

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Angel Samuel Seda and others

v.

Republic of Colombia

(ICSID Case No. ARB/19/6)

PROCEDURAL ORDER NO. 12

Members of the Tribunal

Prof. Dr. Klaus Sachs, President of the Tribunal

Prof. Hugo Perezcano Díaz, Arbitrator

Dr. Charles Poncet, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal

12 September 2022

I. INTRODUCTION

1. Pursuant to Section 19.1 of Procedural Order No. 1, a pre-hearing organizational meeting between the Parties and the President of the Tribunal was held by video conference on 12 September 2022 (the “**Pre-Hearing Call**” or “**PHC**”). Participating in the video conference were:

Members of the Tribunal

Prof. Dr. Klaus Sachs, President of the Tribunal

Tribunal Assistant

Mr. Marcus Weiler, Assistant to the Tribunal

ICSID Secretariat:

Ms. Sara Marzal, Secretary of the Tribunal

Participating on behalf of the Claimants:

Mr. Rahim Moloo, Gibson, Dunn & Crutcher LLP

Ms. Anne Champion, Gibson, Dunn & Crutcher LLP

Ms. Ankita Ritwik, Gibson, Dunn & Crutcher LLP

Ms. Marryum Kahloon, Gibson, Dunn & Crutcher LLP

Mr. Angel Seda, Claimant

Participating on behalf of the Respondent:

Mr. Giovanni Andrés Vega Barbosa, *Agencia Nacional de Defensa Jurídica del Estado*

Mr. Andrés Reina, *Agencia Nacional de Defensa Jurídica del Estado*

Dr. Yas Banifatemi, Gaillard Banifatemi Shelbaya Disputes

Ms. Ximena Herrera-Bernal, Gaillard Banifatemi Shelbaya Disputes

Ms. Yael Ribco Borman, Gaillard Banifatemi Shelbaya Disputes

Ms. Pilar Alvarez, Gaillard Banifatemi Shelbaya Disputes

Ms. Carolina Barros, Gaillard Banifatemi Shelbaya Disputes

2. During the Pre-Hearing Call, the President of the Tribunal discussed the draft procedural order circulated to the Parties on 29 August 2022, and the Parties joint statement of 5 September 2022 advising the Tribunal of any agreements reached on the open items of the draft procedural order, as well as their respective positions where no agreement was reached.
3. An audio recording of the Pre-Hearing Call was made available to the Members of the Tribunal and the Parties on 12 September 2022.
4. Having considered the Parties’ positions, this Order sets out the procedural rules that the Parties have agreed upon and/or the Tribunal has determined will govern the conduct of the Hearing on New Evidence and Oral Closing Submissions (the “**Second Hearing**”).

II. ORGANIZATION OF THE SECOND HEARING

A. Date and Venue

5. The Second Hearing is scheduled to take place in person on 3 and 4 October 2022 at the hotel Le Royal Manceau in Paris, France.
6. Given the exceptional circumstances created by the COVID-19 pandemic, arrangements will also be made to facilitate connection to the hearing room through a virtual platform for Participants that might need to attend remotely (*see* arrangements detailed in **Annex B**). The costs of these arrangements 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.

B. Order of Proceedings and Schedule

7. Each day, the Second Hearing will start at 9:30 AM.
8. The order of proceedings and structure of the Second Hearing will be as indicated in the agenda incorporated as **Annex A**. The Tribunal will enforce, with a degree of flexibility, the said agenda and, following consultation with the Parties, the Tribunal may adjust it to account for unexpected disruptions during the hearing.

C. Time Allocation

9. The Parties will have a total of 7 hours of hearing time.
10. The time allotted to the Parties does not include breaks, lunch, and Tribunal time.
11. Each Party shall have a total of 3.5 hours. Both Parties reserve the right to request additional time from the Tribunal in the event that extra time is required.
12. Time spent on housekeeping matters or responding to Tribunal questions shall not be counted toward either Party's time allocation unless the Tribunal decides, in particular circumstances, to count a reply to the responding Party's allotted time.
13. If a Party objects or otherwise intervenes during the other Party's speaking time, that time will be counted as part of the objecting Party's time.
14. The Secretary of the Tribunal will keep record the time using the chess-clock method, and report the time used and remaining to the Parties and the Tribunal after each day of the hearing or whenever so requested. Any disagreement between the Parties concerning hearing time shall be dealt with outside sitting hours whenever possible and referred to the Tribunal only as a last resort.

