

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 the Procedure for Addressing Guatemala's Request for a Preliminary Ruling

November 20, 2014

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

Opinion of the Panel Majority

I. Introduction

1. This decision concerns one matter only: how the panel should address, as a matter of procedure, a request by Guatemala for a preliminary ruling. The panel does not address at this time the substance of Guatemala's request.
2. Guatemala seeks a preliminary ruling that "this dispute is not properly presented before [the panel], as the US panel request[] does not meet the minimum requirements to present the problem clearly."¹ Guatemala asks the panel to find "that it does not have the authority to proceed with the analysis of the merits of the dispute."² Guatemala requested that, in order to address this request for a preliminary ruling, the panel suspend a timetable for proceedings previously established to address the dispute, and adopt procedures for a separate preliminary phase of the proceedings. In that regard, Guatemala proposed that the disputing Parties each have the opportunity to file initial and rebuttal submissions with respect to preliminary issues, after which the panel could convene a hearing if it considered it necessary. The disputing Parties would then have the opportunity to present supplementary written submissions and responses to questions from the panel, and then finally an opportunity to make comments on an initial report by the panel prior to issuance of a final report on the preliminary ruling request.
3. The United States of America opposed this request, taking the position that the panel does not have the authority to suspend the timetable for proceedings, and that Guatemala's request for a preliminary ruling can and must be addressed within the sequence of submissions and proceedings laid out in that timetable.
4. On October 30, 2014 the panel issued the following written determination:

The panel has considered the question of how, as a matter of procedure, it should address Guatemala's October 10, 2014 request for a preliminary ruling. The conclusion and the disposition of the panel are set out below. The reasons of the panel will follow.

Subject to the following paragraphs, the panel finds that it must, as a matter of procedure, address Guatemala's preliminary ruling request without altering the procedures and timetable for proceedings established in the October 10, 2014 letter from the disputing Parties to the Responsible Office.

Guatemala informed the Responsible Office yesterday that on October 28, 2014 the President of the Republic of Guatemala declared that Guatemalan government offices, including the Responsible Office Guatemala, would be closed on October 31, 2014.

¹ Request by Guatemala for a Preliminary Procedural Ruling, para. 126 (Oct. 10, 2014).

² *Id.*

As a consequence, under Rules 6 and 11 of the Model Rules of Procedure the United States of America may not deliver a submission on that date. This will require adjustments to the timetable so that the United States of America delivers its initial written submission the next day upon which the Responsible Office has normal business hours.

Accordingly, the panel hereby adopts the timetable set out below and invites the disputing Parties to address Guatemala's request for a ruling on preliminary matters in the written and oral submissions provided for in that timetable.

Without prejudice to any of the other submissions provided for in the timetable:

- The submission of the United States of America in response to Guatemala's request for a preliminary ruling will be due as part of its initial written submission no later than November 3, 2014.
- Any reply by Guatemala to that submission will be due no later than December 1, 2014 as part of its initial submission.
- Any rejoinder by the United States to that reply will be due no later than January 9, 2015, as part of its rebuttal submission.
- The disputing Parties may present arguments with respect to the issues raised in Guatemala's request for a preliminary ruling at the hearing, and those issues may be the subject of written questions from the panel following the hearing.

In the event that, upon receipt of the initial written submission of the United States of America, 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. If Guatemala makes such a request, and if the United States of America opposes that request, the United States of America should submit its views to the panel by no later than November 17, 2014. The panel would endeavor to issue a decision on any such request by November 20, 2014.

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

II. Factual and Legal Background

1. Rules Governing Arbitral Panel Procedures

6. Article 20.10.1 of the Dominican Republic – Central America – United States of America Free Trade Agreement (hereinafter referred to as the "CAFTA-DR" or the "Agreement") requires the Parties to the Agreement to establish Model Rules of Procedure (hereinafter referred to as the "Rules"). They did so by decision of the Free Trade Commission dated February 3, 2011.

7. Article 20.10.2 of the Agreement in turn requires arbitral panels established under Chapter Twenty to conduct their proceedings in accordance with the Rules unless the disputing Parties otherwise agree.

8. The Rules relevant to the matter at hand are the following:

1. These model rules, including the appendices thereto, are established pursuant to Article 20.10 (Rules of Procedure) of the Dominican Republic – Central America – United State Free Trade Agreement and shall apply to the dispute settlement proceedings under Chapter Twenty unless the disputing Parties agree otherwise.

