BEFORE THE ARBITRAL PANEL

OF

THE DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES FREE TRADE AGREEMENT (CAFTA-DR)

Guatemala – Issues relating to the obligations under Article 16.2.1(a) of CAFTA-DR

Request by Guatemala for a Preliminary Procedural Ruling

10 October 2014

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United States Diplomatic and Consular Staff in Tehran (Judgment) [1980] ICJ Rep 3, 18, s33; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73, 87, s 33.

ARBITRATION CASES

Short Title	Full Case Title and Citation
Pope & Talbot v. Canada	*Pope & Talbot v. Canada (Award on Merits)*, 10 April 2011 (2002) 122 IRL 352.
Saipem S.p.A v. The People Republic of Bangladesh	*Saipem S.p.A v. The People Republic of Bangladesh (Award).*
SD Myers v. Government of Canada	*SD Myers v. Government of Canada (First Partial Award)*, 12 November 2000 (2001) 40 ILM 1408.

LIST OF ABBREVIATIONS

Abbreviation	Description
AB	Appellate Body
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
Chapter 16	Chapter Sixteen (Labor) of the CAFTA-DR
Chapter 20	Chapter Twenty (Dispute Settlement) of the CAFTA-DR
DSB	Dispute Settlement Body of the WTO
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
NAFTA	North American Free Trade Agreement between the United States, Canada and Mexico
PCIJ	Permanent Court of International Justice
Rules of Procedure	Decision of the Free Trade Commission Establishing Model Rules or Procedures, 23 February 2011.
UNCITRAL	United Nations Commission on International Law
Vienna Convention	Vienna Convention on the Law of the Treaties
WTO	World Trade Organization

LIST OF EXHIBITS

Exhibit Number	Description of the Exhibit
GTM-1	US panel request, 9 August 2011.
GTM-2	US request for cooperative consultations, 30 July 2010.

I. INTRODUCTION

1. The panel request serves two fundamental functions: i) defining the terms of reference of the arbitral panel; and ii) communicating the case to the defendant that it is required to answer.

2. In accordance with Article 20.6.1 of the CAFTA-DR, the panel request shall set out the "reasons for the request, including identification of the measure or other matter at issue and an indication of the legal basis for the complaint".

3. The panel request submitted by the United States[1] in this dispute was drafted in such extremely broad and vague terms that it fails to present the problem clearly. After a careful reading of the US panel request, Guatemala understands that the United States is claiming that Guatemala is failing to effectively enforce *any or all* labor laws, with respect to *any or all* labor rights, through the sustained or recurring course of action *or* inaction during an *unspecified* period of time, by the Ministry of Labor our Labor Courts, *among others*, in a manner that is affecting *some or all* trade of *unspecified* products or services.

4. Among other deficiencies, the US panel request fails to set out the "reasons for the request", fails to identify "the measure or other matter at issue" and fails to indicate the "legal basis for the complaint". The plain reading of such panel request makes it impossible to know what the terms of reference of the panel are and the case that Guatemala is required to answer. This, inevitably, prejudices the preparation of Guatemala's defence and violates Guatemala's right to due process in these proceedings.

5. Given these fundamental deficiencies, Guatemala respectfully requests the Panel to make a preliminary procedural ruling to find that this dispute was not properly presented before it. Therefore, the Panel must find that it does not have the authority to proceed with the analysis of the merits of this dispute. Since the Panel proceedings were suspended until recently, this is the earliest possible opportunity to bring to the attention of the Arbitral Panel the procedural deficiencies of the US panel request.

6. While preserving Guatemala's right to due process, this preliminary procedural ruling, in no way, precludes the United States from seeking consultations with Guatemala under Chapter Sixteen (Labor) of the CAFTA-DR ("Chapter 16") and requesting again the establishment of an Arbitral Panel in due course, after fulfilling all its procedural obligations.

7. Guatemala also expects to have an opportunity to respond to the US comments on this request for a preliminary ruling.

II. STANDARD OF REVIEW

8. Article 1.2.2 of the CAFTA-DR provides for the following:

> The Parties shall interpret and apply the provisions of this Agreement in light of its objectives set out in paragraph 1 and in accordance with *applicable rules of international law* (emphasis added).

9. Arbitral panels established under the CAFTA-DR shall interpret this Agreement in light of its objectives as set out in Article 1.2.1 and in accordance with applicable *rules of international law*. The reference to "rules of international law" corresponds to the sources of international law in Article 38(1) of the Statute of the International Court of Justice (ICJ) and thus, includes customary rules of

[1] US panel request, 9 August 2011, Exhibit GTM-1.

international law as well as general principles of law.[2] General principles of law include, among others, good faith,[3] *compétence de la compétence*[4] and due process.[5]

10. Furthermore, customary rules of interpretation are part of customary general international law and are codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention).[6]

11. Article 31.1 of the Vienna Convention provides that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose

12. In accordance with Article 31.2 of the Vienna Convention, the context for the purposes of the interpretation of a treaty comprises the text of the agreement concerned, including its preamble and annexes.

13. Article 32 of the Vienna Convention provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

14. Rules of international law have been the subject of abundant jurisprudence in other *fora*. This jurisprudence may be illustrative although it has not binding character (the rule of *stare decisis* is not applicable to this mechanism of dispute settlement). However, the panel's decisions should never be arbitrary. Indeed, the Panel can inspire itself in each case by solutions offered in other legal proceedings without disregarding the relevant texts and more generally the applicable law.

15. The reliance in jurisprudential precedents is very common in the majority of the rules-based system of adjudication. The dispute settlement mechanism under the CAFTA-DR should not be the exception.

