

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ASTRIDA BENITA CARRIZOSA

Claimant

v.

REPUBLIC OF COLOMBIA

Respondent

(ICSID Case No. ARB/18/5)

PROCEDURAL ORDER NO. 3

ORGANIZATION OF THE HEARING BY VIDEOCONFERENCE

Members of the Tribunal

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal

Prof. Diego P. Fernández Arroyo, Arbitrator

Mr. Christer Söderlund, Arbitrator

Secretary of the Tribunal

Ms. Alicia Martín Blanco

Assistant to the Tribunal

Mr. David Khachvani

24 September 2020

I. INTRODUCTION

Pursuant to the Procedural Calendar contained in Annex A to Procedural Order No. 1 (as amended on 29 January 2020), the Parties and the Tribunal held a pre-hearing telephone conference (the “PHTC”) on **8 September 2020, at 15:00 (CEST)**.

At the PHTC, the Parties and the Tribunal discussed the organization of the hearing on jurisdiction (the “Hearing”). The attendees of the PHTC were as follows:

For the Tribunal:

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal

Prof. Diego P. Fernández Arroyo, Arbitrator

Mr. Christer Söderlund, Arbitrator

Ms. Alicia Martín Blanco, Secretary of the Tribunal

Mr. David Khachvani, Assistant to the Tribunal

For the Claimant:

Mr. Pedro J. Martinez-Fraga (BCLP LLP)

Mr. C. Ryan Reetz (BCLP LLP)

Mr. Craig S. O’Dear (BCLP LLP)

Mr. Domenico Di Pietro (BCLP LLP)

Ms. Rachel Chiu (BCLP LLP)

Mr. Joaquín Moreno Pampín

For the Respondent:

Ms. Ana María Ordoñez Puentes (Agencia Nacional de Defensa Jurídica del Estado)

Mr. Andrés Felipe Esteban Tovar (Agencia Nacional de Defensa Jurídica del Estado)

Mr. Paolo Di Rosa (Arnold & Porter Kaye Scholer LLP)

Mr. Patricio Grané Labat (Arnold & Porter Kaye Scholer LLP)

Ms. Katelyn Horne (Arnold & Porter Kaye Scholer LLP)

Ahead of the PHTC, on 14 August 2020, the Tribunal circulated a draft of the present procedural order concerning the organization of the Hearing, to which the Parties provided their comments on 28 August 2020. The Parties provided further comments on matters affecting the hearing schedule on 28 August and on 1 and 4 September 2020.

Considering the Parties' comments and the discussion at the PHTC, and having regard to the procedural rules applicable to these proceedings, the Tribunal issues this order ("PO No. 3" or "Procedural Order No. 3") to govern the organization of the Hearing.

Unless otherwise provided herein, the relevant provisions of Procedural Order No. 1 apply *mutatis mutandis*.

II. HEARING DATES AND FORMAT

1. The Hearing shall take place on **9, 10, 11 and 12 November 2020** (the "**November Hearing**") and on **29 September 2020** (the "**September Hearing**"). The September Hearing will be dedicated to the examination of Dr. Jorge Enrique Ibáñez Najar.
2. Given the exceptional circumstances created by COVID-19 pandemic, the Tribunal and the Parties have agreed to conduct the Hearing by videoconference.

III. PRE-HEARING STEPS

3. The ICSID Secretariat will work closely with the participants to find the best solutions available to ensure a smooth conduct of the Hearing. The ICSID Secretariat will contact the Parties to undertake preliminary test calls of different groups of participants prior to the Hearing, as necessary.
4. A trial run of the video conferencing system with the Hearing participants will be conducted on **5 November 2020, at 15:00 (CET)** for the November Hearing and on **23 September 2020 at 19:00 (CEST)** for the September Hearing.

5. To ensure the efficient conduct of the trial run, all participants shall strive to replicate the conditions under which they will participate in the Hearing:
 - i. To the extent possible, at least one participant per device or connection to be used at the Hearing should attend the trial run videoconference;
 - ii. Each participant should join the trial run videoconference with the same device(s) and internet connection and from the same physical location that he/she intends to use for the Hearing;
 - iii. All participants should join the trial run videoconference through the waiting room function and will follow the same identification procedure as for the Hearing itself;
 - iv. The trial run shall include a test of each of the functions of the videoconference platform that is intended to be used during the Hearing (e.g., presentation of documents via shared screen); and
 - v. The Parties shall not address the substance of any matter scheduled for discussion at the Hearing, but may raise before the Tribunal any procedural issues pertaining to the organization of the Hearing.