7. Each complaining Party shall submit its initial written submission to the panel no later than seven days after the date of the constitution of the panel.

8. Within 14 days of the delivery to the Parties of the request for establishment of a panel, each participating Party shall deliver to the responsible office a list of public holidays on which the Party's office is closed. No later than seven days after the date of the constitution of the panel, the panel shall issue a timetable for the proceedings that provides for:

- (a) submission of the initial written submission of the Party complained against no later than 35 days after the date of the constitution of the panel;
- (b) submission of the written submission of any third Party no later than seven days after the delivery of the initial written submission of the Party complained against;
- (c) submission of any rebuttal submission of any complaining Party no later than 21 days after the submission of the rebuttal submission of the Party complained against;
- (d) submission of any rebuttal submission of the Party complained against no later than 21 days after the submission of the rebuttal submission of the complaining Party or Parties;
- (e) a hearing within 14 days of the date for submission of the rebuttal submission of the Party complained against;
- (f) delivery to the participating Parties of any written questions from the panel within 3 days of the date of the hearing;
- (g) submission of a Party's supplementary written submission responding to any matter that arise during the hearing, along with responses to any written questions from the panel within 14 days of the date of the hearing;
- (h) submission of a Party's comments on the supplementary written submissions of other participating parties and any responses to written questions from the panel within 14 days of the submission of those responses.

In establishing the dates for submission or for the hearing, the panel shall comply with Rule 12 and consult with the responsible office to provide additional time if translation of documents will be necessary under Rule 81.

12. If the date for submission of a document by a Party falls on a public holiday of that Party, or on a date on which the Party's office is closed by force majeure, the date for the submission of the document will be the next business day of that Party.

27. Where a procedural question arises that is not covered by these rules, a panel may adopt an appropriate procedure that is not inconsistent with the Agreement or these rules.

34. 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.

81. Where the responsible office is required to arrange for the translation of a document, any period of time the calculation of which is dependent on the submission of that document shall be adjusted to allow a reasonable time for preparation of the translation. If the preparation of a translation takes longer than the estimate provided to the panel under rule 80, the panel shall make a corresponding adjustment to the timetable issued under rule 8.

2. Proceedings

9. On August 9, 2011 the United States of the America requested the establishment of an arbitral panel under Article 20.6.1 of the CAFTA-DR to consider whether the government of Guatemala is conforming to its obligations under Article 16.2.1(a) of the Agreement.

10. The panel was constituted in November 2012, but suspended its work for 60 days at the joint request of the disputing Parties on November 30, 2012.

11. On January 29, 2013 the disputing Parties informed the panel of their agreement pursuant to Rule 1 to modify the timetable for proceedings otherwise required by Rules 7 and 8 as follows:

- Notwithstanding Rule 7, the United States will submit its initial written submission to the panel no later than 28 days after the date the panel resumes its work.
- Notwithstanding Rule 8(a), Guatemala will submit its initial written submission to the panel no later than 56 days after the panel resumes its work.

12. That same day, the disputing Parties requested that the panel suspend its work for a further ten days.

13. The panel again suspended its work in accordance with a further joint request by the disputing Parties on February 25, 2013. The panel resumed its work on March 8, 2013. The panel subsequently suspended its work, in response to a series of joint requests by the disputing Parties, from April 5, 2013 to September 18, 2014. On September 18, 2014, the United States of America requested that the panel resume its work.

14. On September 26, 2014 the panel proposed to the disputing Parties a timetable for proceedings in accordance with Articles 7 and 8 of the Rules and the joint letter of the disputing Parties dated January 29, 2013.

15. By joint letter dated October 10, 2014 the disputing Parties requested that the Panel adopt a set of modifications to that timetable. Their letter read in relevant part as follows:

The Parties request the Panel to adopt the following modifications to the dates of the timetable:

- The United States of America will submit its initial written submission to the panel no later than October 31, 2014.
- Guatemala will submit its initial written submission to the panel no later than November 28, 2014.
- Any third Party will submit its written submission to the panel no later than December 5, 2014.
- Any request by a non-governmental entity to submit written views will be due by December 5, 2014, or within seven days of the delivery of the non-confidential version of the written submission of Guatemala if that submission contains confidential information.
- The Panel will decide whether to grant leave to submit written views in response to any such request within seven days of receipt of that request.
- The rebuttal submission of the United States of America will be due on January 9, 2015.
- The rebuttal submission of Guatemala will be due on February 13, 2015.
- Any written views submitted by a non-governmental entity will be due no later than February 13, 2015.
- Any response by a Party to a written submission of a non-governmental entity will be due no later than February 27, 2015.
- The hearing would take place no later than March 13, 2015. In the absence of further communications from the Parties or the Responsible Office regarding the matter, the Panel would therefore convene a single day of hearing on March 13, 2015.
- Any written questions from the Panel to the Parties would be due March 16, 2015.
- Any supplementary written submissions and answers to questions from the Panel would be due by March 27, 2015.
- Any decision by the Panel to seek technical advice must be rendered by March 27, 2015. In the event that the Panel decides to seek such advice it will issue a further timetable in accordance with Rules 73 to 77 of the Model Rules of Procedure.
- Any comments by the Parties on supplementary written submissions and responses to questions from the Panel would be due by April 10, 2015.

Recognizing that Article 20.13 of the Dominican Republic-Central America-United States Free Trade Agreement provides a maximum time period for the Panel's presentation of a initial report, unless the Parties otherwise agree, the Parties agree to extend this maximum time period to June 10, 2015.

16. Also on October 10, 2014, after transmittal of the aforementioned joint communication, Guatemala sent a separate communication in which it requested that the

panel suspend the timetable for proceedings and adopt an alternative preliminary procedure, as described above.³

17. In its submissions seeking a preliminary ruling Guatemala argues that the request for a panel by the United States of America dated August 9, 2011 was drafted in such broad and vague terms that it fails to present clearly the problem that the panel would consider. As a result, Guatemala contends, the panel request fails to comply with the provisions of the CAFTA-DR through which the panel obtains jurisdiction or authority to consider the merits of the issues that the panel request raises. Guatemala also submits that the breadth and vagueness of the panel request “prejudices the preparation of Guatemala’s defence and violates Guatemala’s right to due process in these proceedings.”⁴ Without limiting the foregoing, Guatemala also contends that the 28-day period between the due date for the initial written submission of the United States and the due date for that of Guatemala, a period established in the timetable proposed by the panel in its September 26, 2014 letter to the Parties, is insufficient to enable Guatemala to prepare its defense.

18. The disputing Parties differ with respect to whether Guatemala notified the United States that it intended to seek a preliminary ruling and to request a suspension of the timetable for proceedings in advance of doing so. In any event, there is no evidence that the disputing Parties discussed Guatemala’s intention to request a preliminary ruling when they set out the modified timetable contained in their October 10, 2014 letter.

19. In a letter dated October 21, 2014 to the Chair of the panel, Guatemala affirms that it agreed in good faith upon the timetable set out in the October 10, 2014 joint letter.

III. Summary of the Positions of the Disputing Parties with Respect to How, as a Matter of Procedure, the Panel Should Address Guatemala’s Request for a Preliminary Ruling

1. Position of Guatemala

20. In its October 10, 2014 submission Guatemala takes the position that the panel has the authority under Rule 27 to suspend the timetable for proceedings and to establish a separate expedited process to consider its request for a preliminary ruling.

21. Specifically, Guatemala contends that its request for a preliminary ruling is a “procedural question” that is not covered by the Rules. It notes that the lack of special rules to deal with preliminary issues is not uncommon in different jurisdictions. It submits that the panel can have recourse to principles of due process to fill a gap in the coverage of the Rules.

22. Guatemala also contends that its request for expedited preliminary procedures is not inconsistent with the CAFTA-DR or the Rules.

³ In fact, Guatemala’s October 10, 2014 letter asked the panel “to suspend the timetable provided to the Parties on 26 September 2014.” It did not reference the timetable set forth in the disputing Parties’ joint communication from earlier in the day on October 10.

⁴ Request by Guatemala for a Preliminary Procedural Ruling, para. 4 (Oct. 10, 2014).

23. Finally, Guatemala submits that its request for a preliminary ruling relates to extremely important matters, namely, the panel's jurisdiction and Guatemala's right to due process, and that the issues raised in this request are so fundamental that the panel needs first to determine whether it has the authority to proceed with the merits of this case.