16. The International Court of Justice (ICJ) refers to precedents to ensure "consistency of jurisprudence".[7] Sometimes, the ICJ do this by simply insisting on its "settled jurisprudence" (*jurisprudence constante*)[8] and, sometimes, by mentioning judgments previously rendered.[9]

17. In the sector of investment law, arbitration tribunals are also understood to rely on all existing precedent. ICSID arbitration, *ad hoc* decisions adopted pursuant to the UNCITRAL Rules, as well as

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[2] See M.E. Villiger, "*Commentary on the 1969 Vienna Convention on the Law of Treaties*" (Martinus Nijhoff, 2009), p. 433, cited in the Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures (China)*, para. 308.
[3] *Nuclear Tests (Australia v. France) (Merits)* [1974] ICJ Rep 253, 268.
[4] The principle that anybody with jurisdictional power has the authority to determine the extent of its jurisdiction. *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Advisory Opinion)* [1928] PCIJ (ser B) No 31, 5, 20.
[5] See, e.g., *Schweiker v. McClure*, 456US 188, 200 (1982): "due process is flexible and calls for such procedural protections as the particular situation demands".
[6] Appellate Body Report, *US – Gasoline*, pp. 16-18. See also, for example, Appellate Body Report, *India-Patents (US)*, paragraph 46.
[7] See joint declaration of seven judges in the case of Kosovo. *Legality of Use of Force (Serbia and Montenegro v. Portugal) (Preliminary Objections, Judgment)* [2004] ICJ Rep 1160, 1208.
[8] *United States Diplomatic and Consular Staff in Tehran (Judgment)* [1980] ICJ Rep 3, 18, s33; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73, 87, s 33.
[9] *Case of the Readaptation of the Mavrommatis Jerusalem Concessions (Collection of Judgments)* [1927] PCIJ Rep Series A No 11, 18 (10 October 1927).

rendered within the framework of Free Trade Agreements, such as NAFTA and CAFTA-DR, are also frequently invoking precedent. In NAFTA tribunals, for instance, some traces of WTO jurisprudence are commonly found.

18. In *SD Myers v. Canada*, the Tribunal relied on the reasoning of the Appellate Body of the WTO ("Appellate Body" or "AB") over "like products" in its report on *Japan – Alcoholic Beverages II*.[10] In the same vein, the Tribunal in *Pope & Talbot v. Canada*, relied in the reasoning of the Panel Reports in *EC – Bananas III*; *EC – Asbestos* and *US – Alcoholic and Malt Beverages*.[11] The Tribunal in *Canfor et al. v. USA* explained very clearly the role of the WTO/GATT jurisprudence by stating that it would not treat such jurisprudence as "binding precedent" but merely as "persuasive authority".[12]

19. The same approach has been followed in ICSID decisions. For example, in *Saipem S.p.A. v. The People Republic of Bangladesh*, the Tribunal stated that:

> [t]he Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[13]

20. In the WTO, the Appellate Body has clarified the value of precedent. *In United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, the Appellate Body stated:

> Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent *cogent reasons*, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.[14]

21. In the light of the above, Guatemala invites this Panel to consider jurisprudential precedent of other *fora* for legal questions that will arise in the present dispute. While that jurisprudence would not have a "binding" character, it may be illustrative and should have a *persuasive authority*. Absent *cogent reasons*, this adjudicatory body should resolve the *same legal question*s in the same way as they have been solved in previous cases.

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[10] *Pope & Talbot v. Canada (Award on Merits)*, 10 April 2011 (2002) 122 IRL 352, paras. 45-63 and 68-69.
[11] *SD Myers v. Government of Canada (First Partial Award)*, 12 November 2000 (2001) 40 ILM 1408, paras. 243-246.
[12] *Canfor et al. v. USA*, paras. 274-346.
[13] ICSID, *Saipem S.p.A v. The People Republic of Bangladesh (Award)*, para. 67.
[14] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

III. THE PANEL HAS THE LEGAL AUTHORITY TO MAKE A PRELIMINARY PROCEDURAL RULING

22. Rule 27 of the Rules of Procedures provides that:

> 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.

23. The present request for a preliminary procedural ruling is a "procedural question" that is not covered by the Rules of Procedures. It is not inconsistent with the CAFTA-DR or the Rules of Procedure.

24. The lack of existence of special rules to deal with requests for preliminary procedural rulings is not uncommon in different jurisdictions.[15] Tribunals have dealt with these issues with the principle of *due process* in mind (also called "fundamental fairness", "procedural fairness" or "natural justice"). Administrative and judicial systems attempt to achieve due process by exercising their discretion in a fair manner and by developing procedural or evidentiary rules explaining how rights, duties, powers, and liabilities are administered.[16]

25. The question of jurisdiction is one to be examined by the court or tribunal *proprio motu*.[17] As a matter of due process, and the proper exercise of the judicial function, "panels are required to address issues that are put before them by the parties to a dispute".[18] More importantly, "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings".[19] For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues –if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed".[20]

26. In the present case, this request for a preliminary procedural ruling relates to extremely important matters, namely, the Panel's jurisdiction and Guatemala's right to due process. The issues raised in this request for a preliminary procedural ruling are so fundamental that the Panel needs first to determine whether it has the authority to proceed with the merits of this case.

IV. THE LEGAL STANDARD FOR PANEL REQUESTS UNDER THE CAFTA-DR

A. Scope of labor disputes under the CAFTA-DR

27. Under the CAFTA-DR, a Party can resort to dispute settlement procedures with regard to matters under Chapter 16 in very limited situations. Article 16.6.7 of the CAFTA-DR provides that:

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[15] See for example, the WTO Dispute Settlement Mechanism.
[16] Peter Nygh and Peter Butt (eds.), *Australian Legal Dictionary* (1997) 929, 1129.
[17] Case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, ICJ Reports 1988, 76, para. 16. In that dispute, the ICJ opened a phase of the proceedings devoted to jurisdiction and admissibility on its own initiative.
[18] Appellate Body Report, *Mexico – HFCS*, para. 36.
[19] Appellate Body Report, *United States – 1916 Act*, footnote 32, para. 54.
[20] Appellate Body Report, *Mexico – HFCS*, para. 36.

