

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ACP Axos Capital GmbH

v.

Republic of Kosovo

(ICSID Case No. ARB/15/22)

PROCEDURAL ORDER NO. 4

Members of the Tribunal

Mr. Philippe Pinsolle, President of the Tribunal

Dr. Michael Feit, Arbitrator

Mr. J. Christopher Thomas QC, Arbitrator

Secretary of the Tribunal

Ms. Anna Holloway

6 October 2017

I. INTRODUCTION

1. On October 3, 2017, at 9:00 a.m. (EST), the President of the Tribunal and the Parties held a telephone conference to discuss the organization of the forthcoming hearing on jurisdiction and merits (“the Hearing”).
2. Prior to the call, on September 18, 2017, a draft agenda was circulated to the Parties, who were invited to confer and submit a joint proposal advising the Tribunal of any agreements they had been able to reach on any of the agenda items, or of their respective positions where they had been unable to reach an agreement.
3. By the same letter, the Parties were also invited to agree to notify each other, and the Tribunal, regarding the witnesses they each wished to call for cross-examination at the hearing, by September 29, 2017. The Parties confirmed their agreement to this proposal on September 22, 2017.
4. On September 28, 2017, in accordance with the Tribunal’s directions, the Parties jointly submitted a “Summary of Parties’ Positions.”
5. On September 29, 2017, each Party notified the other Party and the Tribunal of the witnesses they intend to cross-examine at the Hearing.
6. The following persons attended the conference call:

Tribunal:

Mr. Philippe Pinsolle, President of the Tribunal

ICSID:

Ms. Anna Holloway, Secretary to the Tribunal

For the Claimant:

Mr. Andrew Cannon

Ms. Patricia Nacimiento

Mr. Peter Archer

Ms. Rosalind Axbey

Mr. Jerome Temme

Mr. Jan Budden

Dr. Ulrich Hammerschmidt
Mr. Bob Vogue

For the Respondent:

Mr. Luka Misetic
Mr. Stephen Anway
Mr. Rostislav Pekař
Mr. Stephan Adell
Mr. Vladimir Polach
Mr. Mark Stadnyk

7. During the conference call, which was audio recorded, the Tribunal and the Parties discussed the items set out in Agenda, and in the Summary of Parties' Positions, as well as other matters raised by the Parties during the conference call.

II. ORGANIZATION OF THE HEARING

A. LOCATION

8. The Hearing will take place in the Magellan Room at the ICC Hearing Centre, located at 112 Avenue Kléber, 75016 Paris, **from Monday November 6, 2017 until Monday November 13, 2017** (with preliminary set-up to be available to the Parties from 1pm on Sunday November 5, 2017). Saturday November 11 and Sunday November 12 are not hearing days.

B. SCHEDULE

9. Each hearing day will, in principle, start at 9:00 am and will end by 17:30 pm. There will be a 45 minute lunch break commencing at 1:00 p.m., and two fifteen-minute breaks in each half of the day (one in the morning and one in the afternoon). This schedule is subject to a general requirement for flexibility and shall be under the control of the Tribunal.
10. The hearing shall proceed according to the following schedule, subject to any adjustments required in the course of the hearing:
 - Tribunal Opening and Logistical Matters

- Claimant's opening submissions, of no more than 3 hours
 - Respondent's opening submissions, of no more than 3 hours
 - Examination of Claimant's fact witnesses
 - Examination of Respondent's fact witnesses
 - Examination of Claimant's legal expert
 - Examination of Respondent's legal expert
 - Examination of Claimant's quantum expert
 - Examination of Respondent's quantum experts (Parties to agree the modalities of this cross-examination)
 - Claimant's closing submissions
 - Respondent's closing submissions
11. Subject to para. 19 the Parties shall inform the Tribunal of the order of their fact witnesses presented for cross-examination, as well as the estimated amount of time each Party intends to use for the cross-examination of each of the witnesses and experts it has called for cross-examination on Monday, 23 October 2017.
12. The Parties shall also provide the Tribunal with an agreed indicative daily schedule for the hearing (including the schedule of witnesses) by Monday, 23 October 2017.

C. ALLOCATION OF TIME

13. Time shall be allocated equally in principle, subject to the control of the Tribunal.
14. The Secretary of the Tribunal will record the time used by each of the parties and advise the parties daily of the length of time used, however, flexibility within the general principle of equal allocation of time shall be observed.

15. In principle, time for the arbitrators' questions is imputed to the party then examining the witness or expert but the Tribunal may decide otherwise, e.g. if its questions are especially time-consuming or put after the parties' respective examinations.
16. Taking into account the duration of the hearing, and the scheduled breaks, in principle there are 43.5 sitting hours available to the Parties and Tribunal. For planning purposes, the Parties should assume they will have no more than [19] hours available each.

