

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Daniel W. Kappes and Kappes, Cassidy & Associates

v.

Republic of Guatemala

(ICSID Case No. ARB/18/43)

PROCEDURAL ORDER NO. 13

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

Date of the Order: 5 April 2022

I. INTRODUCTION

1. Pursuant to Procedural Orders Nos. 1 and 10 (“PO 1” and “PO 10”, respectively), and the directions given by the President of the Tribunal on the last day of the Hearing, the Tribunal issues the present Procedural Order No. 13 concerning next steps following the hearing on the merits and jurisdiction (the “Hearing”) that took place remotely from Monday, 28 February 2022 to Friday, 11 March 2022.

II. TRANSCRIPTION

2. The provisions of PO 1, Sections 22.2 and 22.3 concerning transcription (reproduced below) state as follows:

“22.2. Verbatim transcripts in both procedural languages shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the parties or ordered by the Tribunal, the verbatim transcripts shall be available in real time using LiveNote or similar software and electronic transcripts shall be provided to the parties and the Tribunal on a same-day basis.

22.3. The parties shall agree on any corrections to the transcripts within 30 days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the parties in the transcripts (“revised transcripts”). The Tribunal shall decide upon any disagreement between the parties and any correction adopted by the Tribunal shall be entered by the court reporter in the revised transcripts.”

3. Pursuant to paragraph 22.3 of PO 1 and paragraph 38 of PO 10, and after having consulted the Parties, corrections to the transcripts shall be made no later than **Monday, 11 April 2022**.¹

4. Pursuant to paragraph 47 of PO 10:

“47. [...] [t]he Parties have also agreed that they will not use protected information during examination of factual and expert witnesses without any previous notice or action, and that they will redact the transcripts and video recordings after the hearing to remove such references to protected information. This rule should be applied with

¹ Final Transcript of Day 10, p. 2663: 4 -18.

a certain degree of flexibility. The Parties will undertake best efforts to ensure that they identify confidential information before its use, however, the failure to do so should not be used as a reason to interrupt oral argument or examinations. Any designations of confidential information that are not made before its use shall be made promptly following the close of the Hearing, in connection with the review and correction of Hearing transcripts, to enable the efficient redaction of transcripts and video recordings.”

5. Such review and corrections should indicate, either by way of highlight or comment bubble, any designations of confidential information “that would eventually need to be redacted from both the transcripts and the video[s] before [they are] posted publicly.”² Once the corrections have been received, the ICSID Secretariat can proceed to prepare final versions of both the transcripts and the videos in both their full and their redacted versions.³
6. Pursuant to paragraph 22.3 of PO 1, the sound recordings and transcripts of the hearing are available on case BOX filesharing platform.

III. INTERPRETATION

7. While reviewing transcripts the Parties are not precluded from raising any concerns regarding interpretation with respect to passages that they deem to be material to the case. However, disputes with respect to interpretation should be kept to a minimum. If the Parties cannot agree on corrected translations, the Tribunal “would have to take the two alternate translations back to the official interpreters for their consideration.” The Tribunal shall decide on the dispute “under the guidance of the same people who have done the original translation.”⁴
8. Pursuant to paragraph 11.14 of PO 1, “[t]he costs of the interpreter(s) will be paid from the advance payments made by the parties, without prejudice to the decision of the Tribunal as to which party shall ultimately bear those costs.”

² Final Transcript of Day 10, p. 2663: 19 to p. 2664: 3.

³ Final Transcript of Day 10, p. 2664: 4-7.

⁴ Final Transcript of Day 10, p. 2661: 1-21.

IV. POST-HEARING SUBMISSIONS

9. The provisions of paragraph 45 and 46 of PO 10 concerning Post-Hearing Submissions (reproduced below) apply:

- “45. The Provisions of Procedural Order No. 1, Sections 23.1 to 23.2 apply.
46. Subject to further discussion with the Parties, the Tribunal envisions scheduling a single round of simultaneous written post-hearing briefs, with appropriate page limits. This may be followed by short oral Closing Arguments to address the Tribunal’s questions and any rebuttal points arising out of the post-hearing briefs. The dates and parameters for these later stages will be set following consultation with the Parties.”

