

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Hela Schwarz GmbH**

**v.**

**People's Republic of China**

**(ICSID Case No. ARB/17/19)**

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**PROCEDURAL ORDER NO. 7  
DECISION ON THE RESCHEDULING OF THE HEARING**

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***Members of the Tribunal***

Sir Daniel Bethlehem QC, President of the Tribunal  
Professor Campbell McLachlan QC, Arbitrator  
Mr. Roland Ziadé, Arbitrator

***Secretary of the Tribunal***

Mr. Francisco Abriani

27 January 2022

## **Background**

1. By Annex A to Procedural Order No. 1, dated 9 March 2018, the Tribunal, after consultation with the Parties, laid down the Procedural Timetable applicable to this arbitration. By paragraph 23.2 of the Procedural Order, the location of the hearing and the precise dates of the hearing, within a window of 22 June to 1 July 2020, were left for future determination.
2. The Procedural Timetable was revised by Procedural Order No. 5, dated 29 July 2019. By the revised schedule, the hearing window of 22 June to 1 July 2020 was maintained for a hearing of 5 to 8 days, the precise dates of the hearing within that window being left for future determination.
3. In anticipation of the hearing, the Tribunal wrote to the Parties on 7 February 2020. In that correspondence, noting that “coronavirus restrictions are currently impeding travel in many parts of the world, notably to and from the People’s Republic of China”, the Tribunal invited the Parties to consult and to revert to the Tribunal “in the event that any serious impediment looks like presenting itself as regards the conduct of the hearing”.
4. In correspondence dated 5 March 2020, addressing, *inter alia*, the procedural schedule for the hearing and the hearing location, the Tribunal “encourage[d] the Parties to raise any issue or concern relating to the Coronavirus at the earliest possible point.”
5. By correspondence dated 18 March 2020, the Tribunal wrote to the Parties indicating, *inter alia*, that, “[h]aving regard to current projections on the likely course of COVID-19 infections over the coming months, the Tribunal considers that it will be neither possible nor desirable to proceed with an in-person hearing on 22-30 June 2020, wherever such a hearing might take place.” The Tribunal accordingly invited the Parties to consult and revert to the Tribunal on the possibility of the hearing taking place by video conferencing on the dates then reserved for the hearing.
6. By correspondence dated 24 April 2020, in response to an enquiry from the Tribunal about the appropriate length of the hearing, the Claimant wrote to the Tribunal indicating that the Parties had been unable to agree on the length of the hearing. In the Claimant’s submission “[t]he hearing should ... not last longer than five days, but the Claimant would be willing to undertake to work also on the Saturday of the hearing week, in case a sixth day was necessary.” The Claimant noted, additionally, that the Parties had agreed on the desirability of an in-person hearing and that the June 2020 hearing dates should be

“postponed”. The Claimant further proposed that an in-person hearing should be scheduled for the period 30 November to 5 December 2020.

7. By correspondence dated 25 April 2020, the Respondent noted its agreement on the issue of preference for an in-person hearing but indicated that it considered that a six day hearing, with one day held in reserve, would be necessary. On hearing dates, the Respondent proposed that dates be reserved for an in-person hearing from 30 November to 6 December 2020 (with 6 December in reserve) “or the earliest dates that are available in 2021 for the Tribunal and the Parties.”
8. By correspondence dated 30 April 2020, acknowledging the Parties’ agreement that the June 2020 hearing dates should be rescheduled, the Tribunal vacated the witness notification dates and other pre-hearing scheduled events, pending a rescheduling of the hearing.
9. By correspondence dated 19 May 2020, the Tribunal informed the Parties that the Tribunal could not make the hearing dates proposed by the Parties in November – December 2020.
10. By correspondence dated 22 June 2020, the Tribunal wrote to the Parties to consult further on the rescheduling of the hearing, drawing attention to COVID-19 travel constraints by members of the Tribunal and various logistical issues associated with the holding of a video hearing having to span an 11-hour time zone range. The Tribunal invited the Parties to consult and revert to the Tribunal on a number of possible hearing alternatives.
11. By correspondence dated 10 July 2020 and 14 July 2020, from the Claimant and the Respondent respectively, the Parties indicated their agreement “that an in-person hearing continues to be the preferred option, even if this implies that the hearing can only take place in the summer of 2021.” The Parties further indicated that they and their counsel were available in the period 5–16 July 2021, the period proposed by the Tribunal for the holding of the hearing. In communicating the Parties’ agreement, the Claimant added its request that “any further delays in the proceeding be prevented by all available means.” In its communication to the Tribunal, indicating its preference for an in-person hearing and its agreement to the proposed hearing window, the Respondent requested that “the hearing start on 5 July 2021 (with any unused days held in reserve on the week of 13 [sic] July).”
12. On 25 September 2020, having regard to the agreement of the Parties, the Tribunal adopted Procedural Order No. 6, determining that the hearing in this matter was rescheduled to take place in the period 5–16 July 2021. Having regard to the continuing uncertainties associated with the COVID-19 health pandemic and related travel and quarantine