IV. WITNESSES AND EXPERTS

6. The Parties have identified the witnesses and experts whom they wish to call for cross-examination at the Hearing. The Claimant has called Dr. Ibáñez Najar, and the Respondent has called Dr. Briceño de Valencia.
7. In addition, the Claimant has requested (a) the appearance for examination of its witnesses Prof. Mistelis, Mr. Wethington, Prof. Coe, Dr. Briceño de Valencia, Dr. López Roca, and Dr. Vargas Rincón. It has also asked that the Tribunal disregard the expert reports of Dr. Ibáñez following the notification that the latter will not be permitted to participate in the November Hearing under Colombian law as a result of

his appointment on the Supreme Court of Colombia. The Respondent opposes both requests.

8. The Tribunal considers that the Claimant's request to disregard Dr. Ibáñez's expert reports has become moot as during the PHTC it appeared that Dr. Ibáñez could testify before being sworn in as a Supreme Court Justice and a suitable date was found, with the result that Dr. Ibáñez will appear for examination at the September Hearing. The Claimant's request to examine Dr. Briceño is also moot to the extent that she has been called to appear for cross-examination by the Respondent, which will permit the Claimant to examine her pursuant to the terms of Section 19.5 (a) and (c) of Procedural Order No. 1.
9. The Tribunal further finds that, as this is a hearing on jurisdiction and the Respondent has not raised a jurisdictional objection based on a failure by the Claimant to articulate a *prima facie* case on the merits, it will only hear fact and expert testimony on jurisdiction. Thus, Prof. Coe, Dr. López Roca, and Dr. Vargas Rincón will not be heard, and Dres. Briceño and Ibáñez will be heard on matters covered in their reports which relate to jurisdiction.
10. Finally, the Tribunal is not persuaded that there is a basis to call Prof. Mistelis or Mr. Wethington for examination pursuant to Section 19.7 of Procedural Order No. 1. Indeed, having carefully considered the Parties' arguments and these individuals' written evidence, the Tribunal considers that the Claimant has not established compelling reasons to examine Prof. Mistelis or Mr. Wethington in the sense of Section 19.7. Moreover, the Tribunal does not deem it necessary to call them *ex officio* pursuant to Section 19.10. Accordingly, Prof. Mistelis and Mr. Wethington will not be heard.

V. HEARING SCHEDULE

11. The November Hearing shall commence each day at **15:00 CET** and end around **20:00 CET**. The September Hearing shall commence at **16:00 CEST** and end no later than **21:00 CEST**. There shall be two or more short breaks per hearing day.

12. The Hearing will be structured as follows, while maintaining certain flexibility:

The September Hearing:

- i. Day 1 (29 September 2020): Examination of Dr. Jorge Enrique Ibáñez Najar.

The November Hearing:

- i. Day 1 (9 November 2020): Claimant's opening statement (2 hours) followed by Respondent's opening statement (2 hours maximum). Day 1 will conclude with possible questions from the Tribunal.
- ii. Day 2 (10 November 2020): examination of Dr. Briceño de Valencia.
- iii. Day 3 (11 November 2020): Reserve time (if needed); otherwise day off.
- iv. Day 4 (12 November 2020): Claimant's closing arguments (2 hours maximum) followed by Respondent's closing arguments (2 hours maximum); questions from the Tribunal to counsel and procedural discussion.

13. This schedule is subject to any changes that the Tribunal may deem necessary or appropriate during the Hearing, in particular due to delays or other interruptions caused by technical problems in the functioning of the videoconference.

14. In accordance with Section 23.5 of PO No. 1, each Party will have a maximum time available over the entire two Hearings of 6 hours 45 minutes, including oral arguments.

VI. VIDEOCONFERENCING PLATFORM

15. The Hearing shall be held via videoconference using the Zoom or another appropriate videoconferencing platform.
16. The login details for the videoconference will be circulated by ICSID in advance of the Hearing.

VII. PARTICIPANTS

17. Each Party shall provide a list of the persons who will attend the Hearing on its behalf by **25 September 2020** (for the September Hearing) and by **23 October 2020** (for the November Hearing). The list of each Party's participants must include the usernames and Zoom account details by which participants will join the videoconference, and designate the speakers for each Party. With the exception of representatives of the United States, if any, any person not included in the lists of participants provided by the Parties will not be admitted to the Hearing, unless otherwise decided by the Tribunal upon request of any of the Parties.
18. Together with their lists of participants, the Parties shall provide an indication of the location from which each of their participants (including counsel, Party representatives, witnesses and experts) will join the videoconference and confirm that adequate connectivity or technology is available at that location or is in the process of being procured. They shall also indicate if several participants will use one and the same camera.
19. Access to the videoconference shall be restricted to the participants. All participants in the Hearing bear an ongoing duty to warn of the presence of any other person on the videoconference.
20. Participants shall join the videoconference 30 minutes in advance of the start on each day to facilitate the identification of participants and any technical contingencies.
21. Participants will join the videoconference through a "waiting room". Each Party shall identify its representatives at the opening of each day. In order to facilitate identification, participants must join the videoconference showing a username that enables them to be readily identified in line with the list of representatives (i.e., first name, last name, followed by C for Claimant, R for Respondent, E for expert and W

