

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Daniel W. Kappes and Kappes, Cassiday & Associates**

(Claimant)

**v.**

**Republic of Guatemala**

(Respondent)

**ICSID Case No. ARB/18/43**

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**PROCEDURAL ORDER NO. 12**

***Members of the Tribunal***

Ms. Jean E. Kalicki, President of the Tribunal

Mr. John M. Townsend, Arbitrator

Prof. Zachary Douglas QC, Arbitrator

***Secretary of the Tribunal***

Mr. Francisco Grob

Ms. Daniela Argüello

***Assistant to the Tribunal***

Dr. Joel Dahlquist

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28 March 2022

1. This procedural order addresses: (I) the Claimants' application to strike from the record the witness statements of Mr. José Ramiro Oliva Torres and Ms. Grace González, and (II) the Parties' objections to demonstrative slides used by each other's experts during the Hearing on the Merits held on 28 February 2022 through 11 March 2022 (the "Hearing").

**I. CLAIMANTS' APPLICATION TO EXCLUDE WITNESS STATEMENTS**

**A. The Parties' Positions**

2. In a communication dated 26 February 2022, Guatemala advised the Tribunal that one of its witnesses, Mr. Oliva, [REDACTED] and, as a result, was unavailable to testify at the Hearing.<sup>1</sup>
3. At the start of Day 1 of the Hearing, on 28 February 2022, Guatemala advised the Tribunal that Ms. González also would be unavailable to testify, due to objections by Ms. González's current employer.<sup>2</sup>
4. In response to these communications, on 1 March 2022, the Claimants submitted a letter, in which they requested that the Tribunal strike from the record the witness statements of Mr. Oliva and Ms. González.

The Claimants alleged that Guatemala improperly delayed providing information about these two witnesses' availability to testify during the Hearing, which caused prejudice to the Claimants, who had to prepare their cross-examinations anyway, and make plans for its own witnesses and experts based on a schedule that contemplated Mr. Oliva and Ms. González's attendance at the Hearing. Mr. Oliva's and Ms. González's failure to testify during the Hearing, the Claimants say, also prevented the Claimants from exercising their fundamental right to cross examine them, including having an opportunity to confront them about important issues of fact relied upon by Guatemala.

5. By a letter dated 2 March 2022, Guatemala asked the Tribunal to deny Claimants' request that Mr. Oliva's and Ms. González's witness statements be excluded from the record.

Guatemala reiterated that Mr. Oliva is currently undergoing chemotherapy treatment for mantle cell lymphoma and has been ordered to remain on bed rest due to his compromised immunity. In Guatemala's view, Mr. Oliva's health condition is a justified absence in line with paragraph 19.7 of Procedural Order No. 1 ("P.O. No. 1") as well as case law. As for Ms. González, Guatemala remarked that Claimants did not call Ms. González as one of the witnesses they would be cross-examining; as such, they cannot now claim that her absence

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<sup>1</sup> Email from Guatemala to the Tribunal dated 26 Feb. 2022, [REDACTED]

<sup>2</sup> Draft Transcript of Day 1, pp. 14:15-15:22.

is prejudicial to them. In any event, Guatemala contends, Ms. González is an independent third party in this case whose actions are not under Guatemala's control.

6. On 16 March 2022, the Claimants wrote in response to Guatemala's letter dated 2 March 2022. According to the Claimants, Guatemala's letter confirmed that Guatemala was on notice – for (at least) several weeks prior to the Hearing – of Mr. Oliva's and Ms. González's inability to testify, and yet chose to withhold this information from the Tribunal and Claimants. Due process thus requires that these statements be excluded from the record. The Claimants further requested that the Tribunal award Claimants the costs that they have incurred in preparing for the cross-examinations of these two witnesses.
7. In a letter dated 21 March 2022, Guatemala responded to the Claimants' 16 March letter. According to Guatemala, Mr. Oliva's health took a turn for the worse one week before the hearing, which was something that no one could anticipate; so, there was no concealment of information about his health. Nor did Guatemala know that Ms. González would not testify until 2 March 2022, when Ms. Gonzalez herself notified Guatemala's counsel that NBC would not let her attend the Hearing.