restrictions, the Tribunal further determined that the hearing shall take the form of an in-person hearing, to take place in either Paris (at the ICC) or London (at the IDRC), venue availability having been confirmed in both locations for the dates in question. The Tribunal further determined that, in the event that for any COVID-19 or other imperative reason the hearing could not take place in an in-person format, the hearing would proceed by way of a video hearing or, as the case may be, a hybrid in-person / video hearing within the designated hearing window. In the same Procedural Order No. 6, the Tribunal fixed dates for the Parties and the Tribunal to conduct a feasibility assessment of an in-person hearing.

13. By correspondence dated 29 March 2021, the Claimant suggested that, given the “uncertain development of the COVID-19 pandemic and the impossibility to predict the time at which associated restrictions will be lifted”, the discussion on the feasibility of an in-person hearing within the window designated in Procedural Order No. 6 be postponed until 10 May 2021. In the same correspondence, the Claimant “maintain[ed] its strong preference for an in-person hearing, which should only be replaced by a virtual hearing if necessary” and indicated that “the option of a hybrid hearing should also be thoroughly explored.”
14. By correspondence of 30 March 2021, the Respondent indicated that it shared the Claimant’s view that it was premature at that stage to assess the feasibility of an in-person hearing on the designated dates, and agreed with the Claimant’s proposal to postpone the Parties’ feasibility assessment until 10 May 2021. In the same correspondence, the Respondent shared the Claimant’s strong preference for an in-person hearing and indicated that “[h]earing by video conference will not in China’s view provide the Parties with an appropriate forum to present their case.”
15. By correspondence of 5 April 2021, the Tribunal agreed that the Parties may postpone their assessment of the hearing arrangements until 10 May 2021. The Tribunal indicated that it had carried out its own assessment of the likelihood of being able to hold a hearing in person on the scheduled dates and concluded that this will not be possible. The Tribunal also noted that a hybrid hearing would be organisationally complex and costly, for little apparent advantage, while noting that video hearings are able to be both efficient and effective. The Tribunal invited the Parties to consider the possibilities of a video hearing on the then scheduled dates or the postponement of the hearing to a date to be determined that would allow for an in-person hearing.
16. By correspondence of 10 May 2021, the Claimant informed the Tribunal that “[t]he Parties agree[d] with the Tribunal’s conclusion that an in-person hearing will not be possible on the scheduled dates” and that they were “further in agreement that the hearing should be

postponed in order to search for alternative dates that would allow the hearing to be held in person.” The Claimant also submitted that the possibility of finding replacement dates by the end of 2021 should not be ruled out prematurely, and that the possibility of splitting the hearing should be contemplated to avoid unnecessary further delay. It further noted that “the rescheduling should not at [that] point be made entirely conditional on the feasibility of a purely in-person hearing” and that alternative options (including a virtual or hybrid hearing) should be considered if an in-person hearing was not feasible earlier than the summer of 2022. On the duration of the hearing, the Claimant referred the Tribunal to the letter submitted on 24 April 2020. The Claimant further submitted that the discussion on the location of the hearing should be held once concrete hearing dates will have been suggested by the Tribunal.

17. By correspondence of 11 May 2021, the Respondent confirmed its agreement with the Claimant concerning the postponement of the hearing. It also noted that the Respondent was “unlikely to be able to attend an in-person hearing at the end of 2021” , and proposed to postpone the hearing “to the earliest dates in 2022 that would work for the Tribunal and the Parties.” On the format of the hearing, the Respondent submitted that, should it become apparent that an in-person hearing is not feasible on the rescheduled hearing dates, the Parties and the Tribunal shall consider the appropriate format (including virtual, hybrid or in-person) at that point in time. The Respondent noted that it agreed with the Tribunal that the organisation of a hybrid hearing would be organisationally complex, and submitted that equal treatment of both Parties must be ensured if the hearing were to be conducted in hybrid form. The Respondent stated that splitting the hearing would be costly and unduly burdensome, and should therefore not be considered at that stage. Regarding the location of the hearing, the Respondent agreed with the Claimant’s proposal to defer the discussion to a later date.
18. By correspondence of 11 May 2021, the Tribunal noted that the Parties are agreed that the hearing then scheduled should be postponed and directed that the hearing dates of 5–16 July 2021 were vacated. It indicated that it would revert to the Parties on possible alternative hearing dates and associated issues.
19. By correspondence of 12 November 2021, the Tribunal invited the Parties to indicate their availability for a hearing on each of the following dates: 30 May–8 June 2022; 20 June–13 July 2022; and 5–16 September 2022. It also noted that the modalities of the hearing to be scheduled will be fixed closer to the time of the scheduled hearing on the basis of the then-prevailing global health situation and prevailing or anticipated travel restrictions or compelling impediments.

