

DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES FREE TRADE
AGREEMENT

ARBITRAL PANEL ESTABLISHED PURSUANT TO CHAPTER TWENTY

IN THE MATTER OF
GUATEMALA – ISSUES RELATING TO THE OBLIGATIONS UNDER ARTICLE
16.2.1(a)

Ruling on Request for Extension of Time to File Initial Written Submission and on the
Treatment of Redacted Evidence

February 26, 2015

Panel Members
Professor Kevin Banks (Chair)
Mr. Mario Fuentes Destarac
Mr. Theodore R. Posner

Statement of Reasons of the Panel Majority

I. Introduction and Disposition

1. Guatemala requested that the panel extend the deadline to file its initial written submission, and that the panel instruct the United States to provide a complete set of non-redacted and legible versions of certain exhibits submitted in support of its initial written submission. Guatemala asked that the panel find that the initial written submission of the United States was not properly submitted until it has done so. In the alternative, Guatemala requested that the panel strike the redacted documents from the record. The United States opposed each of these requests.

2. On December 31, 2014 the panel issued the following majority determination:

The panel finds that it is without authority to instruct the United States to submit unredacted copies of the exhibits submitted with its initial written submission. The panel will assess what effects the redactions have, if any, on the probative value of those exhibits in the course of dealing with the dispute on its merits.

The panel declines to treat any evidence as inadmissible at this stage of the proceedings. The panel will keep under review the question of the treatment of evidence from anonymous sources and may revisit the question of the admissibility of such evidence at a later stage of the proceedings.

The panel hereby extends the deadline for the filing of Guatemala's initial written submission to February 2, 2015.

The panel notes that this extension will necessitate adjustments to other deadlines, including the deadline for the panel to submit its initial report to the disputing Parties (as would have been the case in any event under the previously agreed extension of the deadline for Guatemala's first written submission). The panel therefore invites the disputing Parties to confer with a view to agreeing on appropriate adjustments to the timetable for proceedings. In the absence of agreement between the disputing Parties on such matters by January 15, 2015, the panel will propose adjustments for the disputing Parties' consideration.

3. The reasons of the panel majority are set out immediately below.

II. Background

4. In a letter to the disputing Parties of October 30, 2014, the panel confirmed a deadline of December 1, 2014 for Guatemala to file its initial submission. The panel also stated that

[if] Guatemala considers that it requires as a matter of due process additional time to prepare its initial written submission, the panel invites it to confer with the United States of America on an appropriate extension and thereafter, but in any event by no later than November 10, 2014, make a request for such an extension to the panel.

5. In a letter to the panel dated November 10, 2014 Guatemala indicated that it had conferred with the United States regarding such an extension of time, but that the disputing Parties had not reached agreement. Guatemala requested that the panel extend the deadline for filing its initial written submission to February 1, 2015.

6. In a letter to the panel dated November 12, 2014 the United States objected to Guatemala's request, but stated that it would not object to an extension to January 9, 2015.

7. On November 18, 2014 the panel sent to the disputing Parties a letter asking if they would be amenable to extending the deadline in question to January 14, 2015, and requesting that each Party submit its answer to this question in writing to the Responsible Office by no later than Thursday, November 20, 2014.

8. On November 20, 2014 the United States responded to the panel's request by agreeing to that extension.

9. However, Guatemala's letter to the panel of that same day raised new issues. It drew the panel's attention to "the fact the United States redacted important information from 135 of its exhibits and, as of today, the United States has neither provided Guatemala nor the Panel with non-redacted versions of such exhibits."¹ Guatemala took the position that "[b]y redacting information from these exhibits, the United States is acting in a manner contrary to the Model Rules of Procedure ("MRP") and violated Guatemala's due process rights, including its right to have an adequate opportunity to prepare its case and to respond to adverse evidence."² Guatemala noted that "the information redacted from the exhibits includes the identity of the person providing the statements, the name of the judges participating the labor legal proceedings, the names of the inspectors from the General Inspection Directorate (GLI) in charge of inspections in the cases identified by the United States and the case number of certain domestic proceedings."³

10. The letter went on to request that the Panel instruct the United States to provide the Panel and Guatemala, without delay, a complete set of non-redacted and legible exhibits; that in the meantime, the panel treat the United States' initial written submission as not properly submitted; or that in the alternative the panel strike the redacted exhibits from the record of these proceedings.

¹ Letter from Guatemala to the panel Chair., para 3 (November 20, 2014).

² Ibid at para 4.

³ Ibid at para 5.

11. Guatemala also stated in its November 20, 2014 letter that if the United States were to provide complete non-redacted versions of all exhibits by November 21, 2014, it would be in a position to file its initial written submission by Monday, February 2, 2015. On the other hand, in the event that the United States were to take more time in providing complete non-redacted versions of all the exhibits, Guatemala requested that the Panel adjust the deadline to file its written submission in the light of such delay. Finally, Guatemala stated that if the panel were to strike the redacted exhibits from the record it would be in a position to file its initial written submission by January 16, 2015.

12. On November 21, 2014 the panel sent a letter to the Disputing Parties extending the deadline for the filing of Guatemala's initial written submission to January 14, 2015. The panel indicated in that letter that it would consider whether a further extension was warranted, and requested that the United States provide any written response to Guatemala's November 20 letter by November 25, 2014.

13. On November 25, 2014 the United States sent a letter to the panel taking issue with Guatemala's requests of November 20, and refusing to agree to any extension of time beyond January 14, 2015. In its letter the United States stated that it had acted in accordance with the Rules (including, in particular, Rules 15 and 16) in the presentation of its initial written submission. It maintained that, as relevant here, the Rules address the treatment of information submitted to the Panel and other Parties and designated as "confidential," but they "do not address what information does or does not need to be submitted to the Panel and do not govern submitting evidence with material already redacted."⁴ The United States then explained that the "redactions it has made to factual information are imperative to protect the safety and security of the workers who have provided their personal information, including in court records, for the purposes of these proceedings with the understanding that they would be protected by the Rules".⁵ The letter went on to state that "the United States remains deeply concerned that disclosing information regarding these workers could subject them to retaliation in the workplace."⁶

14. On December 5, 2014 the panel sent a letter to the disputing Parties requesting that they attend a telephone hearing to address the following matters:

1. Whether the panel has authority to extend the deadline for filing Guatemala's initial written submission for under Rule 27 or Rule 34 to allow Guatemala additional time to locate documents and witnesses in response to evidence submitted by the United States from which identifying information had been removed;
2. How to calculate how much time Guatemala requires, as a matter of necessity, to locate such documents and witnesses; and
3. Whether the United States might assist in expediting that process by providing information (such as file numbers) enabling Guatemala to identify relevant files and documents.