for witness)¹. Any prospective participant who cannot be identified shall not be granted access to the videoconference, unless otherwise decided by the Tribunal.

22. After having been identified, participants will be assigned to the appropriate breakout room until the Hearing commences. The identification protocols will be practiced during the test calls organized by ICSID.

VIII. INTERNET CONNECTION AND DEVICES

23. The Parties are responsible for ensuring that each of their representatives, witnesses and experts connects to the video conference through a stable internet connection offering sufficient bandwidth and uses a camera, microphone, and speaker of adequate quality.
24. The participants should consider using a wired Ethernet connection instead of Wi-Fi. Participants are also encouraged to keep a smartphone or tablet, having at the minimum a 4G data connection and mobile hotspot functionality, available as a backup internet connection at all times during the Hearing.
25. A dial-in telephone audio option shall be offered as a backup option for participants experiencing difficulties with computer audio. Certain key participants may wish to dial-in by phone in addition to connecting through their computer, so as to be able to switch seamlessly to telephone audio in case they should happen to be disconnected at any point.
26. Each participant is encouraged to have at least two devices or screens available for use during the Hearing, one to connect to the videoconference and another for the transcript. Where possible, using a third device or screen to display evidence and demonstrative exhibits is recommended.

¹ Participants joining collectively from a conference room should be identified by “Conference Room” C or R.

27. After testing, ICSID will provide further guidance if needed.

IX. VIDEOCONFERENCE ETIQUETTE

28. Once admitted to the videoconference, and barring technical issues or other exceptional circumstances, lead counsel and Party representatives should remain connected throughout the Hearing day.

29. Participants without an active role at any given moment should mute their audio. The Tribunal may request participants without an active role to turn off their video as well in order to preserve internet bandwidth for the active participants.

30. The Parties shall provide a list of the participants from each side who will speak to a specific issue by e-mail to the other participants (including the other side, the members of the Tribunal, ICSID, the interpreters and the court reporters) one hour prior to the start of each day. Similarly, the Parties should, insofar as possible, circulate any speaking notes to the court reporters and interpreters prior to the start of any relevant session.

31. In order to facilitate the accurate transcription and interpretation of the Hearing, speakers shall speak slowly and with pauses between phrases.

32. Participants should join the Hearing from a location without background noise and with adequate lighting.

33. The Parties will make use of the breakout room functions within the videoconference platform to avoid delays associated with admitting participants to the videoconference and to enable to promptly reconvene all participants following breaks.

34. Each Party will make its own separate arrangements for private communication within its team during the Hearing by instant messenger or other appropriate means.

35. The above provisions on etiquette may be adjusted or supplemented by the Tribunal, in consultation with the Parties, in the course of the Hearing.

X. TRANSCRIPT

36. As provided in Section 24.2 of PO No. 1, verbatim transcripts in the procedural languages (English and Spanish) shall be available in real-time.
37. ICSID will circulate the connection details for the transcript prior to the trial run. Participants are encouraged to use a second device or a second screen for viewing the transcript. Provisional transcripts will be circulated by e-mail at the end of each day.
38. Pursuant to Section 24.3 of PO No. 1, the Parties shall agree on corrections to the transcripts of both Hearings within 21 days of the later of the dates of the receipt of the sound recordings and transcripts of the November Hearing. The agreed corrections shall be entered by the Parties in the transcripts (“revised transcripts”). The Tribunal shall decide upon any disagreement between the Parties and corrections adopted by the Tribunal shall be entered by the Parties in the revised transcripts.

XI. INTERPRETATION

39. Pursuant to Section 12 of PO No. 1, either English or Spanish may be used during the Hearing. Simultaneous interpretation from one language into the other language shall be available at all times.
40. ICSID will give the appropriate technical specifications about interpretation, which will be tested, if possible, during the trial run.

XII. RECORDING

41. ICSID will arrange for an audio-video record of the Hearing.
42. No participant, other than the court reporter, shall record any part of the Hearing, unless the Tribunal grants express leave to this effect.

