as expressed during the Pre-Hearing Conference, the Tribunal issued its Procedural Order No. 10 (“**PO10**”) on 25 January 2022. In PO10, the Tribunal determined *inter alia* as follows:
 - “Witnesses and experts will be shown documents from [a cross-examination bundle in electronic format] by the Technical Operator through the Hearing Platform. Witnesses and experts will be permitted to have an IT specialist, paralegal, or equivalent assistant in the room to assist them, if necessary, in viewing the relevant documents on the Hearing Platform during the examination” (PO10, ¶ 19);
 - “Witnesses and experts that testify by remote modality are to follow the instructions provided in Annex C” (PO10, ¶ 32)
 - “The Parties shall ensure that each of their representatives, witnesses and experts who will connect to the Hearing Platform use a stable internet connection offering sufficient bandwidth, and use a camera and microphone/headset of adequate quality” (PO10, Annex C, ¶ 7);
 - “[R]emote Hearing Participants are advised to have at least two screens, and preferably three ... to facilitate simultaneous viewing of: (i) the platform video connection; (ii) the Real-time transcript; and (iii) offline documents” (PO10, Annex C, ¶ 12);

¹ Audio Transcript of the Pre-Hearing Conference, from 38:15.

² Audio Transcript of the Pre-Hearing Conference, from 49:40.

- “Each testifying witness shall be required to testify in a location with a 360 degree camera. Arrangements shall be made with FTI in advance for the testing and set-up of all such cameras, as well as the rental of equipment as necessary” (PO10, Annex C, ¶ 19);
 - “No person shall be present in the room with the testifying witness or expert during that witness’s testimony and examination, except that witnesses and experts will be permitted to have an IT specialist, paralegal, or equivalent assistant in the room to assist them, if necessary, in connecting with the Hearing Platform and addressing any technical issues” (PO 10, Annex C, ¶ 20);
 - “Each witness and expert shall affirm at the start of the examination that he or she will not receive or provide communications of any sort during the course of his or her examination” (PO10, Annex C, ¶ 21);
 - “The witness or expert shall not use a ‘virtual background’ or in any way prevent or limit the recording of the remote venue from which he or she is testifying” (PO10, Annex C, ¶ 23).
5. During the second day of the Hearing, 1 March 2022, after examination already had begun of the Claimants’ first witness Mr. Kappes, the Respondent objected that Mr. Kappes was using monitors supplied by Claimants’ counsel, rather than monitors rented from and remotely controlled by FTI (which the Respondent had opted to use for its witnesses).³ The Respondent expressed concern that this could allow Mr. Kappes to receive unauthorized communications during his examination. In response to this concern, the Tribunal arranged for the 360-degree camera recording the room in which Mr. Kappes was testifying to be readjusted in order to capture a clear view of the display field of all monitors in the room, and indicated that an equivalent camera angle would be used with all subsequent witnesses.⁴
6. Also during the examination of Mr. Kappes, the Respondent requested that the Tribunal reconsider its prior decision, reflected in PO10, that witnesses not be accompanied during their examination by anyone other than an IT specialist. Specifically, the Respondent requested that it be allowed to send a representative to White & Case’s London office, as well as to the location in Guatemala in which Claimants’ other fact witnesses were scheduled to testify, that day or the next day.⁵ Given that Mr. Kappes’ testimony was already under way, the Tribunal deferred further discussion of this application until after conclusion of his examination.⁶ Mr. Kappes’ examination occupied the rest of that Hearing day.
7. At the conclusion of that Hearing day, the Tribunal stated that it was not persuaded that there had been any changed circumstances justifying revisiting its earlier determination regarding

³ Preliminary Hearing Transcript, Day 2, p. 350:4-6.

⁴ Preliminary Hearing Transcript, Day 2, from p. 356:16.

⁵ Preliminary Hearing Transcript, Day 2, p. 359:22-360:7.