Accordingly, Guatemala requests that the Tribunal apply Sections 19.5 and 19.7 of Procedural Order No. 1 to assess the weight of the written testimonies of Mr. Oliva and Ms. González considering the entire record and relevant circumstances and deny Claimants' request that Mr. Oliva's and Ms. González's written testimony be stricken from the record.

### **B. The Tribunal's Analysis**

8. The Claimants' application to exclude the witness statements is based on two different types of stated concerns: (a) concerns about admission of the *substance* of the witnesses' written testimony, without Claimants having an opportunity to cross-examine them, and (b) concerns about additional *time and costs incurred* by Claimants in preparing for cross-examination, because of the alleged lateness with which the Respondent conveyed the witnesses' unavailability. The Tribunal considers that the two issues should not be conflated, and that only the former issue requires examination at this juncture.
9. Specifically, the former issue – whether the substance of Mr. Oliva's and Ms. González's witness statements should be admitted into the record – is governed expressly by paragraph 19.7 of Procedural Order No. 1. This sets forth a standard by which admissibility should be assessed: namely, was there sufficient justification for their absence from the Hearing, having been called for examination? By contrast, the latter issue – concerning responsibility for costs incurred – does not relate to the substance of the witnesses' testimony, and is distinct from the inquiry set out in Procedural Order No. 1. The Parties are free to return, in their eventual costs applications, to the effect of these matters on overall costs incurred. But the

cost issue is not *itself* a basis for determining whether the written testimony of witnesses should be maintained in the record.<sup>3</sup>

10. Applying, then, the standard set forth in paragraph 19.7 of Procedural Order No. 1, the Tribunal turns first to Mr. Oliva. It considers the grounds of justified absence to be easily met in his case.

[REDACTED]

The Tribunal sees no basis to second guess the representations made that his condition on the eve of the Hearing did not permit him to appear for cross-examination. On this basis, Claimants' application to exclude Mr. Oliva's written testimony is denied. As provided in paragraph 19.7 of Procedural Order No. 1, the Tribunal will assess the weight of that testimony taking into account the entire record and all the relevant circumstances, just as it previously determined to do for Claimants' witness Mr. Carraza, who passed away after submitting a written statement but before the Hearing.

11. The circumstances are rather different with respect to Ms. González. As an initial point, the Tribunal does not accept her employer's denial of permission to testify as a valid justification, given that she already was employed by the same employer when she put in her witness statement. Nothing prevented Ms. González at *that* time from seeking confirmation from her employer regarding whether she would be allowed to testify. The failure to make a full inquiry then, resulting in an apparently unexpected answer from the employer when the inquiry was made in the run-up to the Hearing, does not constitute a changed circumstance. The Tribunal therefore would have been inclined to grant Claimants' application to exclude Ms. González's written testimony from the record, if she were a witness whom they had sought to cross-examine based on the content of that written testimony.
12. However, that is not the case for Ms. González. Claimants did not ask that she be present at the Hearing for cross-examination. This means that, in the exercise of their own judgment, they apparently were ready to let her statement remain in the record for whatever weight the Tribunal considered appropriate to assign it. Claimants decided to cross-examine Ms. González only after Respondent noticed her for direct examination, using the unusual procedure the Parties had jointly proposed be included in Procedural Order No. 1, whereby each Party would be allowed to notice up to three of its own witnesses even if the opposing Party did not seek to cross-examine them.<sup>4</sup> In other words, once it appeared that the Tribunal would hear from Ms. González orally in any event, and would be able to form added

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<sup>3</sup> This is consistent with the approach previously used in determining that Mr. Carraza's witness statement would remain in the record. His unfortunate death clearly satisfied the standard of justified absence set forth in paragraph 19.7 of Procedural Order No. 1. This was the case *whether or not* Claimants could have discovered the fact of Mr. Carraza's death earlier than they did, and conveyed that information earlier to Respondent for purposes of its Hearing preparations.