D. Documents for Use at the Second Hearing

1. Demonstrative Exhibits

15. Demonstrative exhibits shall be used in accordance with Section 16.8 of Procedural Order No. 1 reproduced below:

Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence. Each party shall number its demonstrative exhibits consecutively and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The party submitting such exhibits shall provide them in electronic and hard copy to the other party, the Tribunal Members, the Tribunal Secretary, the court reporter(s) and interpreter(s) at the hearing. Each Party shall ensure that the opposing Party and each Tribunal Member have both electronic and hard copies of demonstrative exhibits prior to commencing its oral arguments or the examination in which they will be used.

16. The Parties shall produce electronic copies of all demonstrative exhibits used in the Hearing at least 24 hours before the respective demonstrative exhibit is used to opposing counsel. However, PowerPoint presentations in support of a Party's oral argument are not considered to be demonstrative exhibits and shall be shared with the opposing Party, each Tribunal Member, the court reporters and interpreters at the start of each Party's oral argument in electronic format and hard copy.¹
17. In addition, promptly after the conclusion of the hearing day in which the corresponding Demonstrative exhibit is used, the Parties shall upload each Demonstrative exhibit to the case folder in the electronic file sharing system ("BOX"), with the required CD-__ or RD-__ number.

E. Interpretation

18. The hearing shall be conducted in Spanish and English with simultaneous interpretation into the other procedural language. Transcripts shall be taken in both languages.

F. Sound Recordings and Transcripts

19. According to Section 21 of Procedural Order No. 1:

"21.1. Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the parties and the Tribunal Members.

¹ Prof. Perezcano does not wish to receive hard copies.

21.2. Verbatim transcripts in the 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.

21.3. The parties shall agree on any corrections to the transcripts within 30 calendar days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the court reporter 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. The Secretariat shall provide the Parties and the Tribunal Members the final version of the transcripts once the revised transcripts have been approved by the Tribunal.”

20. A video recording of the hearing will be made, in the language that is spoken at each time by the hearing participants.

G. Transparency

21. Pursuant to Article 10.21.2 of the United States - Colombia Trade Promotion Agreement (“US – Colombia TPA”), the Hearing shall be open to the public and the Tribunal shall, in consultation with the disputing Parties, establish the logistical arrangements to ensure public access, as well as the protection of information designated by the disputing Parties as protected information.

22. In this regard, the following logistical arrangements will be made:

- i. A video recording of the Hearing will be made. The Hearing will be made publicly accessible by posting the edited video recording (*i.e.* to remove all the protected information) on the ICSID website as soon as possible after the 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 Hearing.
- iii. After the Hearing, either Party may request that a specific section of the Hearing be considered protected and therefore excluded from the recording (“ex-post requests”). The Party making the ex-post request shall be responsible for providing to the Tribunal, the Secretary of the Tribunal and the opposing Party the exact period of time which it seeks to be removed from the recording. If the opposing Party has an objection to such request, the Tribunal shall decide after hearing both Parties.

- iv. ICSID will edit the recording and the transcripts accordingly. The Parties will send ICSID a list of agreed edits (including the end and start timestamps of the video recording that should be excluded from publication). The Tribunal will decide if there are any pending disagreements.
23. ICSID will announce the hearing on the Centre’s website before the hearing. Below is a draft of the public announcement:

“A second hearing on jurisdiction and the merits in the above case is scheduled to take place in Paris, France, on 3-4 October 2022.

Pursuant to Article 10.21 of the United States - Colombia Trade Promotion Agreement, and mindful of the confidential information which disclosure may cause irreversible harm to the Parties, the hearing will be made accessible to the public by publishing a video recording of the hearing on ICSID’s website as soon as possible after the hearing.

Please continue to monitor our website for further announcements.”

24. In accordance with Article 10.20.2. of the US – Colombia TPA, the USA attended and made oral submissions to the Tribunal regarding the interpretation of the Treaty during the first hearing on jurisdiction and the merits held in May 2022 at the seat of the Centre in Washington, D.C. In the event that the USA also wishes to attend the Second Hearing, appropriate arrangements will be made for the USA government officials to attend [in person / either in person or virtually].²

H. Statements on Costs

25. According to Section 22 of the Procedural Order No. 1:

22.1. All matters concerning post-hearing memorials and statements of costs shall be discussed at the close of the oral hearing. In any event, such submissions, if any, shall not contain new evidence, documents, sources, witness statements or expert reports or opinions, except in exceptional circumstances, as determined by the Tribunal upon consultation with the Parties.