> No Party may have recourse to dispute settlement under this Agreement for any matter arising under any provision of this Chapter other than Article 16.2.1(a).

28. Thus, a Party can resort to dispute settlement procedures *only* for matters arising under Article 16.2.1(a), which provides the following:

> A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

29. From a plain reading, it is clear that the matters for which a Party may resort to dispute settlement procedures under Article 16.2.1(a) refers to *failures of effective enforcement of labor laws*. There is a direct link between *existing labor laws* and a *sustained or recurring course of action or inaction* that *affects trade* between the Parties. Article 16.2.1(a) also contains a temporal clause that would preclude any Party to present claims on issues that arose before the date of entry into force of the CAFTA-DR.

B. The rules applicable to panel requests for labor matters under the CAFTA-DR

30. Article 16.6.6 provides that:

> If the matter concerns whether a Party is conforming to its obligations under Article 16.2.1(a), and the consulting Parties have failed to resolve the matter within 60 days of a request under paragraph 1, the complaining Party may request consultations under Article 20.4 (Consultations) or a meeting of the Commission under Article 20.5 (Commission – Good Offices, Conciliation, and Mediation) and, as provided in Chapter Twenty (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter."

31. In other words, if cooperative labor consultations under Article 16.6.1 fail to resolve the matter under Article 16.2.1(a), the complaining Party has two options: either to request consultations under Article 20.4; or to request a meeting of the Commission under Article 20.5 of the CAFTA-DR. Thereafter, the complaining Party can resort to the dispute settlement procedures provided for in Chapter Twenty (Dispute Settlement) of the CAFTA-DR ("Chapter 20"), including the possibility to request the establishment of an arbitral panel in accordance with Article 20.6.1.

32. The last sentence of Article 20.6.1 provides for the content of the panel request:

> The requesting Party shall deliver the request to the other Parties, and shall set out the reasons for the request, including identification of the measure or other matter at issue and an indication of the legal basis for the complaint.

33. According to this provision, when setting out the reasons for the panel request, the complaining Party must include: i) the identification of the measure or other matter at issue; and ii) an indication of the legal basis for the complaint. Both elements are different and clearly distinguishable one from the other, as explained in further detail below.

C. The function of a panel request under the CAFTA-DR

34. The panel request serves the purpose of defining the terms of reference of the panel, which establishes the panel's jurisdiction. Article 20.10.4 states that:

> Unless the disputing Parties otherwise agree within 20 days from the date of the delivery of the request for the establishment of the Panel, the terms of reference shall be:

> "To examine, in the light of the relevant provisions of this Agreement, the matter referenced in the panel request and to make findings, determinations, and recommendations as provided in Articles 20.10.6 and 20.13.3 and to deliver the written reports referred to in Articles 20.13 and 20.14".

35. In other words, the panel shall examine "the matter referenced in the panel request" to determine its own jurisdiction.

36. The panel request also serves an important due process role of notifying the respondent and third parties of the nature of the complainant's case. For these reasons, extremely broad and vague panel requests certainly would not serve the principles of due process, including the definition of the terms of reference of the panel.

D. Principles applicable to panel requests under the CAFTA-DR

37. Guatemala observes that the CAFTA-DR provisions for the establishment of an arbitral panel are very similar to those for the establishment of a panel under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) of the World Trade Organization (WTO). Therefore, this Arbitral Panel can find relevant guidance in the WTO jurisprudence when interpreting the CAFTA-DR provisions. The *principles* applicable to the WTO disputes are also applicable to this dispute.

38. Article 6.2 of the DSU provides that:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

39. Article 6.2 of the DSU and Article 20.6.1 of the CAFTA-DR require similar conditions for a panel request: i) must be submitted in "writing"; ii) has to identify the measure at issue (and in the case of the CAFTA-DR, the possibility to identify an "other matter at issue" as well); and iii) has to provide the legal basis of the complaint.

40. Article 6.2 of the DSU explicitly states that the identification of the specific measures at issue and that the brief summary of the legal basis of the complaint must be "sufficient to present the problem clearly". The CAFTA-DR is silent in this regard, as it does not contain a similar provision. However, it stems from the nature and scope of the CAFTA-DR dispute settlement mechanism that such silence on the requirements of "sufficiency" and "clarity" cannot be understood as a permission to draft a panel request in such extremely broad and vague terms to make it impossible to determine the precise terms of reference of the Panel or with a view to affect the due process rights of the defendant and the third parties.

41. In the light of the close similarities between the DSU and the CAFTA-DR Chapter 20 provisions, Guatemala considers that WTO principles and jurisprudence can be illustrative and persuasive to the case at hand. Absent *cogent reasons*, this Panel should resolve the same legal questions in the same way.

E. The protection of due process is an essential feature of a rules-based system of adjudication

42. The Appellate Body has held that "the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU" and that "due process is

fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings".[21] The Chapter 20 Dispute Settlement Mechanism of the CAFTA-DR was designed as a rules-based system of adjudication as well. Therefore, the principle just cited above is also applicable in the present dispute.

43. The Appellate Body has also clarified that a panel request fulfils a due process objective that consist in "providing the respondent and third parties notice regarding the nature of the complainant's case* to enable them to respond accordingly*" (*original footnotes omitted*).[22] The same principle applies here. The panel request is the procedural document by which the responding party has the opportunity to know the case that it has to respond.