2. Position of the United States of America

24. In its October 15, 2014 letter to the panel Chair, the United States responds with three sets of arguments.

Scope of Panel Authority to Adopt Procedures under Rule 27

25. First, the United States argues that neither the CAFTA-DR nor the Rules permit the panel to accede to Guatemala's request for altered procedures. It submits that, unlike the rules governing the settlement of disputes before the World Trade Organization Dispute Settlement Body, the Rules govern these proceedings unless the Parties otherwise agree. It contends that Guatemala's proposed procedures would be a departure from the Rules to which the United States has not agreed. It argues that Rules 7 and 8 provide for a sequence of submissions according to a timetable, that therefore the Rules cover the sequencing and timing of submissions, and that a departure from such timetable without the agreement of both parties would be inconsistent with the Rules. The United States submits that the panel therefore does not have discretion under Rule 27 to grant Guatemala the procedural ruling that it seeks.

Appropriateness of Procedures

26. Second, the United States contends in addition that Guatemala's proposed procedures are not appropriate because any examination of the issues raised in Guatemala's request for a preliminary ruling would require discussion of the issues that the United States will present as part of its initial written submission on the merits of its complaint. As a result, the United States argues, addressing such issues separately from the timetable for proceedings on the merits of the complaint would require it to present part of its first written submission out of context, in a disjointed and piecemeal fashion.

27. Further, the United States insists that Guatemala's proposed procedures would result in undue delay. It contends that the Rules contemplate a process in which the Party complained against has a maximum of 42 days to prepare its defense and first written submission from the time of the request for a panel. By contrast, argues the United States, under Guatemala's proposed procedures there would be eight or more substantive submissions and a hearing before the United States files its first written submission on the merits of its complaint. As a result, the United States contends, Guatemala's first written submission would be filed on a date far exceeding the 42 days provided in the Rules. Further, says the United States, Guatemala's proposed procedures would effectively reverse the order of submissions provided in the Rules. For these reasons, the United States argues that such procedures would not be consistent with the Rules.

Due process

28. Finally, the United States submits that Guatemala's due process concerns can be addressed through the procedures for submissions, questions from the panel, and written responses established in the October 10 timetable for proceedings.

3. Reply of Guatemala

29. In a letter to the panel Chair dated October 21, 2014 Guatemala replies to each of these arguments.

Scope of Panel Authority to Adopt Procedures under Rule 27

30. Guatemala submits that, with the exception of Rule 27, the Rules provide for proceedings to address the merits of disputes and not procedural issues. Thus, Guatemala contends, the Rules do not cover the timing and sequence of submissions in a preliminary matter limited to a due process question of sufficiency and clarity of the panel request. The sufficiency and clarity of a panel request is, in Guatemala's submission, a procedural question that relates to due process and the panel's jurisdiction. It follows, in Guatemala's submissions, that Rule 27 authorizes the panel to adopt appropriate procedures to deal with such questions without needing the agreement of the disputing Parties. Guatemala adds that in its view it is incorrect to characterize its proposal as reversing the sequence of submissions, since the Rules address only the sequence of submissions on the merits of a case and not in preliminary procedural matters.

Appropriateness of Procedures

31. Guatemala insists that time invested by the panel in addressing due process and whether a dispute had been correctly submitted to the panel cannot and should not be understood as undue delay.

32. Guatemala rejects the claim that its proposed procedures would require the United States to present its case to the panel in a disjointed and piecemeal fashion, arguing that the sufficiency and clarity of the panel request can be decided solely on the basis of the text of that request, without entering into the merits of the case.

33. Finally, Guatemala notes that the panel "is free within its authority to decide the best way to approach [Guatemala's] request," while reiterating its request that the disputing Parties have ample opportunities to comment on each other's positions.⁵

Due process

34. Guatemala argues that acceding to the US request to address its request for a preliminary ruling after the initial submission of the United States would be a violation of Guatemala's right to due process and prejudice the preparation of Guatemala's defense. Guatemala contends that the panel request serves an important due process role of notifying the respondent and third Parties of the nature of the complainant's case, and that non-compliance with requirements for that request cannot be subsequently cured.

⁵ Letter from Guatemala to Panel Chair at 4 (Oct. 21, 2014).

35. Moreover, Guatemala submits that, taking into account the suspensions of proceedings in this matter, the United States has had five years to prepare its case, while Guatemala has had no explicit indication of the case that it must to respond to.