22.2. Each party will submit its Statement of Costs within 4 weeks after the hearing or the final exchange of Post-Hearing Memorials (if any).

I. List of Participants

26. Each Party will provide by **14 September 2022** its respective List of Participants for the Second Hearing (“**List of Participants**”) using the format provided in **Annex C**.

² However, in accordance with Article 10.21.4, the USA’s government officials will not have access to those sections of the Second Hearing in which protected information is discussed.

On behalf of the Tribunal,

[signed]

Prof. Dr. Klaus Sachs
President of the Tribunal
Date: 12 September 2022

ANNEX A
HEARING AGENDA³

Day 1: Monday 3 Oct. 2022

Time	Procedural Step
9.30am – 9.45am	Housekeeping (15 min)
9.45am – 11.15am	Claimants' Closing (1.5 hours)
11.15am – 11.30am	Tea Break (15 min)
11.30am – 1.00pm	Claimants' Closing (1.5 hours)
1.00pm – 2.00pm	Lunch (1 hour)
2.00pm – 3.30pm	Respondent's Closing (1.5 hours)
3.30pm – 3.45pm	Tea Break (15 min)
3.45pm – 5.15pm	Respondent's Closing (1.5 hour)

Day 2: Tuesday 4 Oct. 2022

Time	Procedural Step
9.30am – 9.45am	Housekeeping (15 min)
9.45am – 10.15am	Claimants' Rebuttal (30 min)
10.15am – 10.30am	Tea Break (15 min)
10.30am – 11.00am	Respondent's Rebuttal (30 min)
11.00am – 11.15am	Tea Break (15 min)
11:15am – 12:45pm	Tribunal Questions (1.5 hours)

³ The times denoted in this Schedule are good faith estimates but are subject to change as necessary during the course of the Hearing and at the Tribunal's discretion, within the time allocated to each Party.

ANNEX B
HYBRID MODALITY ADDITIONAL ARRANGEMENTS

This Annex contemplates certain additional protocols applicable to a hybrid format, *i.e.* a scenario with certain Participants attending in-person at Le Royal Monceau Hotel in Paris (“**In-Person Participants**”), and others joining the Hearing remotely (“**Remote Participants**”).

I. LOGISTICAL ARRANGEMENTS

1. Videoconference Platform and Streamed Transcript

1. The virtual platform shall be managed by the AV technicians on site at Le Royal Monceau Hotel (“**Operator**”).
2. Real-time court reporting shall be made available to the Remote Participants via an online link connection to be provided by the court reporters. The Remote Participants will be able to access the streamed transcripts from their own devices.
3. The connectivity details (links and instructions) for Remote Participants to join the videoconference session, and to connect to the streamed real-time transcripts in both procedural languages will be shared by ICSID prior to the start of the Second Hearing.

2. Participants

4. As provided *supra*, each Party will provide its respective List of Participants for the Second Hearing (“**List of Participants**”), using the format provided in **Annex C**. In that List of Participants, each Party identified those who will attend in person (“**In-Person Participants**”) and those participating remotely (“**Remote Participants**”). Each Party also designated those Participants that will have an active speaking role (“**Active Participants**”), and those who will be passive attendees (“**Passive Participants**”).

5. For ease of identification, Remote Participants shall join the videoconference using the naming convention indicated in the format in **Annex C**.
6. Access to the videoconference session shall be restricted to those identified in the List of Participants as Remote Participants.
7. Remote Participants shall join the videoconference 30 minutes in advance of the start on each day to facilitate the identification and to address any technical contingencies.

3. Technical Testing of Virtual Platform [to be confirmed with the AV Operator from Le Royal Monceau]

8. There shall be a technical test with the Remote Participants in advance of the Second Hearing, to test connectivity to the virtual platform and to the online real-time transcriptions. For the efficient conduct of this test, Remote Participants are advised to replicate the technical conditions in which they will connect to the Second Hearing (location and equipment).

