

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Riverside Coffee, LLC

v.

Republic of Nicaragua

(ICSID Case No. ARB/21/16)

PROCEDURAL ORDER No. 8

Members of the Tribunal

Dr. Veijo Heiskanen, President of the Tribunal

Mr. Philippe Couvreur, Arbitrator

Ms. Lucy Greenwood, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal Yetano

16 January 2024

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I. PROCEDURAL HISTORY

1. On 27 June 2022, the Tribunal issued Procedural Order No. 1 (“**PO1**”), setting out the procedural rules that govern this arbitration, in addition to those applicable under the ICSID Convention and ICSID Arbitration Rules.
2. On 1 July 2022, the Tribunal issued Procedural Order No. 2, setting out the Procedural Calendar. According to the Procedural Calendar, a hearing on jurisdiction and the merits is scheduled to take place on 1-12 July 2024 (the “**Hearing**”). PO1 further confirmed that Washington D.C. would be the place of the proceeding, and that the Tribunal could hold in-person hearings at any other place that it considered appropriate if the Parties so agreed.
3. On 6 October 2023, the Tribunal invited the Parties to confirm, by 13 October 2024, that the Hearing would take place at the seat of the Centre in Washington D.C. and noted that, in the meantime, a hearing room and all relevant services had been tentatively booked at ICSID’s hearing facilities in Washington D.C.
4. On 13 October 2023, the Claimant proposed that the Hearing be held remotely in order to (i) reduce costs and carbon footprint and (ii) avoid complex visa requirements. The Claimant argued that the United States sanctions in place against certain categories of Nicaraguan government officials could affect the ability of Nicaragua’s potential witnesses and representatives “*to attend in person and instruct Nicaragua’s counsel.*” The Claimant added that, should the Tribunal decide against holding a remote hearing, it would be agreeable to holding the hearing at the seat of the Centre in Washington D.C.
5. On the same date, 13 October 2023, the Respondent confirmed that it agreed to hold the Hearing at the seat of the Centre in Washington D.C. and that its preference was to hold the Hearing in person. According to the Respondent, to the extent that any of its witnesses would be “*unable to participate in the hearing in person, Nicaragua reserve[d] the right to have them appear virtually.*”

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6. On 6 November 2023, the Tribunal wrote to the Parties, taking note of their disagreement as to whether the Hearing should be held in-person or virtually, and invited the Parties to submit their views on (i) whether the Hearing should be held in-person, virtually or in hybrid format; (ii) whether the Tribunal had the power under the ICSID Convention and the ICSID Arbitration Rules to hold the hearing virtually (or in a hybrid format) in circumstances where one of the Parties required an in-person hearing; and (iii) whether, in the event the Tribunal decided to hold the Hearing in hybrid format, there would be any due process considerations that the Tribunal should take into account when determining which aspects of the Hearing should be conducted in-person and which ones should be conducted virtually.
7. On 20 November 2023, the Claimant submitted its views on the issues identified by the Tribunal in its communication of 6 November 2023. The Claimant reiterated its proposal for a fully remote hearing and argued that, based on precedent established in previous ICSID cases, the Tribunal possessed the requisite authority to mandate a remote hearing even when the opposing party required an in-person hearing.
8. The Claimant further contended that some government witnesses offered by the Respondent were ineligible for U.S. entry visas due to the operation of Proclamation 10309 issued by the President of the United States on 16 November 2021. According to the Claimant, other witnesses were also likely ineligible, but a definitive determination could only be made once the U.S. Embassy in Managua had taken a decision on the relevant visa applications. Moreover, the Claimant argued that, even without the operation of U.S. Proclamation 10309, the Respondent and the Claimant's witnesses who are based in Nicaragua would face significant challenges in acquiring visas to the United States. The Claimant also objected to the imbalance that would allegedly arise if the Hearing proceeded with the Claimant predominantly presenting witnesses in person, while the Respondent relied solely on remote testimony.