⁶ Preliminary Hearing Transcript, Day 2, p. 360:8-22.

witnesses being physically accompanied during examination by anyone other than an IT specialist, particularly given that the earlier ruling was made *inter alia* in response to the same COVID-19 safety concerns that had led to the Hearing as a whole being held through a remote modality, and given also the practical impediments to implementing any new rule before the remainder of Claimants' fact witnesses were set to testify the next day. The Respondent then indicated that notwithstanding the Tribunal's preliminary views, it nonetheless wished to put its application in writing, including an articulation of changed circumstances, to which the Claimant objected. The Tribunal granted the Respondent's request to make an application in writing, and confirmed that it would give due consideration to any such application upon receipt.

8. On 2 March 2022, prior to the start of the third Hearing day, the Respondent submitted its application in writing, requesting that the Tribunal issue a number of orders in the interest of safeguarding the integrity of the proceeding (the "**Application**").
9. At the outset of the third hearing day, 2 March 2022, the Tribunal invited the Claimants to respond promptly in writing to the Application, in order to allow the Tribunal to rule on it in an expeditious manner.
10. On 2 March 2022, after the conclusion of the third Hearing day, the Claimants submitted their reply to the Application (the "**Reply**").

II. THE PARTIES' POSITIONS

A. The Respondent's Position

11. In its Application, the Respondent expresses concerns about the integrity of the ongoing proceedings. The Respondent references para. 19 of Annex C to the Tribunal's PO10, which provides that "[e]ach testifying witness shall be required to testify in a location with a 360-degree camera. Arrangements shall be made with FTI in advance for the testing and set-up of all such cameras, as well as the rental of equipment as necessary (emphasis by the Respondent)."
12. The Respondent specifically objects to the monitors used by the Claimants' witnesses, which are not controlled by the FTI, but rather by the Claimants themselves. The Claimants have rented only the 360-degree camera from FTI, and not the monitors, which the Respondent argues means that FTI cannot guarantee the integrity of the proceedings. According to the Respondent, this is contrary to their understanding that all necessary equipment should have been rented from FTI, which the Respondent itself has done.
13. While assuming that all Hearing participants will behave in good faith, the Respondent says that "Claimant's Counsel behavior have made it necessary" to make the present Application.
14. In order to guarantee the integrity of the proceedings, the Respondent therefore requests that the Tribunal:

a. To make all possible arrangements and efforts, so that the witness and expert examinations be initiated and finalized on the same day, avoiding the sequestration of witnesses and experts [footnote omitted].

b. That a representative from the Parties be present at all times during the examination of witnesses and experts. This is nothing extraordinary and it does not require excessive additional costs or international traveling [footnote omitted]. It is the rule in many remote proceedings and is the rule internationally accepted and recommended in the Seoul Protocol on Video-Conferencing in International Arbitration [footnote omitted]. In this regard, we inform that Guatemala will be transmitting from the Ministry of Economy in Guatemala City during the first week, and from the offices of GST LLP in Washington, DC during the second week of the hearing.

c. Additionally, Guatemala requests that an additional camera be placed where the 360-degree camera was located today, and that the 360-degree camera be used as originally envisaged and strictly following the instructions provided by FTI. This additional camera shall record the monitors that are displayed to the witness or expert. Alternatively, we request that the Claimants hire all the monitors used for this purpose from FTI. Please note that the Republic of Guatemala is willing to cover the costs this will entail, reserving the right to request the reimbursement as cost of these proceedings.

B. The Claimants' Position

15. In its Reply, the Claimants object to the Respondent's Application. The Claimants ask that the Application be denied, "for the same sound reasons it has now twice been rejected by this Tribunal."
16. The Claimants point out that, contrary to the Tribunal's oral instructions, the Application does not contain an explanation for any change in circumstance that would explain why the Respondent is bringing the Application only now, more than five weeks after the Pre-Hearing Conference. Nor does the Respondent explain why it raised the issue only after the Claimants' witness examination had already begun.
17. The Claimants further refer to para. 19 of Annex C to PO10, and argue that they have complied with the language of that provision by only renting the necessary equipment from FTI. The Claimants were already in possession of most of the required equipment, and therefore only arranged for renting one 360-degree camera from FTI.

