

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Daniel W. Kappes and Kappes, Cassidy & Associates

(Claimant)

v.

Republic of Guatemala

(Respondent)

ICSID Case No. ARB/18/43

PROCEDURAL ORDER NO. 7

ON THE RESPONDENT'S REQUEST FOR A CONFIDENTIALITY ORDER

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

Ms. Daniela Argüello

Assistant to the Tribunal

Dr. Joel Dahlquist

21 June 2021

I. PROCEDURAL HISTORY

1. On 14 May 2021, the Respondent submitted a request for a confidentiality order to protect documents disclosed by the Parties to one another or placed on the record of these proceedings (the “**Request**”).
2. On 17 May 2021, the Tribunal invited the Claimants to respond to the Respondent’s Request by 19 May 2021.
3. In an email on 19 May 2021, the Claimants requested a one-week extension to respond to the Request, which the Tribunal granted later that same day.
4. The Claimants submitted their response to the Request (the “**Response**”) on 26 May 2021. In addition to opposing the Request, the Claimants also indicated that if the Respondent requested, and were granted, leave to reply to the Response, Claimants would request a time to respond sufficiently after the 11 June 2021 filing of their Reply Submission in this Arbitration.
5. On 27 May 2021, the Respondent requested the opportunity to reply to the Claimants’ Response, and indicated it would be able to do so by 4 June 2021. Later that same day, the Tribunal granted this request, while also granting the Claimants’ request, included in their Response, to present further responsive observations by 14 June 2021.
6. On 1 June 2021, the Claimants requested that their 14 June 2021 deadline be extended until 16 June 2021. Later that same day, the Respondent requested that the Parties be granted until the next day to “find a mutually beneficial solution.”
7. In an email on 2 June 2021, the Respondent informed the Tribunal that the Parties had agreed to extend the deadlines for the Parties’ second round of submissions to 7 June 2021 (Respondent) and 18 June 2021 (Claimants) respectively. The Claimants confirmed the Parties’ agreement in an email later that same day, albeit with the correction that the Claimants had requested until 16 June 2021, and not 18 June 2021 as indicated in the Respondent’s email, to reply to the Respondent’s letter. On 3 June 2021, the Tribunal approved these extended deadlines.
8. On 7 June 2021, the Respondent submitted its reply to the Claimants’ Response (the “**Reply**”).
9. On 18 June, the Claimants submitted their second response (the “**Second Response**”).

II. THE PARTIES' POSITIONS

A. The Respondent's Position

10. The Respondent requests that the Tribunal “issue a confidentiality order to protect all documents Guatemala has placed on the record of these proceedings and has disclosed in response to Claimants’ requests for documents.”¹
11. The Respondent says it disclosed a large number of documents – some 56,000 pages – without redaction and without prior agreement on a confidentiality order, in good faith and for the benefit of the Claimants, in order to avoid delays during the document production phase. However, a significant number of these documents contain personal identifying information – so-called *habeas* data – that the Respondent says is legally protected from disclosure under Guatemalan law. The Respondent contends that reviewing each page of its production to identify and redact the protected information would be a “herculean task.” Short of requesting a “claw back” of the documents already shared, until a solution is identified, the Respondent says a confidentiality order preventing use of such materials outside of this arbitration is the most reasonable and effective solution to address this issue. In recognition of this, the Respondent asked the Claimants immediately after the conclusion of the document production phase to agree to a joint request for a confidentiality order, which would not prevent the Claimants from using the documents in these proceedings. The Claimants however did not agree to this proposal.²
12. The Respondent argues that the Claimants’ refusal to confirm that they have no intention of using the documents outside of this Arbitration raises concerns, given the fact that the Claimants’ law firm represents other clients with interests adverse to the Respondent in other disputes. The Respondent says that the protected information contained in produced documents should not be used outside of this Arbitration, and should remain protected in accordance with Guatemalan law.³
13. In this respect, the Respondent argues that a confidentiality order would be necessary in order to comply with Guatemalan law. The Respondent points out that Article 10.21 of CAFTA-DR protects information “that is privileged or otherwise protected from disclosure under a Party’s law.” If the personal identifying information contained in some of the documents provided to the Claimant were to be compromised, this could lead to the Guatemalan officials involved in this Arbitration being subject to criminal proceedings under Guatemalan law, the Respondent says. For these reasons, the Respondent contends, the requested order is necessary and would amount to a “reasonable measure” to protect the information in question, as required by the Respondent under Guatemalan law.⁴

¹ Request, p. 4.

² Reply, pp. 1-2.

³ Request, pp. 2-3; Reply, p. 2.

⁴ Request, pp. 1-2; Reply, pp. 2, 8.