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9. The Claimant submitted that, while it would be technically possible to hold some segments of the Hearing in person and others remotely, this approach would be impractical. Instead, a fully remote hearing would be the most effective solution to ensure that both Parties were treated equally in every respect. However, the Claimant noted that, should the Tribunal choose to exercise its discretion to hold a hybrid hearing, expert witness examination and closing statements could be held in person. The Claimant added that holding a fully remote hearing would not prevent the Tribunal from sitting together, either at the seat of the Centre or in another location.
10. On the same date, on 20 November 2023, the Respondent also presented its views, reiterating its position that all aspects of the Hearing should be conducted in-person, unless specific circumstances justified holding certain aspects remotely.
11. While the Respondent did not dispute that the Tribunal has the authority to decide to hold the Hearing remotely or in a hybrid form even in the absence of an agreement to that effect between the Parties, the Respondent maintained that such a decision should be justified by extraordinary circumstances of equal weight and force as pandemic disruptions, in accordance with Section 20.3 of PO1.
12. The Respondent argued that the Claimant had not demonstrated that such circumstances existed in this case. *First*, the possibility of cost savings was not a sufficient reason to impose a remote hearing in the absence of an agreement between the Parties, particularly considering the scale, the complexity and the gravity of this case. In any event, the Respondent contended, it was not clear that a remote hearing would save any costs. *Second*, the Respondent stated that none of Nicaragua's experts or witnesses was subject to international sanctions and that none of the three individuals that were subject to U.S. sanctions, mentioned in the Claimant's letter of 13 October 2023, was a witness in this case. *Third*, a remote hearing would also require significant travel (to enable counsel and witnesses to work together) and therefore it was not certain that it would reduce the carbon footprint of the Hearing.

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13. By contrast, the Respondent submitted that considerations of due process and practicality required an in-person hearing. Among other considerations, the Respondent stressed that the Tribunal would benefit from in-person cross-examination and that Nicaragua should be allowed to challenge the evidence against it in-person given (i) the high number of witnesses; (ii) the Claimant's acknowledgement that its case depends heavily on witness testimony; and (iii) the serious allegations made against Nicaragua.
14. The Respondent also argued that it was unlikely that a remote hearing could be completed in the two weeks reserved for the Hearing (or at least that this could be done other than through an unnecessarily punishing and unnatural schedule), and that hearing participants connecting from Nicaragua would likely face technical difficulties, given the unreliability of internet services in the country.
15. Finally, should the Tribunal decide to hold a hybrid hearing, the Respondent requested that several conditions be met, including that (i) the Tribunal Members, the Parties' representatives and experts attend in person and that (ii) witnesses only be allowed to attend remotely following a prior application to the Tribunal based on compelling and specific circumstances.
16. In view of the scope of the disagreement, on 4 December 2023, the Tribunal invited the Parties to a procedural meeting via videoconference to hear them on the disputed issues, as identified on the agenda of the meeting circulated by the Tribunal.
17. On 12 January 2014, the Parties and the Tribunal held the procedural meeting by videoconference. During the meeting, the Parties further developed their positions regarding the possibility of a remote or hybrid hearing, as well as on the availability of the Parties' witnesses to attend the Hearing if held in person in Washington, D.C.
18. The Parties also expressed their views on alternative venues outside the United States, should the Tribunal decide to hold the Hearing in person. The Claimant objected to holding the Hearing in a place other than the seat of the Centre and maintained that pursuant to

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Articles 62 and 63 of the ICSID Convention, the seat of the Centre was the only available option, given the lack of agreement for the Tribunal to sit elsewhere. The Respondent, on the other hand, proposed several possible venues in Latin America and argued that the Tribunal had the power to decide to hold the Hearing in a place other than the seat of the Centre, pursuant to Article 44 of the ICSID Convention.

19. Finally, both Parties indicated that, at this point, they were unable to confirm whether they would call all the witnesses of the opposing party for examination at the Hearing.

II. THE TRIBUNAL'S ANALYSIS

i. The venue of the Hearing

20. The relevant provisions regarding the place of the proceedings are Articles 62 and 63 of the ICSID Convention, which provide:

Article 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

(a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or

(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

21. Consistent with Articles 62 and 63 of the ICSID Convention, the Tribunal provided further rules regarding the place of the proceedings and the venue of the hearing in Sections 10.1 and 10.2 of PO1, which provide:

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10.1. Washington D.C. shall be the place of the proceeding.

10.2. The Tribunal may hold in-person hearings at any other place that it considers appropriate if the parties so agree.

22. The Tribunal notes the Respondent’s argument that the Tribunal would have the authority under Article 44 of the ICSID Convention to hold the Hearing in a place other than Washington, D.C., even in the absence of an agreement between the Parties. Article 44 provides:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

23. In view of the unambiguous language of Articles 62 and 63 of the ICSID Convention, the Tribunal is not persuaded that it would have the authority under Article 44 of the ICSID Convention, without the agreement of the Parties, to hold the Hearing in any place other than Washington D.C. Article 44 merely provides for the general authority of the Tribunal to decide “any question of procedure” only to the extent that such questions are “*not covered by this Section or the Arbitration Rules or any rules agreed by the parties.*” Article 44 does not confer any authority on the Tribunal to deviate from Articles 62 and 63 of the ICSID Convention.
24. Furthermore, while Article 63 of the ICSID Convention envisages that the Parties may agree on a place of proceeding other than Washington D.C., there is no such agreement in this case. Indeed, Section 10.1 of PO1 provides that “*Washington D.C. shall be the place of the proceeding,*” and as summarized above, the Parties have not subsequently agreed, pursuant to Section 10.2 of PO1, to “*hold in-person hearings at any other place.*”
25. Consequently, in the absence of any agreement between the Parties to the contrary, Washington D.C. shall be the place of the proceedings.