A. POST HEARING BRIEFS

10. Pursuant to paragraphs 45 and 46 of PO 10 and after having consulted the Parties, post-hearing briefs shall be filed simultaneously in English no later than **Friday, 20 May 2022**, and may not exceed 100 pages,⁵ provided that a Spanish translation of the post-hearing brief is filed within **15 days, i.e., by Monday, 6 June 2022**.⁶
11. With respect to the format and structure of the post-hearing briefs, the Tribunal suggested during the Hearing that the Parties try to organize their written submissions by each proposition which they believe the Tribunal should decide in order to resolve the various jurisdictional objections and liability claims. With respect to each such proposition, the Parties should set forth: (i) specific citations to the evidence that they believe supports their position on the proposition, and; (ii) their comments on the other Party’s position, including the evidence on which the other Party principally relies.⁷ Given the extensive written briefing that preceded the Hearing, the Tribunal suggested that the Parties focus primarily on what has changed or developed as a result of the Hearing, for example as a result of witness and expert testimony relevant to disputed issues, while taking care to establish the

⁵ Final Transcript of Day 10, p. 2680: 5 to p. 2681:1.

⁶ Final Transcript of Day 10, p. 2688:3-19.

⁷ Final Transcript of Day 10, p. 2664: 10 to p. 2667:18.

relevance of such testimony to particular legal propositions.⁸ The Tribunal stated that it does “not feel it [is] necessary for [the Parties] to go back to international law, [legal] authorities, ICSID case law and so forth,”⁹ which were amply briefed in the pre-Hearing written submissions. The Tribunal explained that its goal “is to have a much clearer understanding of the connection between the factual disputes and the legal propositions.”¹⁰

B. POST-HEARING TRANSLATIONS

12. The translations to English or Spanish of any documents or excerpts of documents that were shown during the Hearing in the original language by either Party, should be filed at the latest by **Friday, 20 May 2022**.¹¹

V. POST-HEARING CONFERENCE

13. The Post-Hearing Conference, for the purpose of allowing brief rebuttals to Post-Hearing Briefs and addressing any further Tribunal questions, will take place by a remote modality, using the video conference platform Zoom, hosted by FTI. The Post-Hearing Conference will be held on **Wednesday, 22 June 2022**. The details to join the Zoom session will be shared by the ICSID Secretariat in advance of the Post-Hearing Conference.¹²
14. The Post-Hearing Conference shall be held at a time determined by the Tribunal after consultation with the parties.

VI. SUBMISSION ON COSTS

15. Pursuant to Section 23 of PO 1, and after having consulted with the Parties, the Tribunal schedules two rounds of simultaneous submissions on costs as follows: (i) with respect to the first round, the Parties will file simultaneously their submissions on costs (which may not exceed 10 pages) no later than two weeks after the Post-Hearing Conference, **i.e., by Wednesday, 6 July 2022**,¹³ and (ii) with respect to the second round, the Parties will file

⁸ Final Transcript of Day 10, p. 2665:2-19.

⁹ Final Transcript of Day 10, p.2665:1-4.

¹⁰ Final Transcript of Day 10, p. 2666:16-19.

¹¹ Final Transcript of Day 10, p. 2663: 1-11.

¹² Final Transcript of Day 10, p. 2676: 8 to p. 2680: 4 and p. 2681:8-15.

¹³ Final Transcript of Day 10, p. 2682:2-3.

simultaneously their comments on each other's submission on costs (which may not exceed 5 pages) no later than one week after the first round, *i.e.*, by Wednesday, 13 July 2022.¹⁴

VII. PUBLICATION

16. Pursuant to Section 21.6 of PO 1, Section J of PO 10 and DR-CAFTA Article 10.21.2, the recordings of the Hearing will be posted for viewing on the ICSID website, in English and Spanish, shortly after the review and correction of Hearing transcripts, to enable efficient redaction of the video recordings.
17. Pursuant to paragraph 48 of PO 10, any information designated by one or both of the Parties as being confidential will be excluded from the public recordings. The redaction of the videos will be done by FTI, the provider, who will charge \$275 per hour for this service; these FTI costs will be paid from the advance payments made by the Parties, without prejudice to the decision of the Tribunal as to which Party ultimately shall bear those costs.
18. Pursuant to paragraph 36 of PO 10, the video recordings of the hearing are available in the case folder on BOX, the file sharing platform.
19. Pursuant to paragraph 49 of PO 10, the availability of the Hearing recordings will be announced publicly via the ICSID website in English and Spanish.

For and on behalf of the Tribunal,

[signed]

Ms. Jean Kalicki
President of the Tribunal
Date: 5 April 2022

¹⁴ Final Transcript of Day 10, p. 2688:20 to p. 2689:1-22.