

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. 6

ON THE PARTIES' REQUESTS FOR DOCUMENTS

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

Date of the Order: 15 March 2021

I. THE PARTIES' REQUESTS FOR DOCUMENTS

1. Following Party correspondence on 24 and 25 July 2020, the Tribunal adjusted the Procedural Timetable for this Arbitration on 27 July 2020.
2. Pursuant to the adjusted Procedural Timetable, the Parties exchanged document production requests, followed by responses. On 15 February 2021, the Respondent requested a one-week extension to present its reply to the Claimants' objections, to which the Claimants consented. The Tribunal granted the Respondent's request on 17 February 2021.
3. The Parties' completed schedules relating to their respective document requests, responses, and requests for rulings were submitted to the ICSID Secretariat, for transmission to the Tribunal, on 22 February 2021.
4. On 24 February 2021, the Respondent requested an opportunity to briefly elaborate on the issue of publicly available documents, relating to the Respondent's objections to the Claimants' requests. On 25 February 2021, the Claimants objected to the Respondent's request.
5. The Tribunal granted the Respondent's request on 25 February 2021, on the conditions that both Parties' additional submissions be limited to the issue of publicly available documents and no more than three pages long.
6. On 1 March 2021, the Respondent submitted its clarification on the issue of publicly available comments. The Claimants submitted their response on 3 March 2021.
7. The Tribunal has duly considered the Parties' respective positions on the requested documents. Its rulings on the Claimants' requests are set out as Annex A accompanying this Procedural Order; its rulings on the Respondent's requests are set out as Annex B. The rulings in Annexes A and B are subject to certain general observations and determinations set forth in this Procedural Order No. 6.

II. PRIVILEGED DOCUMENTS

8. First, the Tribunal confirms that its production orders in Annexes A and B are understood to apply only to non-privileged material. To avoid subsequent disputes over the scope of applicable privilege, and to maintain equality of treatment as between the parties, the Tribunal adopts the formulation for legal privilege that is reflected in Article 9(3)(a) of the IBA Rules, namely that the Parties need not produce documents (or portions of documents) that reflect communications "made in connection with and for the purpose of providing or obtaining legal advice."
9. Where only a portion of a document meets this definition, the Parties are expected to produce the other portions of the document with appropriate redactions. At the same time, the

Tribunal rejects for present purposes the various demands for preparation of privilege logs to justify any withholding or redaction on this basis. The Tribunal expects both Parties' counsel to engage in a responsible, good faith privilege review on the basis of the definition hereby provided, on the understanding that the Tribunal does not rule out a possible later return to the privilege log issue, if there are reasons later to suspect an overly broad application of that definition.

III. PROTECTED INFORMATION

10. Second, the Tribunal notes that the Respondent also invokes Article 10.21 of the CAFTA, which provides that “[n]othing in this Section requires a respondent to disclose protected information,” a term which is defined in the CAFTA to include information “that is privileged or otherwise protected from disclosure under a Party’s law” (emphasis added). The Respondent refers to several concrete categories of information that are considered confidential under Articles 22 and 23 of its Law on Access to Public Information (Decree No. 57-2008), and under certain Articles of its Code of Criminal Procedure (Decree No. 51-92).
11. The Claimant does not appear to dispute the Respondent’s enumeration of these categories, nor the Respondent’s position that Article 10.21 of the CAFTA by extension protects these categories of information from disclosure.
12. In the absence of any current dispute about these categories, the Tribunal therefore accepts (at least for the time being) that they may serve as exceptions to production, along with legal privilege as addressed in the preceding paragraph. This is subject to the same understanding set out above, namely that counsel (in this case, on Respondent’s side) are expected to engage in a responsible, good faith review of the confidentiality issues, to ensure that the relevant provisions regarding protected information are applied no more broadly than is strictly required within the framework of the relevant laws.

IV. PUBLICLY AVAILABLE DOCUMENTS

13. Third, the Respondent makes a recurring objection to many of the Claimants’ document requests on the basis that the documents sought are “publicly available.” The Respondent’s argument is not that the relevant materials already have been released to the general public. Rather, the argument is that the Claimants could seek access to such materials through domestic procedures available under Guatemalan law, including under the Law on Access to Public Information (Decree No. 57-2008) and the Law of the Judiciary Body (Decree No. 2-89).
14. The Tribunal declines to accept this recurring objection. While it may be true that Guatemalan law – like the law of many States – provides a legal framework through which the public may seek information from State ministries and agencies, the possibility that such processes eventually may yield some of the information sought is not a basis to exclude requests for relevant and material documents from the ambit of international arbitration procedures. There is no guarantee that domestic procedures will result in the release of the

same scope of material as an arbitral tribunal may order produced, nor that such procedures in any event will conclude within the timetable required for the arbitration to proceed effectively and efficiently. More generally, there is no rule in international law that States enacting “freedom of information” laws, or similar laws establishing procedures for the requested release of government documents, are thereby excused from their obligation to affirmatively produce documents which an arbitral tribunal deems relevant to the case and material to its outcome, within the meaning of the IBA Rules.

15. Accordingly, in Annex A, where the Tribunal takes note in a number of instances of the Respondent’s agreement to produce responsive “non-publicly available documents,” but states that the Tribunal does not accept this limitation to the extent it would exclude documents from production solely on the basis that Claimants might seek their production alternatively through domestic law procedures, the intent of the ruling is that the Respondent is directed to produce responsive documents as though it had agreed to do so without this particular limitation.

V. GENERAL OBSERVATIONS

16. Finally, the Tribunal notes that its rulings on the Parties’ contested requests are not intended to provide an implied decision on any substantive issue in dispute between the Parties. Accordingly, if a request is denied or granted in a modified fashion, that should not be taken as any indication as to the Tribunal’s views on the merits, and the Parties should not hereafter plead or allege that the Tribunal’s decision to uphold or deny a request was indicative of a position either in their favor or against them. If a request is denied, for example, that does not mean that the requested Party can consider that its own burden of proof has been discharged.
17. Moreover, if a Party refuses to produce documents on an issue for which it bears the burden of proof, notwithstanding the Tribunal’s order of such production, then such Party runs the risk of having the issue resolved in due course as not proven. The Parties are expected to bear this in mind in facilitating disclosure of relevant and material documents in compliance with the Tribunal’s rulings.

[signed]

Ms. Jean Kalicki
President of the Tribunal
Date: 15 March 2021

Annexes:
Annex A Decision on Claimants’ Document Requests
Annex B Decision on Respondent’s Document Requests