**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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

**v.**

**Republic of Guatemala**

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

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# PROCEDURAL ORDER NO. 3

## Hearing Protocol

***Members of the Tribunal***
Ms. Jean Kalicki, President of the Tribunal
Mr. John M. Townsend, Arbitrator
Prof. Zachary Douglas QC, Arbitrator

***Secretary of the Tribunal***
Mr. Francisco Grob

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**Date of the Order:** November 27, 2019

## I. PROCEDURAL BACKGROUND

1. On November 9, 2018, Daniel W. Kappes and Kappes, Cassiday & Associates submitted a Request for Arbitration against the Republic of Guatemala. The Request was registered on December 11, 2018, and the Tribunal was constituted on July 2, 2019.

2. On August 16, 2019, the Republic of Guatemala submitted a Memorial on Preliminary Objections pursuant to Article 10.20.5 of the Dominican Republic-Central America-United States Free Trade Agreement (the "DR-CAFTA").

3. Following a First Session on August 26, 2019, the Tribunal issued Procedural Order No. 1 dated September 10, 2019. In Annex B to that Order, the Tribunal set a procedural timetable for the parties' pleadings including in respect of the Preliminary Objections.

4. As scheduled, the Claimants filed their Counter-Memorial on September 27, 2019, the Respondent filed its Reply on Preliminary Objections on October 25, 2019, and the Claimants filed their Rejoinder on Preliminary Objections on November 22, 2019.

5. On November 20, 2019, ICSID circulated to the Parties a draft Hearing Protocol prepared by the Tribunal. The Parties were invited to consider and discuss all open issues in the draft, as well as any other items they may wish to add to the agenda. On November 25, 2019, the Parties submitted their comments indicating the items on which they disagreed.

6. On November 26, 2019, at 2:00 p.m. (Washington, D.C. time), the President of the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference. The session was adjourned at 2:39 p.m.

7. An audio recording of the session was made and deposited in the archives of ICSID. The recording was distributed to the Members of the Tribunal and the Parties.

   Participating in the conference were:

   Members of the Tribunal:
   Ms. Jean Kalicki, President of the Tribunal

   ICSID Secretariat:
   Mr. Francisco Grob, Secretary of the Tribunal
   Ms. Daniela Argüello, Legal Counsel, ICSID

   Participating on behalf of the Claimants:
   Ms. Andrea J. Menaker, White & Case LLP
   Mr. Rafael Llano, White & Case LLP
   Ms. Agnieszka Zarowna, White & Case LLP
   Ms. Alexa Romanelli, White & Case LLP

   Participating on behalf of the Respondent:
   Mr. Adolfo E. Jiménez, Holland & Knight LLP

Mr. Brian A. Briz, Holland & Knight LLP
Ms. Katharine Menéndez de la Cuesta, Holland & Knight LLP
Ms. Arantxa Cuadrado, Holland & Knight LLP
Ms. Luisa Gatica, Procuraduría General de la Nación (Attorney General's Office, Republic of Guatemala)
Ms. María Hernández, Procuraduría General de la Nación (Attorney General's Office, Republic of Guatemala)
Mr. Mario Mérida, Procuraduría General de la Nación (Attorney General's Office, Republic of Guatemala)

8. During the telephone conference, the President of the Tribunal and the Parties discussed the items of the draft Hearing Protocol as well as other matters raised by the Parties.

9. Having consulted with the other Members of the Tribunal, the Tribunal President issues the present Order on behalf of the Tribunal.

## II. ORGANIZATION OF THE HEARING

### A. LOCATION

10. The Hearing will take place at the World Bank "C" Building, Room C3-150 located at 1225 Connecticut Avenue, NW, Washington, DC 20036 on Monday, December 16, 2019. The Tribunal hereby releases the previously reserved morning of Tuesday, December 17, 2019 (See Annex B of Procedural Order No. 1).

### B. PROCEDURAL LANGUAGES

11. Either English or Spanish may be used during the hearing. Simultaneous interpretation from one language into the other language shall be available at all times. Transcripts shall be taken in both languages (See Section 11.11 of Procedural Order No. 1).

12. The costs of the interpreter(s) 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 (See Section 11.14 of Procedural Order No. 1).

### C. SCHEDULE

13. The hearing will start at 9:00 a.m. and will end presumptively by 5:00 p.m.; there will be a one-hour lunch break in the afternoon and appropriate shorter breaks in each half of the day. The Tribunal reserves discretion to adjust the hearing schedule, including to start earlier or sit later, as needed to accomplish the prescribed agenda.