<sup>4</sup> Procedural Order No. 1, paragraph 19.3.

impressions of her beyond her written witness statement, Claimants added her to their cross-examination list, presumably so that the Tribunal's in-person impressions of the witness would be informed by questioning from both sides. In these circumstances, Ms. González's subsequent failure to appear for either direct-examination or cross-examination therefore placed both Parties, in terms of the evidentiary record, back precisely where they would have been when Claimants themselves indicated they had no affirmative need to cross-examine her. The only difference is that Claimants in the interim expended certain effort in preparation of her cross-examination, which (as noted above) may be relevant to costs issues, but is not relevant to admissibility of the substance of her written statement.

13. Taking all these considerations into account, the Tribunal denies Claimants' application to exclude Ms. González's statement. While Respondent has not demonstrated a justified basis for her absence, the predicate basis for that standard applying in the first place – that the Claimants affirmatively requested that she appear for examination at the Hearing – is not applicable either. The Tribunal leaves the record regarding Ms. González where Claimants were content for it to lie when they compiled their own cross-examination notices. As with the other witnesses not appearing at the Hearing, the Tribunal will assess the weight of her written statement taking into account the entire record and all the relevant circumstances.

## **II. THE PARTIES' OBJECTIONS TO DEMONSTRATIVE SLIDES**

### **A. The Parties' Positions**

14. In SRK's Direct Presentation during Day 8 of the Hearing, it included content in Slide 5, to which the Respondent objected as not containing any citations to the record and, in the Respondent's view, reflecting content that in any event was not already part of the record. The Claimants indicated that they would resubmit the slide with additional citations. The Tribunal deferred ruling on any objection pending receipt of such citations.<sup>5</sup>
15. On 15 March 2022, the Claimants resubmitted Slide 5 of SRK's Direct Presentation. The Claimants stated that they had now added the citations that were missing from the original slide and requested that it be included in the record.
16. In a response submitted the same day, Guatemala requested that the Tribunal exclude Slide 5 from the record. Guatemala argued that Slide 5 was misleading and that the late introduction of the missing citations deprived it of its right to cross-examine SRK's experts on this issue.
17. The Claimants replied, also the same day, that Slide 5 was schematic and was merely intended to provide a visual illustration of the three assessments covered by SRK's expert reports. According to the Claimants, Guatemala had full opportunity to cross-examine SRK on the entirety of its reports, including the paragraphs cited in support of Slide 5. The

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<sup>5</sup> Draft Transcript of Day 8, 1950/16-20.

Claimants also claimed that there were numerous slides in the SLR Direct Presentation that did not contain any citations to evidence or SLR's expert reports, and that had not been sent in advance for review as provided in the protocol governing use of demonstrative exhibits. The Claimants objected to the inclusion in the record of these SLR slides. The Claimants further objected to a reference in Slide 34 of Prof. Richter's Direct Presentation, which they said included a reference to alleged case law from the 1990s that was not present in either of Prof. Richter's reports.

18. In a communication sent on 16 March 2022, Guatemala reiterated its objection to admission of SRK's Slide 5 and rejected the Claimants' objections to the slides used in the SLR Direct Presentation and the reference included in one of Prof. Richter's slides. According to Guatemala, Claimants' objections are misconceived and have no merit, or were waived by the Claimants' failure to raise them in a timely fashion during the Hearing.

#### **B. The Tribunal's Analysis**

19. The Tribunal takes both the objections and the responses under advisement, and will resolve these disputes if it finds that doing so would be material to its decision on any contested matters. As a general matter, the Tribunal expects to render its decisions based on the evidence in the record, and not on mere assertions by experts that are unsupported by the record.

[signed]

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Ms. Jean Kalicki  
President of the Tribunal  
Date: 28 March 2022