36. Finally, Guatemala states that it is seriously concerned that accepting the US proposition that 42 days is sufficient time to prepare a defense would open the door to the tactical use of broad and vague panel requests by complaining Parties to prejudice the right of defense of defending Parties.

4. Rejoinder of the United States of America

37. In a letter to the panel Chair dated October 27, 2014 the United States submits by way of rejoinder that due process does not require that the United States respond to Guatemala's request for a preliminary ruling prior to filing its first written submission. It contends that it is common in working procedures of World Trade Organization dispute settlement panels to provide that if the party complained against makes a request for a preliminary ruling it should do so no later than its first written submission, and the panel would then set a date for response after that first written submission. The United States cites this approach as demonstrating that "others do not share Guatemala's view that there is a general 'due process' 'right' to the type of schedule that Guatemala proposes here."⁶

IV. Decision

38. Guatemala submits that Rule 27 provides the panel with authority to suspend the previously established timetable for proceedings – whether as set forth in the September 26, 2014 communication from the Panel to the disputing Parties or as set forth in the disputing Parties' October 10, 2014 joint communication to the panel – and to adopt separate procedures to address the preliminary issues raised in its October 10, 2014 submission. We must therefore first consider the scope of discretion that Rule 27 confers on the panel.

Scope of Panel Authority to Adopt Procedures under Rule 27

39. We recall that Rule 27 provides as follows:

Where a procedural question arises that is not covered by these rules, a panel may adopt an appropriate procedure that is not inconsistent with the Agreement or these rules.

Rule 27 thus authorizes the panel to adopt "an appropriate procedure" in specified circumstances, subject to specified constraints. It applies only where "a procedural question arises that is not covered by the[] [R]ules." If that condition is met, then any procedure that the panel may adopt must be not only "appropriate," but also "not inconsistent with the Agreement or the[] [R]ules".

⁶ Letter from the United States to the Panel Chair at 1 (Oct. 27, 2014).

40. Guatemala takes the position that its request to the panel to “make a preliminary procedural ruling to find that this dispute was not properly presented before it”, and find that “it does not have the authority to proceed with the analysis of the merits of the dispute” is a “procedural question” that is “not covered by the Rules”.⁷ We do not agree that this is a procedural question. By “procedural question” we understand Rule 27 to refer to questions of how the panel should operate procedurally, and not to questions the answers to which may dispose of a complaint. The functions of the Rules are to stipulate how panels are established and operate.⁸ Within such Rules the term “procedural question” should logically refer precisely to such matters. Rule 27 is contained within a part of the Rules entitled “Operation of Panels”. In addition to the matters addressed by Rule 27, that part of the Rules deals with matters such as the means of communication by which the panel may conduct its business, who may take part in panel deliberations, how to confirm the willingness of panelists to serve, replacement of panelists, suspensions of the panel’s work, and what issues the panel must or must not consider. By contrast, Guatemala’s October 10, 2014 submission with respect to the clarity and sufficiency of the request for a panel raises questions the answers to which may effectively dispose of the complaint. They require the panel to consider whether or not the panel request was sufficiently clear and met the requirements of the Agreement, and if not, what implications this has for the panel’s authority and jurisdiction to proceed with an analysis of the merits of the complaint.

41. Nonetheless, taken together, the positions and arguments of the disputing Parties do in fact raise a procedural question within the meaning of Rule 27: the question of how, as a matter of procedure, the panel should consider Guatemala’s request for a preliminary ruling. We must therefore determine whether this procedural question is covered by the Rules.

42. In our view it is. By determining in detail both the sequencing and timing of proceedings, and the reasons for which a panel may adjust them within the time limits placed on panel proceedings by the CAFTA-DR, the Rules cover the question of how preliminary issues such as those raised by Guatemala must be addressed.

43. Rules 7 and 8 establish a detailed sequence and timetable for proceedings. Rule 7 provides that after a panel has been constituted, the first written submissions to be filed shall be the written submissions of each complaining Party. It does not provide for a circumstance in which the first written submission to be filed may be a jurisdictional objection (or other preliminary objection) by the Party complained against. This is in contrast to the CAFTA-DR’s provisions for investment dispute settlement, for example, which expressly contemplate a respondent submitting certain objections “as a preliminary question” “as soon as possible after the tribunal is constituted,” whereupon “the tribunal shall suspend any proceedings on the merits.”⁹ However, in dispute settlement under Chapter 20 of the CAFTA-DR and the

⁷ Request by Guatemala for a Preliminary Procedural Ruling, paragraphs 5 and 23 (October 10, 2014).