4. Connectivity

9. The Parties shall ensure that each of their representatives planning to attend as Remote Participants will connect to the videoconference through a stable internet connection offering sufficient bandwidth and using a camera and microphone/headset of adequate quality.
10. If available, Remote Participants are advised to use a wired Ethernet connection instead of Wi-Fi. Remote Participants are also encouraged to keep a smartphone or tablet, having a 4G data connection and mobile hotspot functionality, available as a backup internet connection at all times.
11. The virtual platform will also offer a dial-in telephone audio connection as a backup option should a Remote Participant experience a temporary technical difficulty with a computer online connection.

5. Equipment and Set Up for Remote Participants

12. For optimum sound quality, especially important for the audio recording, the transcription and the interpretation, Remote Participants that are also Active Participants are encouraged to use a headset which incorporates a microphone.
13. While not indispensable, Remote Participants are also encouraged to have at least two screens, and preferably three (it can be one device with multiple screens or a combination of devices including tablets) to facilitate simultaneous viewing of: (i) the video connection; (ii) the online real time transcripts; and (iii) documents.

6. Electronic Document Display

14. During their interventions at the Second Hearing, each Party shall have the ability to electronically display documents (*e.g.*, PowerPoints presentations, demonstrative exhibits, exhibits and authorities) through the screen-sharing function of the video conference platform, and the displayed document will be visible to the In-Person Participants and the Remote Participants. Each Party will designate a person(s) in its own team (“**Party Document Manager**”) to manage the document display during the respective Party’s interventions at the Second Hearing.

7. Videoconference Etiquette for Remote Participants

15. For optimum operation of the videoconference platform, the Parties are advised to keep the number of Remote Participants with video connection to a minimum. Remote Participants that are Passive Participants should preferably join the meeting through their computer but turning their video off.
16. Remote Participants shall use the “mute microphone” function when not speaking to reduce background noise and to avoid interference with the audio recording. The Operator serving as host of the videoconference shall have the ability to mute Remote Participants if needed to avoid background noise, under the Tribunal’s control.

17. Remote Participants are advised to join the Second Hearing from a location without background noise and with adequate lighting. Remote Participants joining via video shall avoid sitting with a window or source of light behind them.

8. Technical Issues

18. The Tribunal may temporarily or permanently suspend the Hearing if it deems the functioning of the videoconference system for Remote Participants to be inadequate or likely to prejudice the due process rights of either of the Parties or the integrity of the proceeding. Full recordings and real-time streamed transcripts will also be available to mitigate any prejudice arising from the temporary failure of a given Remote Participant to be able to follow the entire Second Hearing on the videoconference platform.

ANNEX C
[TEMPLATE] LIST OF PARTICIPANTS

TRIBUNAL					
Break Out Room	Name	Mode	Type ⁵	Affiliation	Place of Connection
T	[T] – Prof. Dr. Klaus Sachs klaus.sachs@cms-hs.com	IP	A	President	Paris, France
T	[T] – Prof. Hugo Perezcano Díaz hugo.perezcano@iiuris.com	IP	A	Arbitrator	Paris, France
T	[T] – Dr. Charles Poncet charles@poncet.law	IP	A	Arbitrator	Paris, France
T	[T] – Mr. Marcus Weiler marcus.weiler@cms-hs.com	IP	P	Tribunal Assistant	Paris, France

ICSID SECRETARIAT					
Break Out Room	Name	Mode	Type	Affiliation	Place of Connection
T	[T] – Sara Marzal Yetano smarzal@worldbank.org	IP	A	Secretary of the Tribunal	Paris, France

CLAIMANTS					
Break Out Room	Name	Mode	Type	Affiliation	Place of Connection
	<i>Counsel:</i>				
C	[C] –				
C					
	<i>Party Representatives:</i>				
C	[C] –				
C	[C] –				

RESPONDENT					
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⁴ “IP” (In-Person Participant) / “RP” (Remote Participant)

⁵ “A” (Active Participant) / “P” (Passive Participant).

Break Out Room	Name	Mode	Type	Affiliation	Place of Connection
	<i>Counsel:</i>				
R	[R] –				
R					
	<i>Party Representatives:</i>				
R	[R] –				
R	[R] – C				

COURT REPORTERS					
Break Out Room	Name	Mode	Type	Affiliation	Place of Connection
N/A	[CR]		P		
N/A	[CR]		P		
N/A	[CR]		P		

INTERPRETERS					
Break Out Room	Name	Mode	Type	Affiliation	Place of Connection
N/A	[INT]		P	ENG-SPA interpreter	
N/A	[INT]		P	ENG-SPA interpreter	
N/A	[INT]		P	ENG-SPA interpreter	