⁴ Letter from the United States to the panel Chair, para 3 (November 25, 2014).

⁵ Ibid, para 5.

⁶ Ibid.

15. The disputing Parties attended a telephone hearing on December 11, 2014. At that hearing the panel heard submissions on each of the above matters. Guatemala stated that while it had located some of the court files in question, a number of courts were located in different municipalities in remote locations, and that it was difficult to make progress in view of the upcoming Christmas holiday season. As a result, Guatemala said that it would be difficult for it to commit to a fixed deadline. The United States stated that it could not agree to disclose any information that would identify, directly or indirectly, workers providing information to the panel, because those workers had made their statements on condition that the United States would not reveal their identity in the course of these proceedings. When asked by the panel Chair whether it might consider discussing with the workers in question the release of some potentially identifying information, such as court file numbers, in light of confidentiality safeguards provided under the Rules, the United States indicated the workers had insisted on remaining anonymous with an understanding of the operation of the proceedings.

16. The United States sent a letter to the panel (dated December 16, 2014, and transmitted by the Responsible Office to the Panel on December 17, 2014) discussing certain legal authorities to which it had referred in the course of the December 11 hearing, related to the use of evidence with redactions in other dispute settlement proceedings. On December 17, 2014, Guatemala requested an opportunity to respond. The panel, by letter dated December 18, 2014 requested that Guatemala provide any such response no later than December 22, 2014. Guatemala responded by letter of that date.

III. Positions of the Disputing Parties

17. We first summarize the arguments of the disputing Parties with respect to Guatemala's request for an extension of time to file its initial written submission. Then we canvass their positions on Guatemala's request for further relief in respect of the redactions of evidence.

Request for Extension of Time

18. Guatemala's November 10, 2014 request for an extension of time to February 1, 2015 advances five arguments.

19. First, Guatemala submits that it should not be required to file its initial written submission in just one month and five days because the United States decided when to bring its complaint and took as much time as it needed to prepare its offensive case.

20. Second, Guatemala contends that the panel request of the United States was drafted in such broad and vague terms as to fail to present the problem clearly or provide Guatemala with the opportunity to know in advance the case it had to answer before the United States filed its initial written submission on November 3, 2014.

21. Third, Guatemala points out that it received the translation into Spanish of the initial written submission of the United States only on November 10, 2014 and that a number of Guatemalan officials who do not read English were not in a position to understand that submission until November 17, 2014, ten days before the deadline for filing Guatemala's initial written submission.

22. Fourth, Guatemala maintains that the redaction of information from the exhibits of the United States places a burden on Guatemala to "search among thousands of administrative and judicial files to find those that support US allegations and to verify the status of each of the instances in which the United States claims that Guatemala allegedly failed to enforce labor laws"⁷, thus impeding its ability to prepare its initial written submission.

23. Finally, Guatemala notes that members of the team of officials assigned to Guatemala's case take vacations in November, December and January and that the team would be complete and fully operational only on January 16, 2015.

24. In its response of November 12, 2014 the United States affirms its willingness to extend the deadline in question to January 9, 2015 in light of translation requirements and conflicts with holidays created by those requirements. On the other hand, it takes the position that Guatemala's reasons for requesting an extension beyond January 9 are not compelling, arguing that the alleged breadth and vagueness of the US panel request is an issue for the panel to address at and following the hearing, that Guatemala's internal review processes cannot justify delaying the proceedings, and that Guatemala was able to begin searching for the documents that it needed to respond to the exhibits submitted by the United States upon receipt of Spanish versions of those exhibits.

25. In the course of the December 11, 2014 telephone hearing, Guatemala maintained that the panel has authority under Rule 34 to extend deadlines for due process reasons, and that it should do so in order to ensure that Guatemala has the opportunity to make a complete response to the allegations of the United States. (Guatemala's argument that such an opportunity is required by due process is summarized below as part of its arguments for relief against redacted evidence.) The United States acknowledged that, subject to Article 20.13.3 of the Agreement, the panel had the authority under Rule 34 to modify time periods where required as a matter of necessity for the appropriate management of the proceedings, but reiterated its view no such modification is justified in this case.

Request for Further Relief in Respect of Redacted Evidence

26. In its letter of November 20, Guatemala makes two arguments in support of its request for further relief in respect of the redacted documents.

27. First, Guatemala argues that the redactions of information from exhibits submitted by the United States are contrary to the Rules, because the Rules require that all

⁷ Letter from Guatemala to the panel Chair, para 6 (November 10, 2014).

information designated as confidential must be disclosed to approved persons of the other party.⁸

28. Second, Guatemala submits that: “[w]ithholding information contained in exhibits provided as evidence from a respondent party violates the basic due process obligations recognized in international and municipal law” and that “[i]t is a fundamental tenet of due process that a party has a right to adequately prepare its defence and to see and respond to evidence put forward against it by the other party”.⁹ Without the redacted information, Guatemala asserts, it is precluded from locating the administrative and judicial files referred to in the exhibits, from verifying the status of each of the cases cited by the United States in support of its arguments, and from verifying the accuracy and truthfulness of the exhibits provided by the United States. Taken together, Guatemala submits, these limitations severely constrain its ability to respond to the claims and evidence put forward by the United States and to prepare its own written submission within the deadline set by the panel.¹⁰

29. Guatemala also suggests in its November 20 letter that its rights to adequately prepare its defence and to see and respond to evidence put forward against it require disclosure of the identity of any witnesses providing evidence against it in these proceedings. Guatemala notes that both U.S. and Guatemalan labour statutes require disclosure of the identity of witnesses providing evidence in tribunal proceedings.¹¹ It points to Rule 35 of the International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings, which gives parties the right to examine witnesses and experts.¹² Guatemala argues that it is impossible to exercise such rights unless the identity of witnesses is disclosed to the examining party. Guatemala notes in addition that Article 6.3 of the European Convention on Human Rights gives persons the right to examine or have examined witnesses testifying against him or her, and argues that this right applies in both civil and criminal proceedings.¹³ Finally, Guatemala cites the *Contador Velasco* decision of the Court of Arbitration for Sport noting that admitting anonymous evidence potentially infringes the right of a party to be heard and to a fair trial.¹⁴ Guatemala notes that the confidentiality provisions of the Rules would prevent disclosure of the identities of the workers in question and submits that the purpose of the redactions is simply to obstruct the preparation of its defence.

30. In its response of November 25, 2014, the United States argues that the Rules deal only with the treatment of evidence that a Party chooses to submit to the panel and other Parties, and they do not require a Party to submit particular evidence even if it is in that

⁸ Supra note 1 at para 4.