F. Compliance with procedural requirements must be demonstrated on the face of the panel request and cannot be subsequently "cured":

44. The Appellate Body has also stated that "compliance with the requirements of Article 6.2 of the DSU must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".[23]

45. The Appellate Body has also indicated that compliance with the requirements of Article 6.2 must be demonstrated "on the face of the [panel] request".[24] Thus, "parties' submissions and statements during the panel proceedings cannot "cure" any defects in the panel request".[25] This was clearly stated by the Appellate Body in *EC-Bananas III*, where it disagreed with the Panel that "even if there was some uncertainty whether the panel request had met the requirements of Article 6.2, the first written submissions of the Complainants "cured" that uncertainty because their submission were sufficiently detailed to present all the factual and legal issues clearly".[26] In disagreeing with the Panel, the Appellate Body in this case also clarified that Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding".[27] A panel must "scrutinize carefully the panel request, read as a whole, and on the basis of the language used".[28]

46. Finally, the Appellate Body also clarified that due process "is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction".[29] The Appellate Body further indicated that the fact that the defending party may have been able to defend itself does not mean that the complainant's request complies with Article 6.2 of the DSU.[30] In other words, the ability of the defending party to defend itself does not cure a faulty panel request either.

47. These principles should be applicable to panel requests under the CAFTA-DR, as Chapter 20

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[21] Panel Report, *Thailand – Cigarettes (Philippines)*, footnote 229, citing Appellate Body Reports, *Canada-Continued Suspension / US – Continued Suspension*, para. 433; and Appellate Body Report, *Thailand – H-Beams*, para. 88, respectively. See also Appellate Body Report, *Chile – Price Band System*, para. 176.
[22] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7.
[23] Appellate Body Report, *US-Carbon Steel*, para. 127.
[24] Appellate Body Report, *China-Raw Materials*, para. 220 (citing Appellate Body Report, *EC-Fasteners (China)*, para. 562). See also Appellate Body Report, *EC and Certain member States – Large Civil Aircraft*, para. 642; Appellate Body Report, *EC-Bananas III*, para. 143; Appellate Body Report, *US – Carbon Steel*, para. 127.
[25] Appellate Body Report, *EC and certain member States – Large Civil aircraft*, para. 787 (referring to Appellate Body Reports, *EC- Bananas III*, para. 143; and *US – Carbon Steel*, para. 127).
[26] Appellate Body Report, *EC-Bananas III*, para. 143.
[27] *Ibídem*.
[28] Appellate Body Report, *EC-Fasteners (China)*, para. 562.
[29] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640.
[30] Appellate Body Report, *China – Raw materials*, para. 233.

does not foresee the possibility to "amend" or "cure" panel requests.

G. The panel request needs to describe the measure at issue with sufficient precision

48. The measures at issue need to be described with "sufficient precision". In this regard, the Appellate Body explained that:

> The specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request … [T]he identification of a measure within the meaning of Article 6.2 need be framed only with sufficient *particularity so as to indicate the nature of the measure and the gist of what is at issue*. (Emphasis added).[31]

49. In light of this, a simple reference to "laws", in general, would not be sufficient. Depending on the nature of a particular dispute, not even a reference to a specific law would meet the standard of "specificity". It is necessary, in all cases, to describe the measures with *sufficient precision* so as to *indicate the nature of the measure and the gist of what is at issue*.

H. In a panel request, the *legal basis* of the complaint cannot be the *matter at issue*, as they are two different concepts

50. Article 20.6.1 of the CAFTA-DR provides that the panel request shall set out "the reasons for the request" which includes two elements: the identification of the *measure* or other *matter* at issue; and an indication of the *legal basis* for the complaint. Therefore, the *measure* or other *matter* at issue is something different to the *legal basis* for the complaint.

51. Similarly, Article 6.2 of the DSU requires the complaining Member, in a panel request, to identify the specific *measures at issue* and provide a brief summary of the *legal basis*. Panel requests in the WTO dispute settlement mechanism also require two distinguishable elements.

52. Therefore, the principles applicable to Article 6.2, as confirmed by the WTO jurisprudence, also apply to Article 20.6.1 of the CAFTA-DR.

53. The Appellate Body has consistently indicated that Article 6.2 of the DSU requires the complaining Member, in a panel request, to identify the specific *measures* at issue and provide a brief summary of the *legal basis* of the complaint sufficient to present the problem clearly. The Appellate Body then found that the "matter referred to the DSB" consists of two elements: the specific measures at issue and the legal basis of the complaint.[32] The Appellate Body also said that "[a] distinction is therefore to be drawn between the "measure" and the "claims".[33]

54. Thus, following that principle, the concept of "legal basis" in the CAFTA-DR cannot be subsumed or conflated with that of the "measure or other matter at issue".

I. The legal basis of the complaint must be clear, as sometimes the provisions claimed to be breached may contain multiple and/or distinct obligations

55. The Appellate Body has also warned that there may be situations in which listing provisions claimed to be violated may not be "sufficient to present the problem clearly". The Appellate Body has added that, in order to "present the problem clearly" a panel request must "plainly connect" the

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[31] Appellate Body Report, *US – Continued Zeroing*, paras. 168-69.
[32] Appellate Body Report, *Guatemala – Cement I*, para. 72.
[33] *Ibíd*, para. 73.

challenged measure(s) with the provision(s) claimed to have been infringed such that a respondent can "know what case it has to answer, and…begin preparing its defence".[34]

J. The panel request cannot include an "open-ended" list of measures at issue or legal claims

56. The panel in *China – Raw Materials* concluded that the complainants could not use the phrase "among others" to list the challenged measures, as this would "not contribute to the 'security and predictability' of the WTO dispute settlement system".[35]

57. Similarly, the Panel in *Canada – Wheat Exports and Grain Imports* stated that:

> [T]he United States' panel request … does not provide adequate information on its face to identify the specific measures at issue … Due process requires that the complaining party fully assume the burden of identifying the specific measures under challenge. In the present case, the panel request effectively shifts part of that burden onto Canada as the responding party, inasmuch as it leaves Canada little choice, if it wants to begin preparing its defence, but *to undertake legal research and exercise judgement in order to establish the precise identity of the laws and regulations implicated by the panel request*. (Emphasis added).[36]

58. In other words, the lack of clarity in the panel request must not shift the burden onto the responding party "to undertake legal research and exercise judgement in order to establish the precise identity of the laws and regulations implicated by the panel request". This principle applies to open-ended list of measures and claims as well.

