



Guatemala, 19 March 2015

Dear Mr. Chairman,

Since the beginning of this dispute, Guatemala has repeatedly expressed concern about the United States' efforts to deny basic due process rights to Guatemala throughout the course of these proceedings. In its rebuttal submission, the United States has continued such efforts, which further undermine not only Guatemala's due process rights, but also the authority of the Panel and the credibility of the new CAFTA-DR dispute settlement mechanism as a whole.

The United States has argued that the information that it has redacted from the exhibits submitted to the Panel and to Guatemala – information that forms the fundamental basis of its claims – cannot be disclosed to Guatemala or even to this Panel. Yet, in its rebuttal submission, the United States acknowledges providing the non-redacted versions of the Exhibits to the Secretary-General of ICSID and her staff. The ICSID Secretary-General and her staff are members of the general public for purposes of this dispute.¹ By voluntarily disclosing this information to members of the general public, the United States should be precluded from continuing to assert its claim of confidentiality before this Panel. There is now absolutely no basis for the United States to continue to refuse to provide the information to this Panel and to Guatemala.

The United States' latest actions confirm that the real reason for its refusal to provide the non-redacted exhibits to the Panel and to Guatemala is not a concern about confidentiality, but rather a desire to prevent Guatemala from being given the full opportunity to defend its interests and to prevent the Panel from objectively assessing the matter before it.

Indeed, the United States is essentially asking the Panel to abdicate its fact-finding responsibilities in favor of outside persons (in this case, the ICSID Secretary-General and her staff).² Put simply, the United States wants its own hand-selected outside persons to evaluate the veracity of the evidence it is submitting in these CAFTA-DR proceedings, when that evaluation clearly falls within the in-delegable functions of this Panel. Imagine if the inverse scenario were to occur, in which Guatemala were to refuse to provide a non-redacted exhibit to the Panel and the United States, and then ask the Registrar of the International Court of Justice or a staff member of another intergovernmental organization to evaluate the veracity of the information in the exhibits. Surely, the United States Government would not stand idle and allow a panel to condemn it on the basis of documents that its attorneys, or the panel itself, have not seen. If the United States is not willing to accept such an outcome for itself, why should it be allowed to insist on this outcome for other countries?

¹ In addition, as the ICSID Secretary-General and her staff are not even included in the list of Authorized Persons submitted by the United States to this Panel, the United States has failed to abide by Rule 4 of Appendix 2 of the Model Rules of Procedures. The U.S. Rebuttal Submission and Exhibit US-170 do not even describe any special procedures adopted by the United States to secure the confidentiality of the information.

² See, for example, U.S. Rebuttal Submission, paras. 95 and 108.



It is this Panel's duty to ensure that these proceedings are conducted with impartiality and to safeguard the due process rights of both Parties to the dispute, including Guatemala's. As the

WTO's adjudicatory bodies have aptly stated, "the protection of due process is an essential feature of a rules-based system of adjudication," and "[d]ue process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute."³ Due process entails providing Guatemala with an adequate opportunity to respond to the evidence submitted.⁴ That opportunity must be meaningful in terms of Guatemala's ability to defend itself.⁵ The Panel has acknowledged that these principles of due process are applicable in these proceedings.⁶ The Panel has also acknowledged that "a consequence of the United States' redactions could be an inability for Guatemala to verify or refute the accuracy and truthfulness of certain exhibits submitted by the United States";⁷ and that "[t]he anonymity of a witness may conceal possible motives or characteristics of a witness that affect the reliability of his or her evidence" and "[i]f the reliability of a witness remains unexamined, a decision can be unfair".⁸ Yet, up to now, the Panel has taken no action to give effect to these principles.

Moreover, the United States is asking this Panel to accept a situation that the United States' own courts would find intolerable. In the United States, if the Government chooses to introduce the allegations of an employee as evidence in the proceedings against an employer, the employer would have the due process right to learn the identity of the employee who made the statement and cross examine him on any prior statements.⁹

For all these reasons, and in light of the continuing due process violations by the United States, Guatemala must now respectfully insist that the Panel not afford any probative value to the redacted versions of the exhibits that have been submitted by the United States. Guatemala must be given an opportunity to verify the veracity and accuracy of the evidence being offered against it by the United States, the same evidence the United States has no problem showing to members of the public.