⁹ Ibid at para 17.

¹⁰ Ibid at para 5.

¹¹ Ibid at paras 17 and 18.

¹² Ibid at 18.

¹³ Ibid at para 20.

¹⁴ Ibid, citing CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC and CAS 2011/A/2386 WADA v. Alberto Contador Velasco and RFEC, <http://tas-cas.org/d2wfiles/document/5648/5048/0/FINAL20AWARD202012.02.06pdf>

Party's possession. It submits that Guatemala's reliance on the Rules is therefore misplaced.¹⁵ The United States also points out that all of the information provided to the panel has also been provided to Guatemala. It contends that Guatemala therefore in fact has an opportunity to see and respond to all of the evidence put forward by the United States in these proceedings.¹⁶

31. At the telephone hearing of December 11, 2014, Guatemala maintained that both the Rules and the due process principle that a party has the right to defend itself place an obligation on the United States to disclose the identity of witnesses providing evidence in these proceedings. It stated that it needs to know the identity of the witnesses at this stage of the proceedings to test the veracity of their evidence, to formulate its defence strategy, and to prepare for cross-examination. It argued that it should have a right at the hearing to cross-examine such witnesses in order to test the veracity of their statements. Guatemala submitted that the panel has authority by virtue of Rule 27 to grant the relief that it seeks in connection with redacted evidence, since the treatment of evidence is not covered by the Rules.

32. The United States responded that the Rules do not contemplate the examination of witnesses at hearings, that the Rules are designed for state-to-state dispute settlement, and that in any event the issue at hand is not the credibility of the witnesses but what actions Guatemala did or did not take to enforce its labour laws. The United States contended that Guatemala is in a position to state whether it has taken such action because it has information on employer company names and events that enable it to locate information relevant to its defence, even in the absence of information that personally identifies the workers in question. It also took the position that in any event the ability to cross-examine is not relevant to the filing of an initial written submission.

33. Guatemala replied that the United States is seeking to reverse the burden of proof. It also pointed out that some of the companies mentioned in the documents submitted by the United States do not exist anymore. It did not however identify which companies those were.

34. In its letter to the panel of December 16, 2014 the United States submits that "the use of evidence with redactions in international dispute settlement is not uncommon", and that "[w]hether applied to protect personally identifiable information, business confidential information, or state secrets, redactions are a frequent feature in state-to-state proceedings."¹⁷ The United States refers the panel to dispute settlement panel reports in two WTO dispute settlement proceedings (*Argentina – Measures Affecting the Importation of Goods*¹⁸ and *Turkey – Measures Affecting the Importation of Rice*),¹⁹ and a party's memorial in an ICJ proceeding (*Case Concerning the application of the*

¹⁵ Supra note 4 at para 3.

¹⁶ Ibid at para 4.

¹⁷ Letter from the United States to the panel Chair, para 2 (December 16, 2014).

¹⁸ Ibid at para 3. The United States makes reference to the Panel Report, *Argentina- Measures Affecting the Importation of Goods*, WT/DS438/444/445/R circulated August 22, 2014, para 6.61.

¹⁹ Ibid at para 4. The United States makes reference to the Panel Report, *Turkey- Measures Affecting the Importation of Rice*, WT/DS334/R adopted October 22, 2014, para 2.53..

Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Memorial of Croatia, March 1, 2001). The United States also refers to two WTO agreements -- the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade* (the Anti-Dumping Agreement), and the WTO *Agreement on Subsidies and Countervailing Measures* (the SCM Agreement) – and maintains that these agreements expressly anticipate and in some instances require the submission of evidence to panels with redactions. The United States notes that these agreements deal with domestic trade remedy actions in which certain information may be given to a domestic investigating authority on a confidential basis. It contends that when such actions are presented for review to a WTO dispute settlement panel, such information is redacted from documents submitted to the panel.²⁰ The United States contends that it cannot be required to disclose the identity of persons providing information to it in confidence. The United States further notes that in none of the instances cited above has a panel considered that it must extend deadlines in order for a party to take steps to discover the information that has been redacted.²¹

35. In its letter to the panel of December 22, 2014 Guatemala asserts that in most jurisdictions, including the United States, parties cannot be held liable or convicted on the basis of secret evidence. It further contends that none of the three cases cited by the United States offers support for admitting redacted evidence in these proceedings.²² Specifically, Guatemala submits that in *Argentina – Measures Affecting the Importation of Goods*, the panel was seriously troubled by the parties’ refusal to disclose evidence, and elected to proceed cautiously and deliberately with the anonymous letters submitted to it.²³ It argues further that unlike Argentina, which in that case had the agreements that were most relevant to the proceedings in its possession, Guatemala does not have access to “a large number of statements submitted by the United States as part of its exhibits”, and therefore is not able to challenge the veracity of the statements to which it must respond.²⁴ Guatemala notes that in *Turkey – Measures Affecting the Importation of Rice* Turkey elected not to submit the redacted evidence at issue, and that consequently the panel found that it had failed to rebut the *prima facie* case of the complainant (the United States).²⁵ Guatemala maintains further that the provisions of the *SCM* and *Anti-Dumping* agreements to which the United States refers govern the treatment of confidential evidence by domestic tribunals rather than by international dispute settlement panels, and that in any event, in proceedings governed by those agreements, confidential information must be disclosed to the investigating authority and to adverse parties.²⁶ Finally, Guatemala contends that the *Croatia v. Serbia* case involved accusations of genocide and is therefore not comparable to the case at hand, that in any event the prosecution in that case deposited a document containing the names of anonymous witnesses with Registrar

²⁰ Ibid at para 5.

²¹ Ibid at Para 7.

²² Letter from Guatemala to the panel Chair, para 3 (December 22, 2014).

²³ Ibid at para 4.

²⁴ Ibid at para 7.

²⁵ Ibid at para 11.

²⁶ Ibid para 12 and 13.

of the Court, and that the Court has yet to pronounce on its treatment of the anonymous evidence in question.²⁷

IV. Reasons for Decision

36. We address Guatemala's requests in connection with redacted evidence first, as they subsume the extension of time requested by Guatemala in its letter of November 10, 2014.

1. Request for interim relief against redactions of documents

37. We begin by noting that all information submitted by the United States to the panel is in Guatemala's possession. What Guatemala seeks is the disclosure by the United States of information that the United States removed from documents submitted to the panel. The information in question is information that identifies workers who furnished statements that the United States submitted in evidence or allegedly could lead to the identification of such workers. The information includes the names of the workers, as well as the names of labor inspectors and judges and case numbers of the matters in question. The United States affirms that it made these redactions in response to concerns by the workers in question that they would be subject to reprisals should their identities become known in the course of these proceedings.