V. THE DEFICIENCIES OF THE US PANEL REQUEST

59. The US panel request fails to set out the "reasons for the request", fails to identify "the measure or other matter at issue" and fails to indicate the "legal basis for the complaint". Such panel request is extremely broad and vague. To a great extent, it simply paraphrases Article 16.2.1(a) of the CAFTA-DR. These failures are also found in the request for cooperative consultations of 30 July 2010.[37]

A. The US panel request needs to comply with the requirements of article 20.6.1 and Article 16.2.1(a)

60. As indicated earlier, the panel request serves the purpose of defining the terms of reference of the panel and that of notifying the respondent and third parties on the nature of the complainant's case. To this end, Article 20.6.1 requires that the panel request sets out the "reasons for the request", including the "identification of the measure or other matter at issue" and an "indication of the legal basis for the complaint".

61. The identification of the measure or other matter and the indication of legal basis for the complaint cannot be made in abstract. Given its due process role, the panel request must be drafted in a way to *present the problem clearly*. It goes without saying that all panel requests necessarily demands the consideration of the provisions and obligations claimed to have been breached.

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[34] Appellate Body Report, *US – Countervailing and Anti-dumping Measures (China)*, para. 4.8, citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 88).
[35] Panel Report, *China – Raw Materials*, Annex F-1, 2First Phase of Preliminary Ruling2, para. 12, p. F-6.
[36] Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 24 of para. 6.10.
[37] Request for cooperative consultations, 30 July 2010, Exhibit GTM-2.

62. Under Chapter 16, a Party can resort to the CAFTA-DR dispute settlement procedures *only* for matters arising under Article 16.2.1(a). From a plain reading of Article 16.2.1(a), it is clear that the matters for which a Party may resort to dispute settlement procedures under Article 16.2.1(a) refer exclusively to *failures of effective enforcement of labor laws*.

63. The labor laws that are claimed to have been breached are the "measures at issue". Such labor laws, thus, must be clearly identified.

64. The United States may argue that Article 20.6.1 gives the option to the complaining Party, in setting out the reasons for its complaint, to describe either the "measure" or "other matter" at issue. However, that interpretation is incorrect. Article 20.6.1 cannot be interpreted in isolation; that provision must be read in conjunction with Article 16.2.1(a) for purposes of labor disputes under Chapter 16 of the CAFTA-DR. Given the nature and scope of the obligations under Article 16.2.1(a), the complaining Party cannot ignore its obligation to properly describe the measures at issue (i.e., the measures that it is claiming to be the subject of failures of effective enforcement).

65. Labor laws, in general, contain a broad range of substantive, procedural and administrative obligations. They are conformed, in the Guatemalan domestic system, of laws of general application, administrative regulations and administrative and judicial decisions. Lack of clear identification of specific labor laws that would form the subject matter of the dispute would shift the burden onto the responding party "to undertake legal research and exercise judgement in order to establish the precise identity of the laws and regulations implicated by the panel request".[38]

66. Furthermore, there is a direct link between *existing labor laws* and a *sustained or recurring course of action or inaction*. "Action" and "inaction" are concepts mutually exclusive. A failure to effectively enforce a specific labor law cannot be the result of a sustained or recurring course of *action* and, *at the same time*, the result of a sustained or recurring course of *inaction*. If that possibility exists, it has to be clearly indicated in the panel request.

67. Moreover, a "sustained or recurring" course of action or inaction must occur in a given period of time. For a panel request to explain the problem clearly, it should make reference to the timeframe in which the alleged "sustained or recurring" course of action or inaction has happened, so as to allow the defending party to know what the period is that it has to look at when beginning to prepare its defence.

68. Article 16.2.1(a) also requires that the alleged failures of effective enforcement happen "in a manner affecting trade between the Parties". There is, therefore, a clear causal link between the alleged failures of effective compliance and the affectation of trade between the Parties. Article 16.2.1(a) does not refer to *any* affectation of trade between the Parties, but the affectation that is *caused* by the alleged failures of effective compliance.

69. In this regard, it is expected that the panel request includes, at minimum, a reference to the sectors or tariff lines that it considers are being affected by the claimed failures of effective compliance of specified labor laws.

70. That would allow the defending Party to initiate the preparation of its defence too. For instance, Guatemala could start looking at the evolution of trade in those sectors (trade in services, for example) or specific tariff lines identified in the panel request. Guatemala could also start preparing its defence by determining whether that alleged affectation of trade can be attributed to the alleged failures of effective compliance or to other factors.

71. Without that clarity, the defending Party would have to exercise its judgment, trying to guess what the alleged affectation of trade is and what could be the potential causal link with the claimed failures to effectively enforce labor laws.

[38] Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 24 of para. 6.10.

72. Finally, Article 16.2.1(a) also contains a temporal limitation to bring disputes under that provision. It refers to situations that happened "after the date of entry into force of [the CAFTA-DR]". It means that the failures to effectively enforce labor laws and affectation of trade caused by those failures must have occurred after the date of entry into force of the CAFTA-DR. In view of that, the alleged failures to effectively enforce labor laws must be limited to those that extend over a period of time that occurs *after* the date of entry into force of the CAFTA-DR.

