

June 14, 2017

In the Matter of *Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*

Mr. Francisco Vásquez Collado
Ms. Beatriz Borrayo
Responsible Office of Guatemala

PRESENTATION OF THE FINAL REPORT

Dear Mr. Vásquez and Ms. Borrayo:

In accordance with Article 20.14 of the CAFTA-DR, attached you will find the Final Report of the Panel. The decision presented in the Report is unanimous.

The Panel directs the Parties and the Responsible Office to destroy all electronic and paper copies of pages in its Initial Report which contain the following paragraphs: 275, 280, 287, 288, 292, 293, 313, 315, 317, 319, 320, 338, 340, 343, 344, 347, 361, 362, 369, 370, 379, 382, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 404, 510, 512, 513, 515, 524, 525, 526, 529, 536, 537, 546, 547, 548, 554, 563, 564, 565, and 569, because those pages contain confidential information.

The Members of the Panel remain concerned about the lack of resolution of issues that the Panel has raised on several occasions over the course of many months regarding their remuneration. The Panel feels compelled to record those concerns here.

Throughout the proceeding, the Members of the Panel have communicated to the Responsible Office and to the Disputing Parties themselves their concerns about being compensated for their services in a timely fashion. They also have requested that the cap on panelist remuneration be raised in view of the extraordinary complexity of this case. Neither issue has been resolved as of the present date.

Remuneration of panelists in CAFTA-DR dispute settlement proceedings is addressed in the May 2012 decision of the CAFTA-DR Parties entitled “Decision of the Free Trade Commission to Establish the Remuneration of Panelists, Assistants, and Experts, and the Payment of Expenses in Dispute Settlement Proceedings Under Chapter 20 (Dispute Settlement)” (the “Remuneration Decision”). That Decision establishes a rate of USD 75 per hour for panelist remuneration and states that “[t]he total remuneration for each appointed panelist shall not exceed 19,000 U.S. dollars, unless the disputing Parties agree that, due to the complexity of the dispute, additional compensation is appropriate.” At USD 75 per hour, a cap of USD 19,000 equates to about 253.3 hours of panelist time. Paragraph 1 of the Remuneration Decision recognizes that in some cases it may be appropriate for the disputing Parties to raise that cap in light of the complexity of a dispute.

Although the Remuneration Decision states that “[a] panelist or assistant may submit requests for payment of fees or reimbursements for expenses during the proceeding,” it does not prescribe a timetable for payment, other than to state that the Responsible Office shall make payments “in accordance with the administrative guidelines applied by the responsible office, using resources provided equally by the disputing Parties, and in coordination with the disputing Parties.”

During this proceeding, Panel Members diligently recorded their time and expenses and periodically sent requests for payment to the Responsible Office. Despite this, Panel Members consistently encountered long, unexplained delays in receiving payment. In some instances, months after submitting requests, Panel Members were required to get those requests notarized and then resubmit them, and even then encountered further delays. Eventually, some payments were made. But as of the date of this Final Report, one Member of the Panel still has not been paid the maximum USD 19,000 due under the Remuneration Decision, despite having submitted invoices in proper form for work up to that amount.

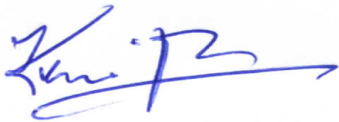
Separately, in light of the extraordinary complexity of this proceeding – in which the disputing Parties raised numerous preliminary issues, many interpretive issues of first impression, presented over 700 pages of written submissions, argument and comments along with thousands of pages of documentary evidence, and which has resulted in Panel Members devoting a combined total of in excess of 1850 hours of work – Panel members requested that the disputing Parties raise the remuneration cap, as the Remuneration Decision contemplates may be appropriate in such circumstances. We note that, as was communicated to the Responsible Office in July of 2015, the Panel Chair reached the number of hours anticipated by the cap on remuneration as of the hearing in Guatemala City on June 2, 2015. He has yet to receive assurance of payment for the over 650 hours of work that he has done on this matter since that time.

Panel members first made a request to raise the cap on July 20, 2015. The Parties did not agree on any response to this request. On September 18, 2016, the Panel Members again requested that the disputing Parties raise the remuneration cap. In reply, the disputing Parties acknowledged the extraordinary complexity of this case. Indeed, precisely because of its extraordinary complexity, the disputing Parties agreed that they should have 11 weeks in which to comment on the Initial Report of the Panel, rather than the 14 days provided for in Article 20.13.6 of the CAFTA-DR. Nevertheless, even as of the date of transmittal of this Final Report, the disputing Parties have yet to agree upon an increase of the remuneration cap.

We have referred to these concerns in our Final Report and elaborated upon them here because, like other aspects of the procedural history, this information provides context for the Report. While initially disposed to produce its Final Report in both English and Spanish, the Panel was not disposed to work on a translation of its Final Report into Spanish under the conditions described above.

Further, this information is important as an institutional matter. CAFTA-DR Article 20.7.2 sets forth the qualifications that the CAFTA-DR Parties require of the individuals who will serve on CAFTA-DR dispute settlement panels. Those qualifications include “expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements.” Attracting persons with those qualifications – persons whose time ordinarily will be in high demand – is likely to be difficult in the absence of a fair and efficiently administered mechanism for the compensation of panel members for their service. Indeed, the Members of this Panel note the contrast between the difficulties they have encountered and the mechanism that prevails, for example, in investor-State dispute settlement (as provided for in Chapter 10 of the CAFTA-DR), wherein disputing parties typically are required to pay funds into an account in advance of tribunal members providing their services, and a failure to make such payments may result in a suspension of proceedings.

Despite the foregoing concerns, the Members of the Panel continued to exercise diligence in carrying out their mandate to prepare and deliver their Final Report.



Kevin Banks
Panel Chair