38. Guatemala notes that information as to the identities of the workers in question could be designated as confidential under the Rules. This would restrict its distribution to approved persons, prevent its disclosure to the public and require its destruction following these proceedings. Guatemala argues that, in light of these confidentiality protections, the redactions can only be construed as an attempt by the United States to obstruct Guatemala in the preparation of its defence.

39. We cannot conclude that this is the case. The information provided to the panel by the United States is that the workers in question appear not to have accepted the confidentiality provisions of the Rules as sufficient protection of their identities, and to have made non-disclosure of their identities a condition upon which they provided their evidence. While this is regrettable, we cannot conclude, without more, that it reflects bad faith on the part of the United States to have offered assurances to the workers in question that it would not disclose their identities in the course of these proceedings.

40. Guatemala's request for relief against the redactions is based on two arguments. First, Guatemala submits that by redacting exhibits in support of its initial written submission the United States has violated the Rules of Procedure. Second, Guatemala takes the position that allowing the United States to file redacted exhibits in support of its initial written submission would violate Guatemala's right to procedural fairness (i.e., due process) even apart from its inconsistency with particular provisions in the Rules. We consider each argument in turn.

²⁷ Ibid at para 16.

A. Whether the Redaction of Information Violates the Rules

41. A Party to dispute settlement proceedings under Chapter 20 of the DR-CAFTA has a prerogative to submit such evidence as it sees fit in support of its position. A corollary to this proposition is that a Party may choose not to submit particular evidence. In other words, a Party may choose which evidence to submit and which evidence not to submit. The first issue before us is as follows: when a Party submits evidence in the form of witness declarations, do the Rules require that it also submit personal identifier or other information related to such declarations?

42. The answer is no. The Rules do not preclude a Party from submitting evidence in the form of anonymous witness declarations. Nor do they require a Party to supplement the submission of witness declarations by providing personal identifier or other information that could help to put such declarations in context. In fact, the Rules impose no affirmative obligation on CAFTA disputing Parties to assist the fact-finding process. In this regard, the CAFTA Rules differ from the WTO Dispute Settlement Understanding, of which the CAFTA Parties unquestionably were aware when they drafted the Rules. The WTO DSU contains, in its Article 13, a duty of collaboration whereby a disputing Party may have an obligation to produce certain information upon request by a dispute settlement panel even if the Party had not chosen to submit such information in the first instance.²⁸ The DR-CAFTA Rules contain no corresponding provision.

43. Guatemala submits that Rules 15 and 16 require a disputing Party to disclose to approved persons representing the other disputing Party all information that its has designated as confidential, and that therefore the United States must disclose to it all information redacted from the exhibits in question. However, the information designated as confidential under Rules 15 and 16 is factual information already included in a Party's submission or other document. As the heading under which they are located indicates, Rules 15 and 16 are rules regarding the public release of written submissions and other documents filed in panel proceedings. The wording of Rules 15 and 16 makes it clear that they deal only with information already contained in such documents and not with whether any particular information must be included in them. Rule 15 enables a participating Party to "designate... for confidential treatment specific *factual information it includes* in a Party submission" [emphasis added]. Rule 16 requires a Party that "designates information *contained in a document* as confidential" [emphasis added] to prepare a non-confidential version of the document (in which the confidential information is redacted and its own confidential information is summarized) for release to the public.

44. The United States has provided to the panel and to Guatemala all information designated as confidential in its initial written submission. The redaction of information from documents presented to both the panel and the other disputing Party is not a subject addressed by these Rules. The Rules therefore provide the panel with no authority to

²⁸ That article provides, among other things, that "A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate."

instruct the United States to provide the panel and Guatemala with unredacted copies of the exhibits submitted in support of its initial written submission. Nor do the Rules provide any basis upon which the panel could declare that the initial written submission of the United States was not properly submitted simply because it contains exhibits from which the United States has redacted information.

B. Whether allowing the filing of redacted evidence in support of the initial written submission of the United States violates due process

45. Guatemala submits that, apart from any express requirement of the Rules, “due process” – by which we understand Guatemala to mean fundamental procedural fairness - - requires that a Party have an adequate opportunity to prepare its defence and to respond to evidence put forward against it. It argues that the redactions deprive it of those opportunities by undermining or impairing its ability to identify and locate evidence in support of its defence, to verify and challenge the accuracy and truthfulness of the exhibits provided by the United States, and to prepare to cross-examine witnesses providing evidence against it.

46. The first question we must address is whether the two procedural standards to which Guatemala refers – *i.e.*, an adequate opportunity for a respondent to prepare its defence and an adequate opportunity for a respondent to respond to evidence put forward against it – are elements of the process that is due to a disputing Party in a proceeding under CAFTA Chapter 20. If they are, then the next question we must address is whether admission into the record of the redacted documents submitted by the United States would be contrary to either of those standards.

47. The first question is easily addressed. We see no controversy in accepting the proposition that a respondent in a CAFTA Chapter 20 dispute settlement proceeding is entitled to an adequate opportunity to respond to evidence submitted against it. As noted in our reasons for decision of November 20, 2014, although the WTO agreements are not at issue in this proceeding, both disputing Parties have referred to reports of WTO dispute settlement panels and the Appellate Body as persuasive. We find it helpful to refer to WTO precedent here. We note, in particular, the Appellate Body’s observation in one of its very first cases that “a [dispute settlement] panel must . . . be careful to observe due process, which entails providing the parties with an adequate opportunity to respond to the evidence submitted”.²⁹ Equally important, the Appellate Body has stated that “[a] party must not merely be given an opportunity to respond, but that opportunity must be meaningful in terms of the party’s ability to defend itself adequately.”³⁰ It is reasonable to conclude that the CAFTA Parties would have expected the application of this principle in panel proceedings under Chapter 20.

48. Guatemala also asserts that due process rights include the right of a party to “an adequate opportunity to prepare its case.”³¹ This would appear to include but extend

²⁹ Appellate Body Report, *Australia – Salmon*, WTO Doc. WT/DS18/AB/R, 20 October, 1998, para 272

³⁰ Appellate Body Report, *US – Gambling*, WT/DS285/AB/R, 7 April 2005, para 270.

³¹ *Supra* note 1 at para 4.

beyond the right to an adequate opportunity to respond to evidence. For present purposes the panel need not canvass the full extent of any such right. We observe that it must include an adequate opportunity to formulate a response to evidence submitted by an opposing party, as this is a logical extension of the right to an adequate opportunity to respond to evidence, and therefore also an element of due process. If the redactions substantially impair either opportunity, allowing the United States to submit the redacted evidence at issue would violate applicable due process norms. We turn therefore to whether this has happened in the case at hand.