⁸ The functions of the Rules include stipulating how panel terms of reference are to be delivered, how timetables for submissions and other proceedings should be structured and established, which documents submitted to or issued by the panel are to be released to the public, procedures for the identification of and treatment of confidential information, how panels should conduct hearings, what notifications the panel should issue, how the panel may secure information and technical advice, who is responsible to rendering which translations, how time periods and to be computed, and similar issues.

⁹ CAFTA-DR, art. 10.20.4.

applicable Rules, the initial written submission of each complaining Party must be filed within 7 days of the constitution of the panel. Rule 8 mandates that the panel issue a timetable for proceedings providing for delivery of the remaining initial written submissions and reply submissions, the holding of a hearing, and for post-hearing procedures, all in accordance with specified maximum timeframes. The timeframes are brief, indicating an intent that proceedings be expeditious. The timetable does not expressly contemplate other submissions or procedures.

44. Neither Rule 7 or 8, nor the disputing Parties' October 10, 2014 joint letter, purport to limit the issues that may be addressed in the disputing Parties' initial written submissions or any subsequent submissions. In particular, neither the Rules nor the disputing Parties' agreed-upon modification of the Rules for purposes of this proceeding require the disputing Parties to address only merits issues in their initial submissions and not jurisdictional issues.

45. Nor is it necessary to restrict the scope of issues covered by Rules 7 and 8 in this manner to give a coherent and reasonable interpretation to the Rules or the agreement of the disputing Parties modifying the application of the Rules. As a matter of practice in WTO and other dispute settlement proceedings, jurisdictional and other preliminary issues can be and often are raised and argued together with merits issues in the same submissions and proceedings. It is true that a panel may find itself in the position of having to disregard evidence and arguments going to the merits of a dispute if it finds itself to be without jurisdiction or otherwise unable to proceed with an analysis of the merits of the complaint. But this is neither unworkable nor beyond the reasonable contemplation of Parties establishing rules for trade dispute resolution. Nor, as we discuss below, does it present due process problems.

46. In fact, in order for panel proceedings to operate consistently with the CAFTA-DR, Rules 7 and 8 must be interpreted as requiring preliminary issues and merits issues to be addressed in the same submissions and proceedings – as opposed to allowing for a bifurcation of the proceeding, with preliminary issues dealt within in a first phase and merits issues dealt with in a second phase (assuming they survive the first phase). Article 20.13.3 of the Agreement requires the panel to present an initial report, including a determination as to whether a disputing Party has conformed with its obligations under the Agreement or any other determination requested in the terms of reference, within 120 days after the last panelist is selected, unless the disputing Parties otherwise agree. The shortness of this timeframe indicates that the Parties have placed a high priority on expeditious process.¹⁰ It also clearly indicates that the Parties did not anticipate separate proceedings to hear and decide preliminary issues. In fact, if a timetable established under Rule 8 accords to each Party at each step in the required sequence the maximum length of time available under that Rule, completing the timetable would take 119 days. In the absence of agreement between the parties to extend the due date for the panel's initial report, the CAFTA-DR therefore appears to contemplate that Parties will not even be given the maximum time allowed at each step in the sequence of proceedings under Rules 7 and 8. It is therefore clear that, except by

¹⁰ Indeed, even in agreeing to extend the maximum time period for the Panel to present its initial report, the disputing Parties established a deadline – June 10, 2015 – that is only two months after filing of the last written submissions. *See* Letter from Guatemala and the United States to the Responsible Office at 2 (Oct. 10, 2014).

agreement of the disputing Parties, the Agreement does not contemplate a separate set of procedures to address preliminary issues prior to addressing the merits of a complaint.

47. Finally, we note that the Rules stipulate in some detail the reasons for which a panel can modify the timetable for proceedings. Rule 8 requires the panel to provide additional time if necessary for translation of documents under Rule 81, and to comply with Rule 12 dealing with public holidays and force majeure. Under Rule 34 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.