14. Furthermore, the Respondent rejects what it says is the Claimants’ “expansive interpretation” of the transparency regime provided for by the CAFTA-DR, which the Respondent says contains requirements that hearings are public and that certain submissions and rulings be published, but that there is no similar provision applicable to documentary evidence or information exchanged during document production. Confidentiality orders such as the one the Respondent seeks do not contravene either the CAFTA-DR’s express provisions, nor its object and purpose, the Respondent argues; in fact, such orders have been issued by other tribunals.⁵
15. The Respondent also points out that the CAFTA-DR addresses “protected information” only in the context of such information being submitted to a tribunal – *i.e.*, not during the document production phase. The documents disclosed *inter partes* have not yet been submitted to the Tribunal, and whichever Party wishes to do so should bear the burden of making any necessary redactions, the Respondent argues. The Respondent says it is willing to provide a redacted version of documents that already are on the record (while maintaining that these documents still should be covered by the requested order), as well as any other documents on which it may rely on in this Arbitration, but it does not agree to redact all documents disclosed in the document production phase “for the sole benefit of the Claimants’ case.”⁶
16. The Respondent also argues that its Request is consistent with the IBA Rules on the Taking of Evidence in International Arbitration (2020) (the “**IBA Rules**”), which provide for confidentiality of non-public documents submitted or produced in an arbitration. The Respondent says that the Claimants have not demonstrated that Article 3(13) of the IBA Rules contravenes the CAFTA-DR’s transparency regime, which focuses only on materials actually submitted to a tribunal. Further, the Respondent contends, none of the documents it provided to the Claimants are in the public domain within the meaning of the IBA Rules, and the documents therefore should be protected from disclosure outside of this Arbitration pursuant to Article 3(13) of the IBA Rules.⁷
17. Finally, the Respondent argues that the requested confidentiality order would reduce the burden on both Parties, rather than shifting the burden to any one Party, as argued by the Claimants. Under the requested order, the Respondent says, both Parties would be able to use unredacted versions of documents for the purposes of this case, unless either Party wishes to rely on any document in its written submissions. This is in line with the obligation outlined in para. 24.2 of the Tribunal’s Procedural Order No. 1, with which the Claimants already have already undertaken to comply. Thus, the requested order would not impose any additional burdens on the Claimants, the Respondent argues.⁸

⁵ Request, p. 2; Reply, pp. 3-4.

⁶ Reply, p 4.

⁷ Reply, pp. 5-6.

⁸ Reply, pp. 8-9.

B. The Claimants' Position

18. The Claimants oppose the Respondent's Request, and request that the Tribunal deny it.
19. The Claimants submit that the issue arises as a consequence of the Respondent's failure to properly redact information from materials it produced in response to the Tribunal's document production order. The Claimants also say that they have attempted to address the Respondent's concerns by offering reasonable accommodations, which the Respondent has rejected.⁹
20. The Claimants raise a number of objections against the order the Respondent requests.
21. First, the Claimants emphasize that there is a "strong presumption of non-confidentiality for arbitrations under the [CAFTA-DR]," which the Claimants say the Respondent has acknowledged. Furthermore, while the CAFTA-DR's Preamble states that the promotion of transparency in trade and investment is among its purposes, it also contains a specific provision on transparency, Article 10.21(4), which recognizes a party's right to protect confidential information. With a specific treaty regime in place, the Claimants argue, the Respondent's reliance on the IBA Rules or the decisions of other tribunals – without regard to applicable confidentiality provisions or agreements in such cases – is misplaced.
22. In any event, the Claimants say that the Respondent's position that the produced documents contain confidential information under Article 3(13) of the IBA Rules contradicts its objections during the document production phase that the very same documents are publicly available through freedom-of-information procedures under Guatemalan law. The Claimants reiterate their position from the document production phase that there is a difference between documents already "in the public domain" and documents which may become "publicly available" through pursuit of additional legal procedures. However, the Respondent previously eschewed such a distinction, objecting to almost all of the Claimants' document requests on the basis that the documents sought were already publicly available. The Claimants add that the Respondent has failed to identify specifically which documents contain confidential information, opting instead to request an order covering all documents it has submitted, which the Claimants say is inconsistent with the CAFTA-DR.¹⁰
23. The Claimants also reject the Respondent's contention that it would be too burdensome for it to have to redact confidential information from its document production. The Claimants emphasize that they have never demanded, contrary to the Respondent's contention, that the Respondent provide redacted copies "in a manner of days." The Claimants also say that if the Respondent were to request a "claw back" of the produced documents, the Respondent still would be under an obligation to produce those documents in redacted form. For their part, the Claimants say that they already have expended significant time and resources to

⁹ Response pp. 2-3.