49. The initial written submission of the United States alleges numerous instances of failure by Guatemalan government and court officials to act in accordance with obligations under Article 16.02 of the Agreement. Some of those allegations are based upon statements of anonymous employees claiming to have had dealings with those officials. Many of the documents submitted in support of the allegations have been redacted so as to remove one or more of the identity of the person making the statement, the name or names of the judges or labor inspectors involved in a particular case, or the case number.

50. Guatemala raises three particular due process concerns with these redactions.

51. First, Guatemala asserts that the redaction of case numbers prevents it from locating the administrative and judicial files referred to in the exhibits, and therefore from verifying the status of each of the cases cited by the United States in support of its arguments.

52. If the redactions entirely prevented Guatemala from locating files documenting the handling of cases that are the subject of allegations in the written submission of the United States, they might substantially impair Guatemala's ability to adequately respond to the case against it.

53. However, the evidence before the panel does not establish that the redactions in question make locating the relevant files impossible. In its November 10, 2014 letter Guatemala notes that the redactions would require it to "search among thousands of judicial files to find those that support US allegations and to verify the status of each of the instances in which the United States claims that Guatemala failed to effectively enforce labor laws".³² This suggests that locating the files will be time-consuming and burdensome, but not impossible. As the United States notes, information upon which to base a file search - such as the dates of relevant events and names of employers - was not redacted from the exhibits. When asked at the telephone hearing to explain the difficulties that it faced in locating the relevant files, Guatemala pointed to the remote location of some of the court offices in which documents were located, but did not offer any information on particular problems with searching court and inspectorate records. In its December 22, 2014 letter to the panel, Guatemala describes the task of locating the files in question in the absence of file numbers as "extremely burdensome" but offers no

³² Ibid at para 6.

reason to think that it cannot be done given reasonable time. We cannot conclude on the basis of the evidence before us that locating the relevant records is impossible.

54. To the extent that the redaction of information makes the location of necessary evidence burdensome and time-consuming but not impossible, the appropriate response of the panel is to consider an extension of time. The panel returns to this question below.

55. A second argument raised by Guatemala is that the redactions “preclude it from verifying the accuracy and truthfulness of the exhibits submitted by the United States”.³³ On its face this could be an important concern from a due process perspective, since an ability to verify or refute the accuracy and truthfulness of evidence is a key element of a meaningful opportunity to adequately respond to it. There appear to be two aspects to Guatemala’s concern. The first is that Guatemala may be precluded from verifying or refuting the factual assertions made by witnesses in the exhibits at issue. The second is that Guatemala may be precluded by the anonymity of those witnesses from examining characteristics or personal motives that may affect the reliability of their evidence. We consider each aspect in turn.

56. With respect to the first, the panel cannot conclude at this time that Guatemala is precluded from verifying or refuting the material allegations contained in the redacted exhibits submitted by the United States. It may be that by reference to its own files and interviews of its own officials, Guatemala is able to verify or refute the allegations of the United States. However, if and to the extent that proves to be impossible, the panel will consider at the appropriate time whether particular redactions have prevented the United States from meeting its burden of establishing the facts it has alleged or whether further relief may be required.

57. Turning to the second aspect, tribunals should treat anonymous evidence with caution. The anonymity of a witness may conceal possible motives or characteristics of the witness that affect the reliability of his or her evidence. If the reliability of a witness remains unexamined, a decision can be unfair.

58. On the other hand, not all anonymous evidence necessarily presents these problems. When an anonymous witness simply presents information readily verifiable through other sources, the credibility of the witness in question may not be a material issue because parties can readily verify the accuracy of the information.

59. At this point in the proceedings, it would be premature for the panel to determine whether the credibility of the witnesses whose anonymous testimony was submitted by the United States is at issue and whether the inability to test that credibility precludes Guatemala from verifying or refuting the accuracy and truthfulness of the assertions in question. Should the evidence and argument in Guatemala’s initial written submission put the credibility of the anonymous witnesses into question, then the panel would have to consider what weight, if any, to give to the disputed anonymous evidence. At this time, however, it would be inappropriate for the panel to presume that the credibility of

³³ Supra note 1 at para 5..

the anonymous witnesses will be at issue and that absent an opportunity to test that credibility Guatemala would be unable to verify or refute the accuracy and truthfulness of particular assertions, and based on that presumption to exclude the redacted evidence submitted by the United States.

60. Guatemala suggests that the anonymity of evidence submitted by the United States, by putting it in the position of having to submit evidence in order to respond to it, is effectively seeking to reverse the burden of proof. By this we understand Guatemala to be saying that allowing the United States to redact identifying information from the exhibits in question effectively prevents Guatemala from simply challenging the credibility of the witnesses testifying in those exhibits without producing independent evidence of its own.

61. We do not agree that the redaction of certain information from evidence submitted by the United States amounts to reversing the burden of proof. Guatemala remains free to submit evidence of its own or to refrain from doing so, just as it would be if the United States had not redacted information from the documents it submitted. In either situation, Guatemala could argue that the United States had failed to make out a *prima facie* case, thus relieving Guatemala of the burden to put on any affirmative evidence of its own; or it could accept that the United States had made out a *prima facie* case and put on its own evidence to rebut that case; or it could argue the two different positions in the alternative. We fail to see how the redactions by the United States affect the options available to Guatemala. Likewise, in either situation, if Guatemala chose to challenge the credibility of witnesses, it presumably would do so either by arguing that the testimony at issue is not credible or by producing evidence demonstrating its incredibility. That would be so regardless of whether the witness's identity were known or not. It is possible that knowing a witness's identity would enable Guatemala to find evidence about the witness that might help to impeach his or her credibility. But, as stated above, at this stage of the proceeding, it is premature to state whether the credibility of particular witnesses is at issue and, if so, how to address the contested credibility in our weighing of the evidence.

62. If Guatemala contended that the United States had failed to make out a *prima facie* case and therefore declined to put on any evidence of its own, the panel would be required, as it would be in any event, to assess the probative value of any evidence submitted by the United States in the course of determining whether the latter has met its burden of proof. In doing so, the panel would be required to take into account all aspects of the evidence, including the fact that the knowledge, characteristics and motives of witnesses had remained unexamined, a matter which may affect the probative value assigned to such evidence.

63. In sum, while it is theoretically possible 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, and while such inability could implicate the due process standards to which Guatemala has referred, it is premature at this stage of the proceeding to conclude that this necessarily will be the case.