48. The Rules therefore require that issues between the parties be addressed according to an expeditious and predetermined sequence of procedures and timetable, unless the disputing Parties otherwise agree, or the panel decides that adjustments are necessary to meet translation or other requirements. By specifying both a sequence and timetable for proceedings and reasons for which a timetable may be adjusted within the time limits on the panel's work established by the Agreement, the Rules thus cover the question of how, as a matter of procedure, panels should address requests for preliminary rulings.

49. The modifications agreed to by the disputing Parties in their joint letter of October 10, 2014 do not alter but rather are consistent with the application of Rules 7 and 8 to preliminary issues. Rule 1 stipulates that the Rules shall apply to dispute settlement proceedings under Chapter 20 unless the Parties otherwise agree. In this case, in their joint letter of October 10, 2014, the disputing Parties recorded their agreement to modify the timetable for, but not the sequence of, written and oral submissions. The sequence of proceedings set out in that letter mirrors that set out in the Rules. The wording of the letter offers no indication that the disputing Parties sought to address or alter the scope of application of the Rules in connection with preliminary matters. Nor is there any evidence that the disputing Parties discussed doing so. Guatemala subsequently affirmed that this was an agreement made in good faith. Following this agreement, the Rules therefore continue to apply, subject only to the changes that the disputing Parties' agreement introduces to the timetable for proceedings.

50. Since the procedural question at hand is covered by the Rules, it would be inconsistent with the Rules and the CAFTA-DR for the panel to alter under Rule 27 the sequence and timetable of proceedings established in the joint letter of the disputing Parties of October 10, 2014.

Due process

51. Guatemala raises two due process concerns that relate to the question of how, as a matter of procedure, the panel should address Guatemala's request for a preliminary ruling.

52. First, as noted above, Guatemala submits that addressing its request for a preliminary ruling after the initial submission of the United States would be a violation of Guatemala's right to due process and prejudice the preparation of its defense.

53. We see no reason why the panel's receiving submissions and evidence on both preliminary issues and the merits of a complaint over the course of a single proceeding (as

opposed to two separate proceedings, one for preliminary issues and another for the merits) would violate due process or prejudice the right of a Party complained against to prepare its defense. If such a Party successfully raises a preliminary issue going to the jurisdiction of the panel or the admissibility of particular claims, a panel having heard submissions and evidence on the merits of the dispute may, and indeed must, simply disregard those submissions and evidence and conclude that it is without a mandate to consider them. The Party raising such a preliminary issue is therefore perfectly able to vindicate its rights. In this case, Guatemala argues that the United States has not complied with legal requirements for a panel request, and that non-compliance with those requirements cannot be subsequently cured. It is of course for the panel to decide whether these arguments are correct and therefore, in the absence of legal reasons why it may not or should not do so, the panel must proceed to consider them. If the panel were to agree with Guatemala's arguments, it would make no difference to Guatemala's ability to vindicate its claims whether the panel so decided before or after having heard submissions and received evidence on the merits. In either case, the panel would simply decline to consider such submissions and evidence.

54. In reaching the foregoing conclusion, we are mindful of the practice of panels in WTO dispute settlement proceedings. Although such practice has evolved under different international agreements, not the CAFTA-DR, both disputing Parties have referred to WTO dispute settlement practice in their written submissions. Since both disputing Parties see such practice as relevant here, it is not inappropriate for us to consider how WTO dispute settlement panels have dealt with preliminary ruling requests and how they have taken account of due process in doing so. In fact, several WTO dispute settlement panels have had occasion to consider preliminary ruling requests related to the sufficiency of the complainant's panel request and the related procedural question of when in the course of the proceeding to address such a request. One such panel was the panel in the *Colombia -- Ports of Entry* dispute (DS366). In its report, that panel found that

... there is no established jurisprudence nor is there any established practice on whether panels need to rule on the scope of their mandate on a preliminary basis, i.e. before the issuance of its Interim Report to the parties. Numerous panels have reserved ruling on preliminary issues until issuing a Final Report.¹¹

55. In light of the foregoing considerations, the panel will address due process arguments going to its authority and jurisdiction to consider the complaint by following the timetable and sequence of submissions and proceedings established in the disputing Parties' joint letter of October 10, 2014, subject to the adjustments set out in paragraph 4 of these reasons and any other adjustments that new circumstances may require.