20. By correspondence of 26 November 2021, the Claimant indicated that it was available for the oral hearing in the period 5–16 September 2022.
21. By correspondence of the same date, the Respondent indicated that it was available to hold the hearing in the period 4–13 July 2022.
22. Upon the Tribunal's invitation to confirm their availability on the other proposed dates, on 29 November 2021 the Claimant confirmed that it was not available in the periods 30 May–8 June 2022 and 20 June–13 July 2022. The Respondent, in turn, confirmed on the same date that it was only available in the period 4–13 July 2022.
23. By correspondence of 23 December 2021, the Tribunal invited the Parties to indicate their availability in respect of the following windows: 2–6 May 2022 and 5–10 December 2022. The Tribunal further invited the Parties to confirm their availability for weekend sittings on either side of these periods. The Tribunal also indicated that, absent agreement of the Parties to postpone the hearing, once rescheduled, it was the Tribunal's inclination that the rescheduled hearing, once fixed, would go ahead in either an in-person or a video format, whatever being the most appropriate in all the circumstances then prevailing, while acknowledging the shared preference for an in-person hearing.
24. By correspondence of 29 December 2021, the Respondent confirmed its availability for a hearing between 5–10 December 2022 and that it would be prepared for a hearing to take place over weekends in that period as required.
25. By correspondence of 4 January 2022, the Claimant confirmed that it is available in the period 5–10 December 2022 and that, if necessary, it should also be available on the weekends preceding and following the period 5–10 December 2022. It also noted that one of its experts is unlikely to be available in the weekend of 3–4 December 2022.

## **Decision**

26. The Tribunal acknowledges receipt of the Respondent's correspondence of 29 December 2021 indicating its availability for a hearing on 5–10 December 2022, including, if necessary, on the weekends on either side of these dates, and that from the Claimant of 4 January 2022 indicating availability for the same period, weekends included. The Tribunal notes that this coincidence of availability for a hearing follows extended correspondence in which the Tribunal canvassed other hearing dates earlier in 2022, although in respect of which common available dates could not be found.

27. The Tribunal recalls that this matter was originally scheduled for a hearing between 22 June to 1 July 2020, a hearing that was vacated in consequence of COVID-19 health and travel-related concerns and restrictions and the Parties' agreed preference for an in-person hearing. The subsequent re-scheduling of the hearing between 5–16 July 2021 was vacated for the same reasons.
28. Having regard to the availability of both Parties in the period 3–11 December 2022, and mindful that this will be almost five-and-a-half years since the claim was first registered by ICSID, the Tribunal directs that a hearing in this matter be scheduled for the period 3–11 December 2022, with final hearing dates within this window to be determined in due course, having regard to a priority to be given to hearing dates on 5–9 December 2022.
29. The Tribunal further directs that, save in the case of agreement by the Parties to the contrary, or to circumstances of force majeure, the hearing now scheduled for 3–11 December 2022 will take place in either an in-person or a video format, the format of the hearing to be determined closer to the hearing date in the light of the prevailing circumstances.
30. The additional pending procedural steps associated with the revised schedule are set out in the revised Procedural Timetable at Annex A hereto.

On behalf of the Tribunal,

[signed]

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**Sir Daniel Bethlehem QC**

President of the Tribunal

Date: 27 January 2022

**ANNEX A**

**REVISED PROCEDURAL TIMETABLE**

<b>Description</b>	<b>Party / Tribunal</b>	<b>Final date / period</b>
Notification of Witnesses / Experts for Cross-Examination	Parties	9 September 2022 <i>[12 weeks before hearing]</i>
Call of Witnesses / Experts not Called by the Parties (if any)	Tribunal	23 September 2022 <i>[Within 2 weeks of Notification by Parties]</i>
Pre-Hearing Organizational Meeting	Parties and Tribunal (or President)	<i>TBD in the period 26 September – 7 October 2022</i>
Hearing	All	<b>3–11 December 2022</b> <i>5 to 7 day in-person hearing, as appropriate</i> <i>Length of video or hybrid hearing TBD</i>
[Post-Hearing Briefs]	Parties	<i>TBD</i>
Statements of Costs	Parties	<i>TBD</i>
Award	Tribunal	<i>TBD</i>