

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

PROCEDURAL ORDER NO. 4

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

Assistant to the Tribunal

Dr. Joel Dahlquist

29 September 2020

I. PROCEDURAL BACKGROUND

1. In a letter on 4 September 2020, The Republic of Guatemala (“**Guatemala**” or “**Respondent**”) requested that the Tribunal order Daniel W. Kappes and Kappes, Cassiday & Associates (“**Claimants**”) to provide revised Spanish translations of the Claimants’ (English) Memorial and accompanying documents (the “**Request**”).
2. Upon invitation by the Tribunal, the Claimants responded in a letter on 10 September 2020, objecting to Guatemala’s Request (“**Claimants’ Response to the Request**”).
3. In an email of 11 September 2020, Guatemala sought permission to respond to the Claimants’ 10 September 2020 letter. By email of the same date, the Claimants opposed the request but added that if Guatemala was granted leave to respond, Claimants should be granted the opportunity to reply, in a submission of equal length. By email of 13 September 2020, the Tribunal granted Guatemala’s permission to submit a two-page response by 14 September 2020, simultaneously granting the Claimants the right to submit a reply of equal length by 16 September 2020.
4. Guatemala submitted its response by letter on 14 September 2020 (“**Respondent’s Response**”), followed by the Claimants’ reply by letter on 16 September 2020 (“**Claimants’ Reply**”).

II. THE PARTIES’ POSITIONS

A. Guatemala’s Position

5. Guatemala requests that the Tribunal order the Claimants to submit new Spanish translations of the Claimants’ Memorial and accompanying documents within 10 days of the Tribunal’s order.
6. In Guatemala’s submission, the Spanish translations of the Memorial and its accompanying documents contain numerous errors which render them partly incomprehensible.¹ This is said to be the case both for the Memorial and for Mr. Kappes’ witness statement.²
7. It is evident, Guatemala argues, that the translations have been made with the assistance of Google Translate (or equivalent software), and that no Spanish-speaker has subsequently proofread them.³ As a consequence of the faulty translation, Guatemala’s review of the Claimants’ Memorial, as part of Guatemala’s work on its Counter-Memorial, is delayed.⁴
8. An accurate Spanish translation is necessary for Guatemala to properly participate in this arbitration, it submits. Under Section 11.1 of Procedural Order No. 1, these proceedings are

¹ Request, p. 2.

² Mark-ups of both these translations, with comments, were submitted together with the Request.

³ Respondent’s Response, p. 2.

⁴ Request, p. 1 and footnote 7.

bilingual and there is no preference given to either English or Spanish. While Guatemala's counsel team regularly work in English, this does not necessarily apply to the multiple ministries involved in the dispute, which rely on an accurate Spanish translation in order to be able to participate in the defense.⁵

9. Furthermore, pursuant to CAFTA Section 10.21, Guatemala has an obligation to help ensure transparency of the proceedings by making the pleadings available to the public. Those transparency goals, which involve the (Spanish-speaking) civil society with an interest in the case, are frustrated when pleadings cannot be understood properly.
10. Finally, under ICSID Arbitration Rule 22, the record in a dual-lingual case such as this should be kept in both languages, with both versions being equally authentic. Pursuant to this provision, the English and the Spanish version of the Memorial must correspond.⁶
11. As clarified in its subsequent Response, Guatemala's request is that a Spanish-speaker review and update the translations, not that such a speaker prepare completely new translations.⁷

B. The Claimants' Position

12. The Claimants argue that Guatemala is "nit picking." The supposed issues identified by Guatemala are neither prevalent nor do they impede the reader's understanding of the translations at issue, the Claimants say.
13. In Claimants' Response to the Request, they break down into four sub-categories the 59 issues Guatemala identified in the body of the Memorial: typographical errors (6 items); definitions of names or entities (6 items); contextual issues (36 items); and non-issues (11 items).⁸ The Claimants also address in an Appendix, item for item, the 11 errors highlighted by Guatemala in the cover letter of its Request (some of which overlap with the itemized issues discussed in the Claimants' Response to the Request).
14. In the Claimant's view, the translations of all of the items are perfectly understandable. None of the items raised by Guatemala detracts from the correct understanding of the sentences at issue, most of which reference specific documents in Spanish that would dispel any supposed confusion in any event.⁹
15. Furthermore, the purported errors identified do not warrant a re-translation of hundreds of pages, in the Claimants' view. This is the case also for the type of review requested by Guatemala, since any such reviewer would begin with the Spanish translations and compare them line by line to the English originals. Such an exercise would require reviewing hundreds

⁵ Request, p. 6.

⁶ Request, p. 7.

⁷ Respondent's Response, p. 2.

⁸ Claimants' Response to the Request, pp. 2-5

⁹ Claimants' Reply, p. 2.

of pages looking for minute and inconsequential errors that exist in all submissions. In the Claimants' view, there is "no substantive difference between asking for everything to be re-translated, or asking for everything to be reviewed and resubmitted with 'errors' corrected."¹⁰

16. The Claimants also argue that Guatemala is using the Request to gain more time preparing its Counter-Memorial. In this regard, the Claimants point out, Guatemala already will have more time to prepare its Counter-Memorial than Claimants had to prepare their Memorial (by 10 days).¹¹

III. THE TRIBUNAL'S ANALYSIS

17. The Tribunal observes that this is a dual-language proceeding, and not a proceeding with only one official language subject to an agreement on courtesy translations. In this context, the Tribunal expects that the Parties will expend sufficient effort to ensure that the filings in their filings in the two official languages of the proceedings will correspond accurately.
18. This effort does not exclude the possibility of minor discrepancies. But it does require, at minimum, that draft translations are reviewed carefully by a bilingual speaker before filing. The Tribunal is not convinced that sufficient effort has been devoted to this process with respect to the Claimants' Memorial and Mr. Kappes' Witness Statement. Accordingly, the Claimants are ordered to conduct such a review, and provide within 21 days of this Procedural Order an updated Spanish version of the Memorial and Mr. Kappes' Witness Statement. The Claimants need not review the translations of accompanying documentation, but to the extent any corrections in the Spanish language version of the Memorial and the Witness Statement relate to passages that are *quoted* directly from source material, the Claimants shall also provide corrected translations of such source material.
19. The Tribunal is confident that these steps can be taken without any adverse effect on the timetable for this proceeding. It is evident that the Respondent already has conducted a close review of the Claimants' Memorial for purposes of its application regarding errors in translation. In any event, any revised translation(s) submitted in accordance with the Tribunal's order will be available to the Respondent more than a month before the Respondent is scheduled to submit its Counter-Memorial.
20. Finally, the Tribunal sees some benefit to each substantive submission in this case being accompanied in future by a certification from an individual who is fluent in both English and Spanish, stating that he or she has reviewed the translations and believes them to be reasonably faithful to the original language version. This person need not be a professional translator, but may be a member of the relevant party's legal team or anybody else who is fluent in both languages.

¹⁰ Claimants' Reply, p. 2.

¹¹ Claimants' Reply, p. 2.

IV. ORDER

21. For the reasons set out above, the Tribunal:

- (a) Orders the Claimants to submit updated Spanish translations of its Memorial and Mr. Kappes' Witness Statement by 20 October 2020;
- (b) Orders both Parties to accompany future translations of substantive submissions with a statement from an individual fluent in both English and Spanish, certifying that he or she has read both language versions and that the translation is reasonably faithful to the original.

[signed]

Ms. Jean Kalicki
President of the Tribunal
Date: 29 September 2020