III. THE TRIBUNAL'S ANALYSIS AND DECISION

18. The Tribunal observes that neither Party raised any question during the Pre-Hearing Conference regarding who would supply the monitors being used by witnesses during their examination, and accordingly, the issue is not expressly regulated by PO10.
19. Nonetheless, certain provisions of PO10 reflect the Tribunal's assumption at the time that the Parties themselves, with the assistance of their respective counsel, would be responsible for ensuring adequate equipment for witnesses to use. This includes the statement that "[t]he Parties shall ensure that each of their representatives, witnesses and experts who will

connect to the Hearing Platform use a stable internet connection offering sufficient bandwidth, and use a camera and microphone/headset of adequate quality” (PO10, Annex C, ¶ 7, emphasis added); the statement that “remote Hearing Participants *are advised to have* at least two screens, and preferably three ... to facilitate simultaneous viewing of: (i) the platform video connection; (ii) the Real-time transcript; and (iii) offline documents” (PO10, Annex C, ¶ 12, emphasis added); and the statement that “[e]ach testifying witness shall be required to testify in a location with a 360 degree camera. Arrangements shall be made with FTI in advance for the testing and set-up of all such cameras, *as well as the rental of equipment as necessary*” (PO10, Annex C, ¶ 19, emphasis added). The last provision in particular referred to FTI’s offer of rental equipment to the extent the Parties considered that to be helpful. The Tribunal *did not require*, however, that equipment be rented from FTI. Nor did it mandate that equipment be identical for each witness. It mandated only that arrangements be made in advance for the testing of the relevant set-ups, so as to ensure that FTI could effectively display documents to each witness and that the 360-degree cameras be functional and appropriately positioned.

20. The Tribunal’s understanding that the Parties might choose to set up their own monitors for the use of witnesses, rather than rent all equipment from FTI, is consistent with standard practice for remote hearings. Indeed, in the Tribunal’s experience, most remote hearing providers do not even offer rental equipment packages, but leave it for the Parties and their counsel to arrange appropriate equipment for witnesses’ use. Where witnesses are testifying from the offices of counsel, as opposed to their individual homes or offices, it is therefore quite common for them to use monitors, microphones and web cameras supplied by counsel. There is no general practice in remote hearings whereby all witnesses must use a standardized form of monitor supplied by a third party, much less one that has been configured technically to prevent any possible receipt of unauthorized communications. Rather, alternative measures are customarily used to guard against any such inappropriate conduct.
21. The Tribunal remains satisfied that the arrangements put in place for the Hearing appropriately safeguard the integrity of the proceedings. A live 360-degree camera feed is visible to the Parties at all times, allowing the Parties to monitor in real time what is shown to any witness and to verify that nothing improper is displayed. The 360-degree camera also shows what is in front of the witness, and whether other persons are present in the room. That camera can be, and indeed repeatedly has been, readjusted so as to satisfy the Parties. Furthermore, the 360-camera feed is recorded by FTI, and will be made available to the Parties for their further review. The Tribunal also notes that, pursuant to para. 21 of Annex C to PO10, each witness is asked to affirm that he or she “will not receive or provide communications of any sort during the course of his or her examination,” and that the same provision goes on to provide that “[w]itnesses subject to sequestration shall also affirm that they have not attended, watched a recording, or read the transcripts of the Hearing prior to their examination.” These affirmations have been made, and will continue to be made, by all witnesses testifying in this Hearing.

22. The Tribunal further considers that it would not only be irregular, but also highly impractical, to alter the previously established hearing protocol when the hearing is in progress. This is especially so considering that the Respondent has not identified any specific grounds for concern about either the witness examinations conducted so far or those to come later in the Hearing.
23. Specifically with respect to the Respondent's request that a party representative be present at all times during the examination of witnesses and experts, the Tribunal wishes to emphasize that this Hearing is proceeding remotely in order to safeguard the health of all participants in light of the Covid-19 pandemic. Changing the established rules of the Hearing, such as to open witness rooms to additional participants on short notice (without opportunity to ensure adequate testing and other precautions) would undermine that aim. It would also create serious logistical difficulties at this late stage.
24. For these reasons, the Tribunal declines to reconsider its directions, as incorporated in PO10. Consequently, the Tribunal rejects the Respondent's Application.

[signed]

Ms. Jean Kalicki
President of the Tribunal
Date: 3 March 2022