D. ATTENDANCE

17. Each Party shall inform the Tribunal and ICSID by October 23, 2017 of the members of its delegation.

E. WITNESS AND EXPERT EXAMINATION

18. The rules set out in Procedural Order No. 1 for the examination of witnesses and experts are confirmed, subject to the provisions of this paragraph. In particular, the examination and cross-examination of witnesses and experts will proceed in accordance with Section 18 of Procedural Order No. 1, the relevant parts of which read as follows:

18.2. Each party will notify to the other party and the Tribunal the factual witnesses and expert witnesses of the opposing party (having submitted written statements and expert reports) whom it intends to cross-examine, and will do so 14 days following the receipt of the last memorial before the hearing at which the party intends to conduct such examination. Shortly after the parties' notifications, the Tribunal will indicate the witnesses and experts not called by the parties that it wishes to question, if any. Any witness or expert so called shall be subject to cross-examination at the oral procedure. If a witness is not made available, the Tribunal shall decide, taking all circumstances into consideration, whether to accept or disregard a witness statement or expert report, and shall determine what weight, if any, to attach to the testimony of such witness or expert.

18.3. Any witness or expert not requested by the other party or by the Tribunal for cross-examination shall not give oral testimony, except upon a reasoned application granted by the Tribunal.

18.4. Each party shall be responsible for summoning its own witnesses and experts to the hearing(s). Each party shall advance the costs of appearance

of its own witnesses. The Tribunal shall decide upon the appropriate allocation of such costs in any decision or the final award.

18.5. It shall not be improper for a party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.

18.6. Examination by video-conference may be permitted for justified reasons at the discretion of the Tribunal.

18.7. Witnesses and experts shall be examined by each party under the control of the Tribunal, unless otherwise provided by the Tribunal. Before giving evidence, witnesses shall make the declaration set out in ICSID Arbitration Rule 35(2), and experts shall make the declaration set out in ICSID Arbitration Rule 35(3). The Tribunal may examine the witness or expert at any time during the oral procedure.

18.8. The witness statements and expert reports shall be sufficiently detailed so as to exempt witnesses and experts from direct oral examination. The direct examination at the hearing(s) shall be limited to no more than fifteen minutes, confirming the witness statement or expert report, to make any corrections to those documents, to explain briefly important aspects of their testimony or to address any new matters or evidence that have arisen or come to light since the submission of the witness' testimony.

18.9. The Tribunal shall have the right to organize the joint examination of two or more witnesses or experts if it deems it appropriate.

18.9.[sic] Unless the parties and the Tribunal agree otherwise, factual witnesses shall not be allowed in the hearing room before giving their oral evidence. Expert witnesses shall be allowed in the hearing room at any time.

18.10. The Tribunal shall have full discretion to assess all evidence, oral or written, including the written statements/expert reports of those witnesses/experts who have not been called to appear for cross-examination. The fact that a witness or expert is not called by the opposing party or the Tribunal for cross-examination shall create no presumption as to the weight the Tribunal will give to that witness's statement or that expert's report.

18.11. Other matters regarding the examination of witnesses and experts may be addressed at the pre-hearing organizational meeting.

18.12. The Arbitral Tribunal will be guided, but not bound, by the IBA Rules of Evidence with regard to the submission of evidence by witnesses.

19. The provisions of Section 18.9[sic] of Procedural Order No. 1 are modified, to permit Mr. Jan Budden, who is a witness for the Claimant but also a principal representative of the Claimant, to attend the hearing *after* he has finished his testimony. For the avoidance of doubt, while Mr. Budden is not permitted to be in the hearing room during the Parties' opening submissions or to follow the proceeding remotely in realtime during this period, he may, *after* he has completed his testimony, review the transcripts of the Parties' openings and otherwise discuss their content with the Claimant's counsel. It is understood that Mr. Budden will be the first witness for the Claimant to be examined, although that is for the Claimant's final determination.
20. The Claimant intends to cross-examine the following witnesses/experts of the Respondent:
 - a. Mr. Besim Beqaj
 - b. Mr. Kreshnik Gashi
 - c. Mr. Fadil Ismajli,
 - d. Professor Qerim Qerimi
 - e. Mr. Michael Peer
21. The Respondent intends to cross-examine the following witnesses/experts of the Claimant:
 - a. Mr. Budden
 - b. Mr. Woog
 - c. Mr. Dixon Doll
 - d. Dr. Plavsak
 - e. FTI Consulting
22. Any redirect or recross-examination of a witness or expert, while not subject to an express time limit, will count towards the time of the party undertaking that examination. The Tribunal records its observation that recross-examination should be used exceptionally and is rarely useful.

23. All experts shall be allowed to make presentations of no more than 20 minutes, in lieu of direct examination. Presentations shall not contain any new material.