56. This does not however address Guatemala's concern that the 28-day period between the due date for the initial written submission of the United States and the due date for that of Guatemala - a period which remains in place under the timetable established in the disputing

¹¹ Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, para. 7.14 & n. 145 (adopted 20 May 2009) (citing examples of other panels that have reserved ruling on preliminary issues until issuing final report); see also Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, para. 9.15 & n.505 (adopted, together with AB Report, 20 Aug. 1999).

Parties joint letter of October 10, 2014 - is insufficient to enable Guatemala to properly prepare its defense.

57. As noted above, Rule 34 provides that “[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 when a panelist is replaced.” Given the framework of Rules discussed above, we consider that Rule 34 provides the panel with discretion to make such adjustments where necessary to meet legal or practical requirements.

58. It may be the case that in certain circumstances, the Panel can make adjustments to a timetable for proceedings that it considers necessary to meet due process requirements. On the other hand, the panel generally should not presume that there are due process problems prior to their having been demonstrated through evidence and argument. This is particularly the case where, as here, the disputing Parties expressly have agreed to a tailor-made process (rather than the default process prescribed by the Rules) well after the establishment of the panel and immediately prior to due process issues being raised.

59. Guatemala might therefore consider, in light of the initial written submission of the United States, whether for due process reasons it requires more time for the preparation of its initial written submission than the time provided for in the October 10, 2014 joint letter. We suggest that if it so considers, it confer with the United States with a view to agreeing on an appropriate extension of time. In the absence of agreement between the disputing Parties, Guatemala may request an extension of time from the panel. If Guatemala makes such a request, the panel will consider whether it has the authority under the Rules to grant such request and whether it should grant it in the circumstances of the present case. In our disposition we establish a timetable for dealing with any such request.

Dissenting Opinion of the Panel Minority

I do not agree that the request of Guatemala, for a preliminary procedural ruling dated October 10, 2014, should be addressed together with the main matter at issue, for the following technical-legal reasons.

1. The request of Guatemala for a preliminary procedural ruling, dated October 10, 2014, lodges a complaint about the infringement of articles 16.2.1(a) and 20.6.1(a) DR-CAFTA in the request of an arbitral panel dated August 9, 2011 submitted by the United States, challenges the authority (jurisdiction and mandate) of the arbitral panel, and raises questions of due process (rights to procedural equality and to a defense).

Therefore, the request of Guatemala for a preliminary procedural ruling dated October 10, 2014, does not address the main matter at issue, but rather a preliminary issue (through which the jurisdiction and mandate of the arbitral panel and the due process will be questioned), for special and prior determination, since the arbitral proceeding cannot be initiated (initial submission, reply, rejoinder, hearing, evidence, final report) if this issue has not been resolved, under the principle of consistency, which governs the dispute settlement proceeding (Chapter 20 DR-CAFTA).

2. Hypothetically and without prejudging, if the arbitral panel, after analyzing the issue, were to determine that the request of an arbitral panel submitted by the United States on August 9, 2011 fails to meet the requirements specified in articles 16.2.1(a), y 20.6.1(a) DR-CAFTA, the process would inexorably have to go back to that prior stage, and, therefore, it is not reasonable to initiate the arbitral proceeding without the arbitral panel having analyzed and resolved the aforementioned preliminary issue.

3. The request of Guatemala for a preliminary procedural ruling dated October 10, 2014 entails a clear expression of its will to modify the schedule agreed upon with the United States, and, therefore, it should be understood that there is no longer an agreement of the Parties in this regard, as well as on the fact that the arbitral panel is the one that should resolve the matter. In fact, Article 27 of the Rules of Procedure (Chapter 20 DR- CAFTA) provides: “Where a procedural question arises that is not covered by these rules, a panel may adopt an appropriate procedure that is not inconsistent with the Agreement or these rules.”

4. Considering that 38 months have elapsed since the request for an arbitral panel was submitted by the United States on August 9, 2011, and taking into account that the work of the arbitral panel was suspended several times, for up to 6 months, it is not reasonable that the arbitral panel, despite accepting that the preliminary issue raised should be analyzed and be resolved, does not take the time to discuss the objections to its authority (jurisdiction and mandate) and to due process, before the United States presents its initial written submission..

5. On the grounds of simple procedural economy, it is not reasonable that the questioning or objection of Guatemala, with respect to the authority (jurisdiction and mandate) of the arbitral panel and to due process, to the request for an arbitral panel dated August 9, 2011 submitted by the United States should be resolved together with the main matter at issue and not earlier.