73. In view of all the above, a panel request under Article 20.6.1, which has to take into account the substantive obligations of Article 16.2.1(a) should include, at least, the following:

a. a clear indication of existing labor laws that are the subject of the claims (the measures at issue);

b. a brief explanation of the "actions" or "inactions" that are attributable to the defending Party and that are causing the alleged failures to effectively enforce the identified labor laws;

c. the timeframe in which the alleged "sustained" or "recurring" actions or inactions have happened, after the entry into force of the CAFTA-DR; and,

d. a brief explanation of how failures to enforce the identified labor laws through a sustained or recurring course of action or inaction affects trade between the Parties. These explanations should include, at least, an identification of the sectors or tariff lines, for example, that are allegedly being affected by the failures of enforcement.

74. These are minimum requirements for a panel request for matters raised under Article 16.2.1(a). Such requirements stem from the text of that provision, read in conjunction with Article 20.6.1 of the CAFTA-DR.

75. These requirements should not be confused, however, with the *arguments* or the need to place the defending Party in a position to *fully develop* its defence on the sole basis of the panel request. The panel in *India – Agricultural Products* clearly explained the differences in this regard:

> …the requirement that a complainant submit a panel request that will allow a respondent to "begin" preparing its defence does not amount to "a requirement for allowing the defendant to fully develop its defence on the sole basis of the complainant's request" … [S]uch an interpretation would wipe out the distinction between claims and arguments and would reduce to futility the subsequent phases of WTO dispute settlement".[39]

76. In this request for a preliminary procedural ruling, Guatemala is not requesting that the United States provide its *arguments* or that Guatemala needs to be in a position to *fully develop* its defence. Guatemala is only submitting, supported by precedent, that the panel request only needs to present the problem clearly and must plainly connect the challenged measure(s) with the provision(s) claimed to have been infringed such that a respondent can "know what case it has to answer and…begin preparing its defence".[40] The panel request also needs to frame the measure(s) at issue with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue.[41] The US panel request fails to do so.

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[39] Communication from the Panel, Preliminary Ruling, *India – Agricultural Products*, para. 3.3, citing Panel Report, *Australia – Apples*, para. 7.929; Panel Report, *China – Electronic Payment Services*, para. 7.4).
[40] Appellate Body Report, *US – Countervailing and Anti-dumping Measures (China)*, para. 4.8, citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 88).
[41] Appellate Body Report, *US – Continued Zeroing*, paras. 168-69.

B. The US panel request is extremely broad and vague

77. After a careful reading the US panel request, there is no manner to discern what is the case that Guatemala has to respond to. The panel request is extremely broad and vague.

78. That broadness and vagueness have been present since the request for cooperative consultations. The United States requested cooperative consultations to "discuss issues and matters related to Guatemala's obligations under Article 16.2.1(a) of the CAFTA-DR, as well as *under Chapter Sixteen of the CAFTA-DR more broadly*" (emphasis added).[42]

79. In the US panel request, three paragraphs appear to describe, unsuccessfully, the matter at issue and the legal basis of the complaint:

> The matter at issue and legal basis for this complaint is Guatemala's failure to conform to its obligations under Article 16.2.1(a) with respect to the effective enforcement of Guatemalan labor laws related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work.
>
> The United States has identified a number of significant failures by Guatemala to effectively enforce labor laws, including: (i) the failure of Guatemala's Ministry of Labor to investigate alleged labor law violations; (ii) the failure of the Ministry of Labor to take enforcement action after identifying labor law violations; and (iii) the failure of Guatemala's courts to enforce Labor Court orders in cases involving labor law violations.
>
> These failures constitute a sustained or recurring course of action or inaction by the Government of Guatemala. Guatemala's sustained or recurring failure to effectively enforce its labor laws is in a manner affecting trade between the Parties.

80. The first paragraph states that the "matter at issue" ***and*** "legal basis" for the complaint is Guatemala's failure to conform to its obligations under Article 16.2.1(a). With this statement, the United States is clearly conflating two concepts that are completely different.

81. The first paragraph also refers to alleged failures to effectively enforce labor laws related to the "right of association", the "right to organize and bargain collectively", and "acceptable conditions of work". The United States did not identify the labor laws (i.e., the measures at issue) that it is referring to. That makes this faulty panel request extremely broad.

82. Even if those labor laws "relate to" the right of association, the right to organize and bargain collectively, and acceptable conditions of work, these concepts combined, under Guatemalan legislation, include, essentially, *all labor rights*. Thus, the US panel request is to be read as including failures to effectively enforce *any or all* labor *rights* under *any or all* labor *laws*.

83. The second paragraph states that the United States has identify, in its view, a number of "significant failures" by Guatemala to effectively enforce labor laws *including* three issues:

a. The failure of Guatemala's Ministry of Labor to *investigate* alleged labor law violations;

b. The failure of the Ministry of Labor *to take enforcement action* after identifying labor law violations;

c. The failure of Guatemala's courts to *enforce Labor Court orders* in cases involving labor law violations

84. This paragraph, again, makes reference to "labor laws", in general, without identifying the

[42] Request for cooperative consultations, 30 July 2010, GTM-2.

measures at issue. Moreover, this paragraph is disconnected from the first paragraph, so that there is no possibility to determine whether the alleged failures to "investigate" and "take enforcement action" by the Ministry of Labor, for example, refer to the alleged failure to effectively enforce labor laws related to the "right of association", the "right to organize and bargain collectively" and/or "acceptable conditions of work". This vagueness confirms that the United States may claim that Guatemala is failing to effectively enforce *any or all* of its *labor laws* with respect to *any or all labor rights*.