Therefore, at this time we reject Guatemala's second argument for seeking exclusion of the redacted exhibits submitted by the United States.

64. Guatemala's third argument is that the redaction of identifying information from exhibits, by maintaining the anonymity of the witnesses in question, prevents it from preparing to cross-examine them. Guatemala submits that without being able to prepare for cross-examination it is denied an adequate opportunity to defend itself.

65. For the reasons that follow, we do not accept this position.

66. First, Guatemala's argument presumes that ordinarily it would have the right to cross-examine witnesses. However, the CAFTA Rules of Procedure do not contemplate such a right. Rules 44 and 45 envisage that hearings will provide an opportunity only for argument by the disputing Parties on the basis of previously submitted documents. The fact that other international instruments, such as the ICSID Arbitration Rules, do provide for cross-examination of witnesses simply makes the absence of such a provision under the CAFTA Rules all the more notable.

67. That the CAFTA Rules do not provide for the cross-examination of witnesses is not contrary to fundamental procedural fairness. First, due process standards do not require in every case the right to examine witnesses with respect to statements submitted in evidence. In some instances such statements will not be material to the issues before the panel. In others, the truthfulness or accuracy of the statement will not be in issue. In such situations a right of examination could serve no useful purpose as it would neither advance the enquiry of the panel nor enable a Party to defend itself. In the present case, for reasons discussed above, it is premature to conclude that the credibility of any particular statement by an anonymous witness is in issue.

68. Second, even when the credibility of a written statement by an author not available for examination is in issue, the prejudice to a Party seeking to challenge that statement may be fully addressed by a tribunal's partially or fully discounting the weight attached to the statement in question, or by excluding it from the record. The panel can keep under review the question of the treatment of evidence from anonymous sources and may revisit the question of the admissibility and probative value of such evidence if and when its credibility becomes an issue.

69. Guatemala suggests, relying upon the example of Articles 6.1 and 6.3 of the European Convention on Human Rights (ECHR), that due process includes the right of a Party to these proceedings to examine or have examined any witness submitting evidence against it, and therefore that the identity of such witnesses must be disclosed at this stage of the proceedings so that it can prepare to examine them. We do not see this example as applicable. The rights to examine or have examined witnesses as provided in Article 6.3 of the ECHR (to which neither Guatemala nor the United States is a party) apply only in criminal prosecutions.³⁴ We do not see the present state-to-state proceedings as

³⁴ Contrary to Guatemala's assertion, Article 6.3 of the European Convention on Human Rights does not apply in civil proceedings as it pertains exclusively to criminal proceedings. Council of Europe, *European*

analogous to criminal prosecutions. Because criminal proceedings concern potential findings of criminal wrongdoing and deprivations of liberty, and because a criminal defendant is generally in a position of structural disadvantage as an individual person confronting the prosecutorial resources of the state, due process mandates the highest degree of procedural protection in criminal trials. State parties to a trade dispute are not in the position of criminal defendants. They may fashion more flexible procedures suitable to the resolution of their disputes without compromising due process. And, as already noted, the inclusion of a right of cross-examination in instruments such as the ECHR serves to highlight the deliberate decision of the CAFTA Parties to exclude such a right from the CAFTA Rules of Procedure.

70. We therefore cannot conclude that all or any of the redactions to documents submitted by the United States with its initial written submission deprive Guatemala of an adequate opportunity to respond to the evidence of the United States or to defend itself. We therefore decline to instruct the United States to produce unredacted copies of those documents or to strike them from the record. We also conclude that there is no basis for an extension of time in addition to the extension that we discuss in section 2 of this statement of reasons, below.

71. The panel will assess what effects the redactions have, if any, on the probative value of the exhibits submitted by the United States in the course of dealing with the dispute on its merits. The panel will keep under review the question of the treatment of evidence from anonymous sources and may revisit the question of the admissibility of such evidence at a later stage of the proceedings. In the event that Guatemala does challenge allegations of fact made by the United States that are supported by anonymous evidence, it will be appropriate at that point for the panel to consider whether to adopt a procedure to investigate allegations by the United States contained in anonymous declarations that are disputed by Guatemala, whether to exclude anonymous evidence, or what weight, if any, should attach to anonymous evidence in the fact-finding process. As discussed above, the Rules do not contemplate the examination of witnesses; the right to examine witnesses is not necessarily required for due process in these proceedings, provided that unexamined evidence going to a material question of fact can be discounted or excluded from the record where appropriate; and in any event the panel has no power to compel the disclosure of information that a disputing Party chooses to withhold from it. By extension, the panel has no power to compel the attendance of a witness at a panel hearing. The question potentially raised by the anonymity of witness statements is therefore simply how the panel should treat such evidence, and in particular whether the panel should seek the cooperation of the disputing Parties to examine it, exclude it from the record, discount the weight attached to it, or simply treat it with caution. That question would have to be considered in light of the particular disputed questions of fact and evidence before the panel.

2. Request for Extension of Time

72. We turn now to Guatemala's request, in its letter of November 10, 2014, for additional time to prepare its initial written submission, which Guatemala says it requires "as a matter of due process." We consider Guatemala's request to be a request for us to exercise our discretion under Rule 34, which provides as follows:

A panel may, after consulting the participating Parties, modify any time period applicable in the panel proceeding and make such other procedural or administrative adjustments as may be required in the proceeding, such as where a panelist is replaced.

73. Rule 34 gives the Panel discretion to adjust the timetable for proceedings, but it subjects that discretion to two conditions. First, the panel must consult the participating Parties before modifying any time period. Second, any adjustment the panel makes must be "required."

74. The first condition has been met. The panel has received written submissions from the participating Parties on the question of modifying the deadline for Guatemala's first written submission, and it heard the participating Parties' oral submissions during a teleconference on December 11, 2014.

75. The question then is whether modifying Guatemala's deadline (and making any additional modifications that would be required as a consequence of modifying Guatemala's deadline) is "required" as that term is used in Rule 34. The ordinary meaning of "required" in this context is "requisite" or "necessary."³⁵ Rule 34 gives a specific example of a circumstance in which procedural or administrative adjustments may be "required" – *i.e.*, where a panelist is replaced. That example must inform our understanding of whether Rule 34's condition of an adjustment being "required" is met.

76. The circumstances that require a procedural or administrative adjustment may be of a practical nature or a legal nature. Replacement of a panelist, the situation referred to expressly in Rule 34, is an example of a circumstance in which, as a practical matter, procedural or administrative adjustments may be required. There may be other circumstances in which, absent a procedural or administrative adjustment, a Party would be denied a meaningful opportunity to be heard or deprived of some other aspect of fundamental procedural fairness, such that an adjustment is required as a legal matter. We understand Guatemala's contention that an adjustment to the deadline for its initial written submission is required to be of the latter variety, and we turn now to the question of whether such an adjustment is required as a legal matter.