XIII. POWERPOINT PRESENTATIONS

43. In accordance with Section 17.9 of Procedural Order No. 1, the Parties may make use of PowerPoint or similar presentations in support of oral argument, provided they do not contain materials not in the record. The Parties shall include in their PowerPoint or similar presentations express citations to the documents on record relied upon in their oral arguments.
44. The Parties shall provide electronic copies of any PowerPoint or similar presentations, by e-mail to all other participants (including the other side, the members of the Tribunal, Assistant to the Tribunal, ICSID, the interpreters, if any, and the court reporters) at least 45 minutes prior to their use during the Hearing. Hard copies shall not be required.
45. As part of their PowerPoint presentations, the Parties may use so-called demonstrative exhibits, i.e. charts or other visual presentations that compile information that is on record but is not presented in such form, provided that these exhibits contain no new evidence and identify their source in the record. An electronic copy of any demonstrative exhibit, except for demonstrative exhibits used during closing presentations, shall be provided to the other Party, with a copy to the Tribunal and ICSID, no later than **7 November 2020**. Any demonstrative exhibit used during closing presentations shall be provided by the end of Day 3 (CET) of the November Hearing. Any demonstrative exhibit shall be assigned an exhibit number according to the numbering rules set out in Procedural Order No. 1.
46. The display of PowerPoints presentations, including demonstrative exhibits, shall be made through the screen-sharing function of the videoconference platform in order that the speaker and the relevant document can be seen simultaneously at all times. The Parties shall designate one person on each side (“Document Manager”) who shall be responsible for such display.

XIV. HEARING BUNDLE

47. In accordance with Section 14.9 of Procedural Order No. 1, the Tribunal requests that, instead of sending USB keys, the Parties make sure that a copy of the full case file (including written pleadings, witness statements, expert reports, factual exhibits, legal authorities, as well as the Tribunal's orders) together with a consolidated and, if possible, hyperlinked index of all the documents, be available by **11 September 2020** in the Box folder created for this case.

XV. TECHNICAL DIFFICULTIES

48. Each Party shall designate, by no later than **27 September 2020** (for the September Hearing) and **23 October 2020** (for the November Hearing) one of its representatives to act as videoconferencing emergency contact person ("VC Emergency Contact Person") for purposes of addressing any technical incidents which arise during the videoconference. The VC Emergency Contact Person shall be responsible for advising the Tribunal and ICSID if an essential participant on his/her side is disconnected or otherwise cannot participate. Otherwise, the VC Emergency Contact Person shall notify and address technical issues with Alicia Martín Blanco, ICSID Counsel (email: amartinblanco@worldbank.org), and Marisela Vázquez Marrero, Paralegal (mvazquezmarrero@worldbank.org).
49. The Tribunal may temporarily or permanently suspend the Hearing if it deems the functioning of the videoconference system to be inadequate or likely to prejudice the due process rights of either of the Parties or the integrity of the proceeding. The Parties are asked to bear in mind that full recordings and transcripts will be available, mitigating any prejudice arising from the failure of any given participant to be able to follow the entire Hearing on the videoconference platform.

XVI. TRANSPARENCY OF THE HEARINGS

50. Pursuant to Procedural Order No. 2, adjusted to the requirements of a remote hearing, the following logistical arrangements will be made to facilitate public access to the Hearings:

- i. An audio-video recording of the Hearings will be made. The Hearings will be made publicly accessible by posting the recording on the ICSID website as soon as possible after the November Hearing.
- ii. Before posting the recording on the ICSID website and in order to avoid public disclosure of protected information, the recording will be edited after the Hearings.
- iii. At any time during the Hearings, a Party may request that a part of the Hearing be held in private and that protected information be excluded from the recording. To this effect, a Party shall inform the Tribunal before topics are raised (or immediately as they begin to be raised) which could reasonably be expected to address protected information. The Tribunal will then consult the Parties. Such consultations shall be held in camera and the transcript shall be marked “confidential”. After consultation with the Parties, the Tribunal will decide whether to exclude the information in question from the recording and whether the relevant portion of the transcript shall be marked “confidential”. The Parties will edit the recording and the transcript accordingly and send them to the Repository for publication. The Tribunal will decide if there is any disagreement.

51. Pursuant to Section 28 of PO No. 1, the Parties shall comply with applicable data protection and privacy rules and regulations.

XVII. POST-HEARING MATTERS

52. Subject to the Tribunal asking the Parties to provide limited briefings on specific issues, there shall be no post-hearing briefs.

53. The Tribunal will issue directions on the Parties' statements of costs at the end of the November Hearing.

[Signed]

Professor Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 24 September 2020