85. Furthermore, the use of the word "including" clearly indicates that the US claims are not limited to these three issues only. It is an open-ended list and the plain reading of the panel request does not allow determining which other issues the United States may consider to be "significant failures" by Guatemala.

86. Finally, the third paragraph basically paraphrases parts of Article 16.2.1(a) without further explanation. It only states that the alleged failures "constitute a sustained or recurring course of action or inaction by the Government of Guatemala". There is no possibility to discern whether the alleged failures to effectively enforce any or all labor laws with respect to any or all labor rights originate in a sustained or recurring course of "action" or "inaction" (two concepts that are mutually exclusive). There is no clear indication either of the timeframe that the United States has set for its assessment of the alleged "number of significant failures". Even worse, the third paragraph states that all alleged failures happen in a "manner affecting trade between the Parties" without any indication of the trade affected (i.e., which products, sectors, whether goods and/or services, etc.).

87. In view of the above, Guatemala understands that the United States is claiming that Guatemala is failing to effectively enforce *any or all* labor laws, with respect to *any or all* labor rights, through the sustained *or* recurring course of *action* or *inaction* by the Ministry of Labor or Labor Courts, *among others*, in a manner that is affecting *some or all* trade of *goods and/or services*.

88. The panel request is so broad and vague that Guatemala does not know what the case it has to respond to is and is unable to begin preparing its defence. With this lack of clarity, the panel cannot determine its terms of reference either. This constitutes a fundamental violation of the due process right of Guatemala and the third parties that have implications on the panel jurisdiction as well. Each of these deficiencies is explained in further detail below.

C. The panel request does not identify the measures at issue as it refers to any or all labor laws

89. As explained earlier, for labor matters under the CAFTA-DR, Article 20.6.1 must be interpreted in the light of Article 16.2.1(a). The last provision refers to "failures of effective enforcement of labor laws". These labor laws are meant to be the measures at issue. The measures at issue must be identified in the panel request, in accordance with Article 20.6.1.

90. The US panel requests fails to identify the measures at issue. It only refers to "labor laws", in general, without any precise indication of the laws that the United States is referring to.

91. The United States may argue that the labor laws that it is referring to are limited to those "related to" the right of association, the right to organize and bargain collectively, and acceptable conditions of work. This reference is insufficient.

92. Guatemala has ratified all fundamental and governance International Labor Organization ("ILO") Conventions. To date, Guatemala has ratified 73 ILO Conventions and 61 Technical Conventions. These Conventions have been implemented through a broad range of legislative, administrative and judicial measures that *directly* or *indirectly* relate to the three topics identified in the panel request (i.e., the right of association, the right to organize and bargain collectively, and acceptable conditions of work).

93. Furthermore, under the Guatemalan domestic legislation, the three topics identified by the

United States can be addressed from many different angles. For example, regarding the right of association and the right to organize and bargain collectively, Guatemala has enacted legislative and administrative measures that range from the creation of inter-institutional committees to discuss relevant matters;[43] the creation of institutional arrangements;[44] the adoption of substantive obligations, general principles and procedures;[45] to the implementation of ILO Conventions.[46]

94. Moreover, under "acceptable conditions of work", Guatemala also has an important number of laws and regulations, other than the *Constitución Política de la República de Guatemala* and the *Código de Trabajo*, that addresses issues like equality of opportunity and treatment,[47] employment policy, promotion of employment and employment services,[48] training,[49] social security,[50] termination of employment,[51] wages,[52] hours of work, weekly rest and paid leave,[53] maternity protection,[54] etc.

