

Guatemala, April 17, 2015

**Mr. Kevin Banks**  
**Chairman**  
**CAFTA-DR Arbitral Panel**  
*Guatemala – Issues relating to the obligations  
under Article 16.2.1(a) of the CAFTA-DR*

Dear Mr. Chairman:

Guatemala thanks the Panel for the opportunity to respond the United States' letter of April 6, 2015.

The uncontested fact is that United States' approach in these proceedings simply would not be tolerated in the US courts (or any other rules-based system of adjudication).<sup>1</sup> A conviction of an employer on the basis of anonymous witness statements would never be allowed in US labor proceedings. The United States' approach is also plainly contrary to the standards that the CAFTA-DR requires for domestic labor proceedings.<sup>2</sup>

It is the responsibility of this Panel to ensure that these proceedings are conducted with absolute fairness and that Guatemala gets a full and meaningful opportunity to respond to the unfounded allegations of the United States.

Without restating its position with respect to the lack of probative value of the redacted US exhibits and anonymous statements, Guatemala wishes to address the following three points raised by the United States in its letter of April 6, 2015:

- (i) The involvement of the ICSID Secretary-General;
- (ii) The information that the United States contends that it has not submitted; and
- (iii) The arbitration cases and rules cited in support of its contentions.

With respect to the first point, the United States asserts that the ICSID Secretary-General and her staff are not members of the "public" because the information was provided to them "in confidence and not as members of the general public".<sup>3</sup> The United States adds that it "asked the

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<sup>1</sup> *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. P. 26*.

<sup>2</sup> CAFTA-DR, Article 16.3.

<sup>3</sup> U.S. Letter of April 6, 2015, p. 3.

ICSID Secretary-General and her staff to sign confidentiality agreements and they did so".<sup>4</sup> These statements are problematic for several reasons.

First, Guatemala recalls that the ICSID Secretary-General and her staff are international officials who are required to be independent and who are forbidden to receive instructions from governments.<sup>5</sup> The statements of the United States would acknowledge that the ICSID Secretary-General and her staff received and followed the instructions of the United States, clearly violating their duties as international officials.

Second, that the ICSID Secretary-General and her staff may have received the information in confidence or signed confidentiality agreements does not alter the fact that they are members of the general public. The ICSID Secretary-General and her staff are clearly not parties to this CAFTA-DR dispute and they cannot be part of the US legal team given their status as international officials. Thus, the United States cannot avoid the conclusion that the ICSID Secretary-General and her staff are members of the general public for purposes of this CAFTA-DR dispute.

Third, by disclosing allegedly confidential information to the general public, the United States contradicts its own position that it cannot provide the information to the Panel and to Guatemala because it is confidential.

Fourth, the United States further undermines its position when it suggests that any public disclosure concerns were mitigated when the ICSID Secretary-General and her staff signed confidentiality agreements. As the United States is aware, the Model Rules of Procedures ("MRP") of the CAFTA-DR provide for the use of non-disclosure agreements as part of the procedures to protect confidential information.<sup>6</sup> The Panel has in its possession signed non-disclosure agreements provided by Guatemala. If signature of confidentiality agreements by the ICSID Secretary-General and her staff was sufficient to allay the United States' concerns about the disclosure of the information, signature of the non-disclosure agreements by the Panelists and Guatemala's legal team, in accordance with the procedures in the MRP, should similarly address the United States' concerns.

With respect to the second point, the United States again contradicts itself when it asserts that "Guatemala mistakenly considers that information not submitted in these proceedings should be treated as though it were submitted".<sup>7</sup> The United States' distinction between "submitted" and "not submitted" information is artificial and cannot withstand scrutiny. However, even following its incorrect proposition, the Panel should take into consideration that the affidavit signed by the

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<sup>4</sup> *Ibid.*

<sup>5</sup> See Principle 3 of the World Bank Staff Manual.

<sup>6</sup> See Appendixes 1 and 3 of the MRP.

<sup>7</sup> U.S. Letter of April 6, 2015, p. 1.



Secretary-General of ICSID concerns information that the United States claims not to have submitted to the Panel. Thus, by submitting the affidavit, the United States has effectively

submitted information that it claims not to have submitted. The United States' position therefore has no logic.

Furthermore, the United States argues that it received information from individuals "on the condition that the United States would not submit the individuals' personally identifiable information in the course of these proceedings".<sup>8</sup> This does not provide a valid justification to violate the other Party's due process rights. Constraints faced by the complaining Party cannot justify violations of the due process rights of the respondent Party, particularly when the complaining Party has not established to the Panel's satisfaction that those constraints are the consequence of actions of the respondent party.

Regarding the third point, the United States submits that independent and impartial examination of information submitted to an arbitral tribunal in arbitral proceedings is an accepted practice in international arbitration. However, the United States fails to note that recourse to such kind of independent examination is exceptional. More importantly, the United States fails to mention that in the two arbitration proceedings to which it refers—*Canfor et al v. United States* and *Eli Lilly v. Canada*—the panel decided on the possible use of an independent reviewer to examine confidential information *after having consulted* the parties.

The United States additionally refers to the World Intellectual Property Organization ("WIPO") Arbitration Rules, which provides for the possibility of appointing an independent expert in order to report on specific issues designated by the Tribunal without disclosing confidential information. However, the United States again fails to note that Article 57(a) of the WIPO Arbitration Rules requires the Tribunal *to consult the parties before appointing the expert*.

Moreover, neither Chapter 20 of the CAFTA-DR nor the MRP expressly provides for an "independent and impartial examination of information not submitted to an arbitral tribunal". Following the Panel's approach regarding cross-examination, the Panel should not accept the United States' proposition in this regard.<sup>9</sup>

Finally, the Panel should not reward the United States for obstructing Guatemala's defense. There is simply no valid justification for the United States to refuse to provide un-redacted versions of the exhibits to the Panel and to Guatemala if it wants to make a *prima facie*. In view of the United States' uncooperative approach, the Panel must not further delay its decision and must rule that it will not attribute probative value to any of the redacted exhibits and, anonymous statements submitted by the United States.

The credibility of CAFTA-DR Chapter 16 and its dispute settlement mechanism are at stake and the repercussions of these proceedings extend beyond the CAFTA-DR. The United States'

<sup>8</sup> U.S. Letter of December 16, 2014; U.S. Letter of April 6, 2015.

<sup>9</sup> Ruling of February 26, 2015, para. 60.



Gobierno de Guatemala

Ministerio de Economía

refusal to respect the rules of procedures that it had agreed for these proceedings will only serve to make other countries more hesitant to accept a labor chapter in future free trade agreements.

Sincerely yours,

  
Alexander Cutz  
DIRECTOR  
Dirección de Administración  
del Comercio Exterior