77. As noted above, the Agreement and the Rules contemplate expeditious proceedings. It follows that disputing Parties will foresee and devote the resources required to resolve disputes expeditiously. The panel should not relieve disputing Parties

³⁵ "Required, adj." *OED Online*. Oxford University Press, December 2014. Web. 6 February 2015

of obligations to meet timelines established under the Rules and Agreement because of circumstances that may be reasonably considered usual and foreseeable.

78. The Agreement and the Rules therefore contemplate that disputing Parties will allocate the personnel required to comply with these timetables for proceedings. This includes taking into account vacation time. Vacation schedules do not usually justify varying the timetable provided under the agreement and the Rules on due process grounds.

79. The Parties should similarly anticipate and allocate resources to review translations. The time required for this does not justify changing the timelines on due process grounds.

80. The length of preparation time available to the complainant is not relevant. The wording of the Agreement and Rules do not take it into account. Due process does not require that it be taken into account. What matters is that a Party complained against can mount a defense within the time available to it. The Parties to the CAFTA-DR clearly contemplated that such a Party could mount a defense within the timeframes established by the Rules, or they would have provided for different dispute settlement procedures. Further, we recall that the CAFTA provides for multiple levels of consultations before a request for an arbitral panel can be filed.³⁶ These processes provide ample opportunities to discuss and clarify the particulars of the measure or other matter at issue. In this case, the United States first requested consultations with Guatemala on July 30, 2010; it requested consultations under the auspices of the CAFTA Free Trade Commission on May 16, 2011; and it requested the establishment of a panel on August 9, 2011. Even then, the panel was not composed until November 30, 2012, and we understand that consultations between the Parties continued during the intervening 15-month period. After the panel was composed, proceedings were suspended for a period of almost two years, during which time we understand that additional consultations occurred. Accordingly, we decline to find the length of time the United States had in which to prepare its complaint as a circumstance requiring an adjustment to the deadline for Guatemala to submit its initial written submission.

81. A failure of a panel request to provide particulars about the complaining Party's allegations and claims may deprive a responding Party of the ability to prepare its defense, if it in fact results in that Party not receiving adequate notice of the case to which it must respond. Due process may, in such circumstances, require that the Party in question receive an extension of time to prepare that defense. On the other hand, the panel should not presume that a broadly worded request for a panel makes it impossible for a disputing Party to properly prepare a defense within the time frames provided by the Rules.

82. Under the circumstances of this case, we need not decide whether the wording of the United States' panel request was such as to require an extension of time for the submission of Guatemala's initial written submission. This is so for two reasons. First,

³⁶ See CAFTA, Arts. 16.6, 20.4 & 20.5.

between the submission of the panel request on August 9, 2011 and the September 18, 2014 letter of the United States asking the panel to resume its work after multiple successive suspensions, a period of more than three years elapsed during which time we understand the Parties were engaged in consultations regarding the subject matter of this dispute. Thus, even if Guatemala correctly characterizes the panel request as “fail[ing] to present the problem clearly” (a question on which we do not opine at this time), it is reasonable to presume in the absence of evidence to the contrary that the basis of the complaint was clarified during the course of those consultations. In light of these circumstances, Guatemala has not established at this point in the proceedings that it did not in fact have notice of the subject matter of the complaint. Second, after the proceedings resumed, in the disputing Parties’ joint communication of October 10, 2014, Guatemala expressly agreed to a timetable wherein its initial submission would have been due four weeks after the written submission of the United States.

83. To be clear, in rejecting Guatemala’s argument that, as a matter of due process, the alleged vagueness of the United States’ panel request requires an extension of the deadline for Guatemala’s initial submission, we do not take a position on Guatemala’s separate request for a preliminary ruling that the United States’ request fails to meet CAFTA’s pleading requirements and therefore the Panel “does not have the authority to proceed with the analysis of the merits of this dispute.”³⁷ As discussed in the November 20, 2014 statement of reasons in support of our October 30, 2014 procedural ruling, we have that request under consideration and will address it in due course.³⁸

84. Finally, we turn to Guatemala’s contention that the redacting of evidence presented by the United States imposes burdensome and time-consuming research requirements on Guatemala that will necessarily delay its initial written submission. We accept this contention. The redaction of information from the testimonial evidence on which the United States intends to rely is not a circumstance Guatemala could have foreseen upon reviewing the United States’ panel request. Nor is it a circumstance Guatemala could have foreseen when it initially agreed to a timetable in the disputing Parties’ joint communication of October 10, 2014. As discussed above, the matter of the burden flowing from having to respond to factual allegations contained in anonymous declarations goes to the ability of Guatemala to defend itself and, therefore, is a matter of procedural fairness. Accordingly, under the circumstances of this case, we find that an adjustment to the timetable is required in order to ensure that Guatemala has an adequate opportunity to respond to the case against it to the extent that case is based on anonymous testimonial evidence.

85. Further, while the panel should not accept that in usual circumstances the scheduling of vacations justifies an extension of time, it should recognize that vacations previously scheduled during a major holiday season can limit the ability of a disputing Party to respond to unusual circumstances. Given the situation at hand, therefore, a factor that must be taken into account in determining the length of any required schedule

³⁷ Preliminary Ruling Request, October 10, 2014, para. 126.

³⁸ See Ruling on the Procedure for Addressing Guatemala’s Request for a Preliminary Ruling, Op. of the Panel Majority, para. 55 (Nov. 20, 2014).

adjustment is that an extension of time to allow Guatemala to undertake the investigation necessary to respond to allegations contained in anonymous declarations would fall during a period in which the ability to pursue such investigation would be limited.

86. The panel has little precise information upon which to determine what length of extension is required, notwithstanding its request for such information at the December 11, 2014 hearing. In the circumstances we are prepared to treat the Guatemala's extension request of November 10, 2014 as a good faith and reasonable estimate of the time required to locate evidence in response to the redacted exhibits submitted by the United States. Given the number of redacted exhibits, we are prepared to treat the difficulties of locating evidence in response to them as a sufficient justification for the entire extension requested in that letter. Since February 1, 2015 does not fall on a working day, we extend the deadline for the filing of Guatemala's initial written submission to February 2, 2015.