Indeed, it is of grave concern to note that the United States has further exacerbated the unfairness by providing an additional 63 redacted exhibits in its rebuttal submission. There are now 198 redacted exhibits (out of 236 total) submitted by the United States to which the Panel or Guatemala do not have access.

³ Appellate Body Reports, *US / Canada – Continued Suspension*, para. 433.

⁴ Appellate Body Report, *Australia – Salmon*, para. 272.

⁵ Appellate Body Report, *US – Gambling*, para. 270.

⁶ Ruling of February 26, 2015, para. 47.

⁷ Rulings of February 26, 2015, para. 63.

⁸ Ruling of February 26, 2015, para. 57.

⁹ *N. L. R. B. v. Seine & Line Fishermen's Union of San Pedro*, 374 F.2d 974, 978 (9th Cir. 1967); see also Fed. R. Civ.



These are the first proceedings brought under Chapter 16 of the CAFTA-DR. The credibility of this new dispute settlement process rests on this Panel's ability to ensure that the proceedings are impartial and that the Parties' due process rights are respected without favoritism. The United States' deliberate disregard of basic principles of due process in these proceedings, if

unanswered, will seriously jeopardize the credibility of CAFTA-DR's dispute settlement procedures, not to mention dispute settlement procedures the United States has or will put in place in its current and future free trade agreements.

The damage done by the United States' actions does not stop with the CAFTA-DR and other free trade agreements. The United States has also put the ICSID Secretary General and her staff in a truly unfortunate situation in which, apparently contrary to internal staff regulations¹⁰, they have taken sides in a State-to-State dispute between two of ICSID's member countries. ICSID's favoring of the United States in this dispute will only result in complaint to and criticism of the ICSID Secretary General and her office.

Guatemala wants to make it clear that it was not consulted about, and certainly did not agree to, the involvement of ICSID's Secretary General and her staff in these proceedings. Furthermore, Guatemala trusts that this Panel had no involvement in the United States' decision to enlist ICSID's support for its case, as Guatemala is not aware of any approval granted to the United States by the Panel to seek assistance from the ICSID Secretariat General. Nonetheless, in order to avoid any misperceptions, Guatemala respectfully requests that the Panel confirm for the record that the United States has acted unilaterally in engaging the ICSID Secretary General, and that neither the Panel nor its members communicated with ICSID or the United States regarding the facts described in paragraph 25 of the U.S. Rebuttal Submission and Exhibit USA-170.

Finally, as the United States has now voluntarily and publicly disclosed the non-redacted version of the exhibits mentioned in paragraph 25 of the U.S. Rebuttal Submission, Exhibit USA-170 and Exhibit USA-188 (collectively the "disclosed exhibits"), Guatemala respectfully requests that the Panel instruct the United States to provide the same full non-redacted version of the publicly disclosed exhibits to the Panel and Guatemala. In the event the United States fails to provide the Panel and Guatemala with the disclosed exhibits, Guatemala must insist that the Panel do not afford any probative value to the redacted versions of the exhibits that have been

¹⁰ Principle 3 of the World Bank Staff Manual requires that staff members :

- respect the international character of their positions and maintain their independence by not accepting any instructions relating to the performance of their duties from any governments; and
- conduct themselves at all times in a manner befitting their status as employees of an international organization. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Organizations. They shall avoid any action and, in particular, any public pronouncement or personal gainful activity that would adversely or unfavorably reflect on their status or on the integrity, independence and impartiality that are required by that status[.]

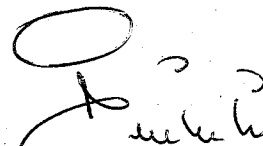


Gobierno de Guatemala

Ministerio de Economía

submitted by the United States, for the sake of fairness to Guatemala in these proceedings, and of establishing credibility for the CAFTA-DR Chapter 16 dispute settlement process.

Sincerely yours,


Alexander Cutz
DIRECTOR
Dirección de Administración
del Comercio Exterior