F. DOCUMENTATION AND HEARING MATERIALS

(1) Demonstratives

24. Section 16.7 of Procedural Order No. 1, is confirmed, as modified and supplemented in this section. Section 16.7 provides:

16.7. Demonstrative exhibits (such as Power Point 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 hard copy to the other party, the Tribunal Members, the Tribunal Secretary, the court reporter(s) and interpreter(s) at the hearing at a time to be decided at the pre-hearing organizational meeting.

25. Any demonstrative exhibit which in some way rearranges or presents in a new way or different fashion existing evidence shall be provided to the Tribunal, the Secretary of the Tribunal, and the opposing Party:

- a. 48 hours in advance of the start of the hearing if it is to be used in a Party's opening submissions; and
- b. 24 hours in advance of its use if it is to be used in an expert presentation or otherwise during the course of the hearing.

26. For the avoidance of doubt, PowerPoint slides which simply summarize arguments or replicate in an unaltered form an exhibit or pleading on the record are not required to be provided in advance pursuant to paragraph 25 above.

27. Complete copies of all PowerPoint slide presentations used by the Parties or their experts shall be submitted in hardcopy at the beginning of the relevant presentation, with electronic copies to follow by email by the end of that same day. Sufficient hardcopies for the

Tribunal, the Tribunal Secretary, the opposing Party, and the court reporter(s) shall be provided.

(2) New Material

28. Section 16.3 of Procedural Order No. 1 is confirmed. Section 16.3 provides:

16.3. Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other party.

16.3.1. Should a party request leave to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request.

16.3.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other party is afforded sufficient opportunity to make its observations concerning such a document.

(3) Hearing Bundles

29. The parties will provide for the Tribunal's use in the hearing room a single hardcopy hearing bundle containing (a) all written submissions; (b) all witness statements; (c) all expert reports (including accompanying exhibits); (d) all fact exhibits (in existing numerical order), form of the bundle to be agreed by the Parties. The Parties shall confer and agree on the production of this hearing bundle (including regarding the costs of its production).

30. The Parties shall also agree appropriate arrangements regarding the production of witness bundles, and revert with their agreement for approval by the Tribunal by October 23, 2017.

31. The Claimant will provide to the Respondent, the members of the Tribunal, and the Tribunal Secretary, no later than by Monday October 31, 2017, USB drives containing (a) all Procedural Orders issued; (b) all written submissions; (c) all witness statements; (d) all expert reports (including accompanying exhibits); (e) all exhibits; (f) all legal authorities; (g) the joint chronology; and (h) a hyperlinked index. For the avoidance of doubt, the date

specified in this paragraph is the date by which the USB must reach the recipients (not the date of dispatch).

32. All references to documents in the Hearing shall be to the relevant document's current designation. In the event that separate witness bundles are created, counsel shall refer to the documents contained therein by both the new tab number and also by its original designation (to ensure that information is recorded in the transcript).

(4) Agreed Chronology

33. Pursuant to Section 20.74 of Procedural Order No. 1, the Parties will file a joint chronology of facts with references to the record by Tuesday, October 17, 2017.

G. POST-HEARING BRIEFS AND STATEMENTS OF COSTS/SUBMISSIONS ON COSTS

34. The Parties shall make oral Closing arguments at the Hearing and hence shall not file any Post Hearing Briefs.
35. The format and timing of costs statements and any submissions on the allocation of costs shall be determined by the Tribunal on the final day of the Hearing, in consultation with the Parties.

III. HEARING LOGISTICS

A. VENUE AND SET-UP

36. The Hearing will take place in the Magellan Room at the ICC Hearing Centre, located at, 112 Avenue Kléber, 75016 Paris.
37. ICSID will liaise with the Parties and the Tribunal regarding the specific logistical details of the Hearing, including set-up, catering, and technology requirements.

B. COURT REPORTER ARRANGEMENTS

38. Sections 21.1, 21.3 and 21.4 of Procedural Order No. 1 are confirmed, except as modified in this section. Those provisions provide:

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.

...

21.3. Verbatim transcript(s) in the procedural language(s) 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.

21.4. The parties shall agree on any corrections to the transcripts within 7 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.

39. The timeframe for agreement to the corrections to the transcripts set forth in Section 21.4 of Procedural Order No. 1 is modified to 14 days.

40. ICSID will liaise with the Parties regarding the specifics of the provision of realtime transcripts, including with respect to the number of laptops for the realtime transcripts required by each Party, and the email distribution list for daily transcripts. There shall be realtime transcript terminals for each Member of the Tribunal and the Tribunal Secretary.

C. INTERPRETATION

41. The Parties have confirmed that no interpretation is required at the hearing.

[signed]

Philippe Pinsolle
President of the Tribunal
Date: October 6, 2017