Statement of Dissenting Reasons of the Panel Minority

I. ARGUMENTS AND COUNTER ARGUMENTS:

I.1 ARGUMENTS FROM GUATEMALA (Letter dated November 20, 2014):

(i) "(...) The information redacted includes the identity of the person providing testimony, the name of the judges who participated in the labor judicial process, the names of the inspectors of the General Labour Inspectorate (IGT) in charge of inspections in the cases identified by the US and the number for some domestic judicial processes. Without this information, Guatemala is precluded from verifying the accuracy and truthfulness of the exhibits provided by the United States. Moreover, the redaction of the case numbers prevents Guatemala from locating the administrative and judicial files referred to in these exhibits and verifying the status of the cases cited by the United States, in support of its arguments. Taken together, these limitations severely constrain Guatemala's ability to respond to the claims and evidence put forward by the United States and to prepare its own writing submission within the deadlines established by the Panel".

(ii) "(...) The United States disclosed the names of the companies against which the employees complaints are directed despite the fact that the names of these companies were included in the exhibits double brackets. As such, the United States should not have publicly disclosed the names of companies, by including their names in its written submission. The United States' position of designating information as confidential, while itself disclosing the information disclosed publicly is completely incoherent (...)".

(iii) "(...) Guatemala requests the Panel to instruct the United States to provide the Panel and Guatemala, without delay, a complete set of non-redacted and legible exhibits, as identified in the attached table. In the meantime, the United States' initial written submission should not be considered properly submitted until it provides Guatemala and the Panel with the complete non-redacted versions of all exhibits (...)"

(iv) "(...) If the United States were to provide complete non-redacted versions of all exhibits by November 21, 2014, Guatemala would be in a position to file its initial written communication by Monday, February 2, 2015. However, if the United States were to take more time in providing complete non-redacted versions of all exhibits identified in the attached table Guatemala respectfully requests that the Panel adjust the deadline for Guatemala to file its written submission in the light of the United States' delay in properly filing such exhibits. On the contrary, if the United States were to refuse to abide by the MRP by failing to provide non-redacted versions of any exhibits, Guatemala requests that the Panel declare such exhibits inadmissible and that it strike them from the record of these proceedings. In this case, Guatemala would be in a position to file its initial submission by Friday, January 16, 2014 (...)"

I.2 COUNTER ARGUMENTS FROM THE UNITED STATES (Letter dated November 25, 2014):

(i) "(...) 1 United States did not intend to create a new category by marking the first page of certain exhibits as "CONFIDENTIAL" and other exhibits with the notation "CONTAINS CONFIDENTIAL INFORMATION." This clerical difference resulted from the use of a "CONFIDENTIAL" stamp on some of the original documents in hard copy form. All documents with the word "CONFIDENTIAL" on the front page should be treated as containing confidential information (...)"

(ii) "(...) The United States notes that the Rules addressing confidentiality apply only to information submitted to the Panel and other Parties. In particular, the Rules govern the handling of confidential information submitted by a Party to ensure its confidentiality is maintained in making public submission. Guatemala's complaint does not concern treating as confidential information that submitted. Guatemala argues instead that the Rules obligate the United States to disclose information that is not submitted. In fact, the Rules do not address what evidence does or does not need to be submitted to the Panel and do not govern submitting evidence with material already redacted. As a result, Guatemala's reliance on Rules 15 and 16, and Appendix 2 is misplaced and is based on fundamental misreading of those Rules (...)"

(iii) "(...) The United States would also emphasize that the redactions it has made to factual information are imperative to protect the safety and security of the workers who have provided their personal information, including in court records, for purposes of these proceedings with the understanding that they would be protected under the Rules. The United States remains deeply concerned that disclosing identifying information regarding these workers could subject them to retaliation in the workplace, and the evidence submitted to the Panel amply justifies such concerns (...)"

II. TECHNICAL LEGAL ANALYSIS:

1) The position of Guatemala goes beyond seeking the simple extension of the deadline to present an initial submission. Guatemala presented a problem regarding a lack of access to part of the evidence presented by the United States, since this part, for alleged confidentiality reasons, was not disclosed in totality to Guatemala or to the Panel, preventing its analysis, assessment and evaluation.

2) In accordance with Article 15 of the Rules of Procedure, arbitrators should ensure that confidential information is not disclosed to the public; however, confidentiality does not assume that within the process, the arbitrators and the parties would not have access to confidential information that has been presented as evidence.

3) Not allowing a party to have full access to a means of proof submitted by another party is equivalent to placing it in a situation of inequality, disadvantage and helplessness, and of not applying the principle of contradiction (adversarial process), implicit in the rights to equality, to defend oneself, and to due process.

4) The requirement that parties present a version containing confidential information and another version without confidential information is precisely so that the arbitrators and the parties can access the first version, and the public in general the second version.

5) Guatemala's request is legitimate in the sense that the United States should provide the information marked as confidential to the Panel and to Guatemala, without prejudice to the obligation of the Panel and the parties not to disclose to the public.

6) In the event that the United States does not provide such confidential information, the initial submission of the United States cannot be considered as validly presented, and therefore the pre-established timeline should be suspended.

III. CONCLUSIONS:

1) Articles 15 and 16 of the Rules prohibit disclosure of information or documents submitted by a party under the guarantee of confidentiality to the public, and not that the Panel and the other disputing party should have unrestricted access to such information and documents. Without such access, we face a clear retention of evidence that not only limits or restricts the right of the other party to defend itself, but also prevents the arbitrators from making a fair appraisal of the evidence.

2) The position of Guatemala not only concerns the extension of the deadline for the submission of its initial written submission, but also the factual and legal impossibility of accessing information and supporting documents. So much so, that in its letter dated November 20, 2014, Guatemala states: "If the United States were to provide

complete non-redacted versions of all exhibits by November 21, 2014, Guatemala would be in a position to file its initial written communication by Monday, February 2, 2015. However, if the United States were to take more time in providing complete non-redacted versions of all exhibits identified in the attached table Guatemala respectfully requests that the Panel adjust the deadline for Guatemala to file its written submission in the light of the United States' delay in properly filing such exhibits."

3) The arbitral panel cannot expressly or implicitly accept retention of evidence, and must request that the United States present the documentary evidence withheld, of course under a guarantee of confidentiality, in accordance with Articles 15 and 16 of the Rules.

4) The decision to extend the deadline for Guatemala to present its initial written submission to February 2, 2015 without also addressing its request to the effect that "[i]f the United States were to provide complete non-redacted versions of all exhibits by November 21, 2014, Guatemala would be in a position to file its initial written communication by Monday, February 2, 2015," and without dealing with the matter of retention of evidence by the United States, constitutes a violation of the directing principles of due process and of congruency, that is, of correspondence between decision and request for relief, and of the principle of contradiction.