¹⁰ Response p. 3; Second Response pp. 2-3.

redact information from their exhibits, and the Respondent's failure to do the same should not be used to shift the burden onto the Claimants.¹¹

24. Moreover, the Claimants say, the Respondent is incorrect in claiming that it produced documents in the expectation that the Claimants would not oppose a confidentiality agreement. The Respondent could not have expected that the Claimants would consent to a confidentiality order, as the Respondent did not raise this issue until after the completion of document production, and in fact has expressly stated that it did not want to raise the issue before this stage.¹²
25. The Claimants also argue that the Respondent's requested order would "shift the burden of Respondent's non-compliance onto Claimants and unjustifiably restrict Claimants' rights," by asking the Claimants not to pass the submitted information along to any third party, rather than "clawing back" the confidential information and re-submitting it in redacted form. The Claimants argue that they "should not have to demonstrate the public nature of the evidence and documents; rather, Respondent has a duty to identify confidential information for which it seeks protection." Furthermore, the Claimants say that if the requested order were to be imposed, they would be put under a burden to comply with it by redacting any confidential information contained in documents obtained from the Respondent through document production, before submitting relevant documents as exhibits in the proceedings. The Claimants however add that they did already redact confidential information from relevant exhibits filed in support of their Reply Submission on 11 June 2021, so there is no basis for a blanket confidentiality order covering the full document production.¹³
26. In response to the Respondent's contention in its Reply that the sought order would "ensure compliance with Guatemalan law," the Claimants argue that even if correct, this assertion does not justify the relief sought. If a mere request to protect information is sufficient for Guatemalan authorities to comply with their obligations under Guatemalan law to take "reasonable measures," then the Claimants say that the Respondent already has complied with this obligation. If, instead, Guatemalan law requires that a confidentiality order be obtained, then (the Claimants contend) that it is "improper" for the Respondent to ask that the Claimants' rights be infringed, in order for the Respondent to comply with its own law. This is particularly the case given that the Claimants say they already offered, and the Respondent rejected, a sufficient compromise solution aimed at protecting the confidential information. Indeed, the Claimants maintain that they do not object to a more narrow order, protecting precise information designated as such by either Party (subject to challenge, should the other Party disagree with the designation.)¹⁴
27. Finally, the Claimants express concern that the Respondent is making demands in "purportedly trying to remedy its own problem." The Respondent has not redacted

¹¹ Response p. 4.

¹² Response, p. 5.

¹³ Response, p. 5; Second Response, pp. 2-4.

¹⁴ Second Response, p. 4.

information which it should not have disclosed, nor has it accepted the Claimants' agreement to a narrower confidentiality order – both of which would have resolved the problem, the Claimants argue. Against this background, the Claimants condemn the Respondent's attempt to now obtain a Tribunal order preventing the Claimants from using information which the Respondent itself has said is publicly available through internal Guatemalan freedom-of-information procedures, while simultaneously requesting confirmation that the Respondents may use outside of these proceedings the Claimants' personal information, such as Exmingua's tax returns.¹⁵

III. THE TRIBUNAL'S ANALYSIS AND DECISION

28. It appears to be undisputed that personal identifying information protected from disclosure under Guatemalan law is entitled to protection in these proceedings against public dissemination or use outside of this case. The dispute is about how this should be accomplished and which Party should bear the burden, given that Respondent represents that a significant amount of such information already has been disclosed by the Respondent to the Claimants during the document production phase.
29. The Tribunal expects each Party to handle documents produced by the other Party in accordance with Article 3(13) of the IBA Rules, which in its view is fully compatible both with the terms of CAFTA-DR and with the Tribunal's prior rulings in Procedural Order No. 1, paragraph 24.2. Article 3(13) provides as follows:

Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.
30. The above provision does not relate to the Parties' memorials themselves, for which the relevant rules on redaction and publication already are provided in Procedural Order No. 1, paragraph 24.2.¹⁶ Further, the presumptive confidentiality of produced documents does not apply to documents otherwise in the possession of a Party independently of these proceedings.
31. Consistent with paragraph 24.2 of Procedural Order No. 1, if any Party introduces into evidence a document (whether as an exhibit to a memorial, a witness statement or expert

¹⁵ *Id.*

¹⁶ Paragraph 24.2 of Procedural Order No. 1 provides as follows: "Pursuant to Article 10.21.4(c) of CAFTA-DR, a party shall, within 10 business days after a document has been submitted containing information claimed to be protected information, submit a redacted version of the document that does not contain the information."

report, or at a hearing) that the other Party believes to contain personal data or similar information that is protected by law, either Party may ask the Tribunal, within 10 days of the submission of that document into evidence, to substitute a redacted version of the document for the one submitted. It shall be the responsibility of the Party objecting to the submission of an unredacted document to prepare a proposed redacted version of that document. If the Tribunal determines that the redacted version is an acceptable substitute for the Tribunal's purposes, the redacted version will become the exhibit of record and the original document will be returned or destroyed. With respect to documents already placed into evidence as exhibits, the 10-day deadline specified above shall run from the date of this Procedural Order.

[signed]

Ms. Jean Kalicki
President of the Tribunal
Date: 21 June 2021