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ii. Whether the Hearing should be held in person, remotely or in hybrid form

26. The Tribunal addressed the modalities of the Hearing in Sections 20.2 and 20.3 of PO1, which provide:

20.2. The hearing may be held in-person or by any other means of communication as determined by the Tribunal after consultation with the parties. An in-person hearing shall be held at a place to be determined in accordance with §10 above.

20.3. Having due regard to the specific circumstances of the case, including any relevant travel restrictions and/or social distancing measures, the Tribunal may, after consulting with the Parties, decide to hold a hearing remotely or in a hybrid form.

27. Pursuant to Section 20.2 of PO1 (which refers to Section 10 thereof), if the Hearing is held in-person, it will be held at the place of the proceedings, in Washington D.C.
28. The Tribunal notes that Section 20.3 of PO1 makes clear that the Tribunal has the power to decide to hold the Hearing, if the circumstances so require, remotely or in a hybrid form. As summarized above, there is disagreement between the Parties as to whether or not the Hearing should be held in person, and the Tribunal must therefore determine, pursuant to Sections 20.2 and 20.3 of PO1, whether the specific circumstances of this case require that the Hearing be held in a remote or hybrid form.
29. Having carefully considered the Parties' submissions, the Tribunal is not convinced that the circumstances of this case require that the Hearing be held remotely. The Tribunal agrees with the Respondent that the in-person format is preferable given the fact-intensive nature of this case, which is reflected in the number of witnesses of fact offered by the Parties and the value of the dispute. Accordingly, the Tribunal determines that the Hearing be held in-person in Washington D.C., subject to the following considerations.

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30. The Tribunal notes that it is not clear, at this stage of the proceedings, whether all the witnesses of fact and other individuals who are resident in Nicaragua will be able to obtain a visa and travel to the United States to attend the Hearing. While the Claimant takes the view that all hearing participants based in Nicaragua will face difficulties in obtaining visas to the United States, the Respondent takes a contrary position and asserts that none of its witnesses of fact is subject to U.S. Proclamation 10309 and that the Office of the Legal Adviser of the U.S. State Department has given it assurances that visas would be issued to Nicaraguan nationals having to travel to Washington D.C. in order to attend the Hearing. The Tribunal is not in a position, based on the limited evidence before it, to take a view on whether any of the witnesses of fact offered by the Parties are subject to U.S. Proclamation 10309 or would be otherwise prevented from obtaining a visa to enter the United States. Consequently, as set out in the operative part of this Procedural Order, the Tribunal directs the Parties to commence the process for obtaining the visas immediately, and to report to the Tribunal by the date fixed in the operative part of this Procedural Order on the status of the process. The Parties are strongly encouraged to cooperate in this process and share with the other Party the information available to them regarding the applicability of the relevant travel restrictions to any of the witnesses of fact offered by either Party and the progress made in obtaining visas.
31. Having received the Parties' status report, including further information on the applicability of the visa restrictions in U.S. Proclamation 10309 to the witnesses of fact offered by the Parties in this case, the Tribunal will determine whether certain aspects of the Hearing, specifically the examination of certain witnesses of fact, may have to be conducted by videoconference. When making this determination, the Tribunal will ensure fair and equal treatment of both Parties.

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III. ORDER

32. In view of the above, the Tribunal orders as follows:

- (a) The Hearing will take place in person in Washington D.C. from 1-12 July 2024;
- (b) The Parties shall immediately start the visa application process for all Hearing participants based in Nicaragua and shall inform the Tribunal on the status of such process within **four weeks** from the date of this Order; and
- (c) Having received the Parties' reports on the status of the visa application process, the Tribunal will decide on any arrangements that may be required to ensure the attendance of Hearing participants and the fair and equal treatment of the Parties.

On behalf of the Tribunal,

[Signed]

Dr. Veijo Heiskanen
President of the Tribunal
Date: 16 January 2024