14. The hearing shall proceed according to the following sequence, subject to any adjustments the Tribunal may make for good cause shown:

9:00 – 9:15 → Tribunal's opening, Party introductions, and logistical matters;
9:15 – 10:45 → Respondent's arguments (up to 90 minutes)
10:45 – 11:15 → Morning Break
11:15 – 12:45 → Claimants' arguments (up to 90 minutes)
12:45 – 1:45 → Lunch break
1:45 – 2:45 → Respondent's rebuttal arguments (including any fuller responses to Tribunal questions from the morning session) (up to 60 minutes)
2:45 – 3:00 → Afternoon Break
3:00 – 4:00 → Claimants' rebuttal arguments (including any fuller responses to Tribunal questions from the morning session) (up to 60 minutes);
4:00 – 4:45 → Reserved for any further Tribunal questions to both Parties
4:45 – 5:00 → Discussion of further procedural steps, if any, and conclusion of the hearing.

### D. TIME ALLOCATION

15. The hearing will proceed on the principle that the Parties should have equal time to present their case, and the Parties accordingly have been allocated in paragraph 14 equal time for each phase of the case. The Parties are not required to use all time thus allocated, but time not used in one phase (*e.g.*, morning arguments) may not be reallocated to extend the maximum time for another phase (*e.g.*, afternoon rebuttal arguments). Time used by the Parties in oral argument shall be attributable to the Party making such argument. Time attributable to minor Tribunal questions to counsel, to clarify points being made, shall not interrupt the clock for the Party otherwise conducting that argument, but the Tribunal will consider appropriate accommodations in the event of any extended Tribunal questioning. The Tribunal also may exercise its discretion in appropriate circumstances to allow one or both Parties to respond briefly to any new points raised during the rebuttal phase. The Parties nonetheless are reminded not to "reserve" points in advance for the rebuttal round.

16. The calculation of the Parties' total allocation of time takes into account the necessary lunch and coffee breaks and also presumes certain inevitable slippage in the sitting day (i.e., unused time from extra breaks, late returns from breaks, technical issues, etc.). Nonetheless, the Parties are expected to seek to use the hearing days efficiently and to avoid unnecessary slippage. In the event of excess slippage, the Arbitrator may revisit the length of the sitting day, or in unusual circumstances the time allocations of the Parties, bearing in mind principles of predictability, equal treatment and a fair opportunity for the Parties to be heard.

17. The Secretary of the Tribunal will keep account of time used and advise the parties at the end of the hearing day of the length of time used.

### E. TRANSPARENCY

18. Pursuant to DR-CAFTA Article 10.21.2 and Section 21.6 of Procedural Order No. 1, the Tribunal shall conduct hearings open to the public by way of a live video and audio transmission to a publicly accessible separate viewing room at the Centre's headquarters in Washington, D.C. To the extent that protected information is referenced at the hearing, the

Tribunal shall suspend the transmission to the viewing room. The parties shall give the Tribunal advance notice prior to referencing protected information at the hearing.

## F. DOCUMENTATION

19. The Parties are requested also to confer and jointly submit to each Member of the Tribunal and the Secretary of the Tribunal, as soon as possible but no later than Tuesday, December 3, 2019 a single consolidated USB (Mac and PC compatible) containing a hyperlinked index to all submissions and supporting documentation regarding the issue that is the subject of the hearing.

20. The Parties are requested to confer and provide to the Tribunal a glossary of the abbreviations and defined terms used by the Parties in their respective submissions on the Preliminary Objections, as soon as possible but no later than Tuesday, December 3, 2019 by email or other electronic means to the parties, the Secretary of the Tribunal, and the Tribunal.

21. Please note that for Prof. Douglas, the submissions in accordance with paragraphs 19 and 20 should be sent to the ICSID Secretariat, as should an A5 hard copy of the Claimants' 22 November 2019 Rejoinder submission.

22. The Parties shall send to the Secretary of the Tribunal no later than December 6, 2019, a full hard copy of all materials related to the Preliminary Objections for the Tribunal's use in the Hearing.

23. The Parties may use PowerPoint or other slide presentations for their oral statements and, subject to the rule on demonstrative exhibits, shall submit hard copies to the Tribunal (3 copies), the Tribunal Secretary (1 copy), the opposing Party (4 copies), the court reporter (2 copies (one for each language)) and the interpreters (1 copy) prior to the beginning of the statement and electronic copies later on the same day.

24. Demonstrative exhibits shall be used in accordance with Section 16.8 of Procedural Order No. 1, which states:

> 16.8. 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 clearly 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 at a time to be decided at the pre-hearing organizational meeting.

25. Documents that do not form part of the record may not be presented at the hearing unless authorized by the Tribunal following a prior application, for good cause shown and after response from the opposing party.

## G. POST-HEARING BRIEFS AND COSTS SUBMISSIONS

26. The need for and content of post-hearing submissions, if any, shall be decided by the Tribunal in consultation with the parties at the close of the Hearing (See Section 23.1 of Procedural Order No. 1).

For and on behalf of the Tribunal,

[signed]

Ms. Jean Kalicki
President of the Tribunal
Date: November 27, 2019