95. Guatemala has hundreds of legal instruments that "relate to" the three issues identified by the

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[43] See, for example, *Acuerdo Gubernativo* 430-2003; *Acuerdo Ministerial* 1-97 of *Ministerio de Trabajo y Previsión Social*.
[44] See, for example, *Acuerdo Ministerial* 2-97 *del Ministerio de Trabajo y Previsión Social*.
[45] See, for example, Decreto 1441 – *Código de Trabajo*; Decreto 13-2001, *Reformas al Código de Trabajo*; Decreto 71-86, *Ley de sindicalización y regulación de la Huelga de los Trabajadores del Estado*.
[46] See, for example, *Normas reglamentarias para la aplicación de los Convenios 87 y 98* of 13 November 1981.
[47] See, for example, *Decreto 22-2008, Ley contra el femicidio y otras formas de violencia contra la mujer; Decreto 81-2002, Ley de Promoción Educativa contra la Discriminación; Decreto 57-2002, Reforma al Código Penal para incluir el delito de discriminación; Acuerdo Gubernativo 525-99, Creación de la Defensoría de la mujer indígena; Acuerdo Ministerial 11-94, Creación de la Sección de promoción y capacitación de la mujer trabajadora; Acuerdo gubernativo 711-93, Comisión para garantizar iguales funciones para el hombre y la mujer; Acuerdo Gubernativo 1177-90, Apoyo político para contribuir al fortalecimiento institucional de la Oficina Nacional de la Mujer; Decreto 27-2000, Ley general para el combate del virus de inmunodeficiencia humana – VIH – y del síndrome de inmunodeficiencia adquirida –SIDA- y de la promoción, protección y defensa de los derechos humanos ante el VIH/SIDA*.
[48] See, for example, *Acuerdo Gubernativo 1-94, Reglamento de la Ley del Fondo de Inversión Social; Acuerdo Gubernativo 310-85, Estatutos de la Asociación de Desocupados o Cesantes de Guatemala; Acuerdo Gubernativo 8-80 of Ministerio de Trabajo y Previsión Social, Normas reglamentarias para la aplicación del Convenio Internacional de Trabajo 96, relativo a las agencias retribuidas de colocación; Acuerdo Ministerial para la autorización de la Asociación General de Agricultores para organizar oficinas regionales de contratación de trabajadores campesinos; Decreto 135-96 y 5-2011, Ley de atención a las personas con discapacidad*.
[49] See, for example, *Acuerdo Ministerial 213-2000, Programa de capacitación y formación profesional del Ministerio de Trabajo y Previsión Social; Decreto 12-91, Ley de Educación Nacional; Acuerdo de creación del Patronato para la Formación de Recursos Humanos*.
[50] See, for example, *Decreto 23-79, Prestaciones en caso de fallecimiento del trabajador; Acuerdo Gubernativo 1380, Protección relativa a enfermedad y maternidad; Acuerdo Gubernativo del Consejo de Ministros 15-69, Licencia con goce de salario para todo servidor público; Acuerdo Gubernativo 1304, Reglamento de prestaciones en dinero; Decreto 63-98, Ley de clases pasivas civiles del Estado; Decreto 56-90, Ley del Instituto de Previsión Social del Periodista*.
[51] See, for example, *Decreto 57-90, Ley de compensación económica por tiempo de servicio; Decreto 76-78, Ley reguladora de la prestación del aguinaldo para los trabajadores del sector privado; Acuerdo Ministerial 1, Ley de compensación económica por tiempo de servicio*.
[52] See, for example, *Decreto Ley 389, Prestación de Aguinaldo; Acuerdo Gubernativo 1319, Reglamento de la Comisión Nacional del Salario y de las Comisiones Paritarias de Salarios Mínimos; Decreto 76-78, Ley reguladora de la prestación de aguinaldo para los trabajadores del sector privado; Acuerdo Gubernativo 1083-84, Normas Reglamentarias para la Aplicación del Convenio 94 de la OIT; Decreto 139-85, Modificación a la Ley de Salarios de la Administración Pública; Decreto 42-92, Ley de bonificación anual para trabajadores del sector privado y público*.
[53] See, for example, Acuerdo Ministerial 39-70, Reglamento de la jornada única de trabajo en el Organismo Ejecutivo; Acuerdo Gubernativo 6-80 del Ministerio de Trabajo y Previsión Social, Normas reglamentarias para la aplicación del Convenio Internacional del Trabajo 30, relativo a la reglamentación de las horas de trabajo en el comercio y las oficinas.
[54] See, for example, Acuerdo Gubernativo 1380, Protección relativa a enfermedad y maternidad; Reglamento para el goce del período de lactancia.

United States. Thus, the reference to "labor laws related to" these topics does not permit to clearly identify the measures at issue, since the United States could be referring to any or all of these laws.

96. Furthermore, Guatemala observes that the reference to the right of association, the right to organize and bargain collectively and acceptable conditions of work, all combined, essentially refers to *all* labor rights.

97. Therefore, the reference of the United States to the aforementioned three topics is equivalent to make reference to any or all labor rights and, consequently, to any or all labor laws. For this reason, among others, the US panel request fails to identify the measures at issue.

D. The panel request includes an open-ended list of alleged "significant failures" by Guatemala that does not present the problem clearly

98. The United States describes three issues that in its view are "significant failures" of Guatemala to effectively enforce labor laws. Bearing in mind the distinction between *measures at issue* and the legal basis of the complaint (*claims*), the "significant failures" described by the United States constitute its *claims* that are part of the *matter at issue*. The United States fails to clearly describe its claims and, therefore, the matter at issue.

99. First, besides the fact that the United States failed to identify the measures at issue, the paragraph in which the United States describes the alleged "significant failures" cannot be linked to the labor laws *related to* the right of association, the right to organize and bargain collectively, and acceptable conditions of work. In other word, there is no way to know whether, for example, the alleged failure of Guatemala's Ministry of Labor to investigate labor law violations refers to those laws related to the right of association, the rights to organize and bargain collectively and/or acceptable conditions of work.

100. Second, the term "including" indicates that the list of alleged "significant failures" is an open-ended list. This term leaves open the list to an *unspecified* number of elements. The same happens with the use of the term "among others".

101. As explained earlier, the panel in *China – Raw Materials* concluded that the complainants could not use the phrase "among others" to list the challenged measures, as this would "not contribute to the 'security and predictability' of the WTO dispute settlement system".[55] Additionally, the lack of clarity in the panel request must not shift the burden onto the responding party "to undertake legal research and exercise judgement in order to establish the precise identity of the laws and regulations implicated by the panel request".[56] The same rationale is applicable in this case.

102. For these reasons, the use of the word "including" listing the US claims fails to describe the problem clearly and blatantly undermines the capacity of Guatemala to defend itself.

E. The panel request does not indicate the timeframe used by the United States for the identification of the alleged "significant failures"

103. Article 16.2.1(a) requires that a Party shall not fail to effectively enforce its labor laws, through a "sustained or recurring course of action or inaction".

104. The ordinary meaning of "sustained" is "[t]hat has been sustained; esp. maintained continuously or without flagging over a long period"[57] The ordinary meaning of "recur" is "[t]o occur

[55] Panel Report, *China – Raw Materials*, Annex F-1, 2First Phase of Preliminary Ruling2, para. 12, p. F-6.
[56] Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 24 of para. 6.10.
[57] The New Shorter Oxford English Dictionary on Historical Principles; Edited BY Lesley Brown; Clarendon Press; Oxford, Vol. 2; 1993; page 3163.

or appear again, periodically, or repeatedly".[58] Both terms have in common the need that something happens in a specific timeframe: i.e., over a long period or periodically.

105. For a panel request to explain the problem clearly, it should make reference to the timeframe in which the alleged "sustained or recurring" course of action or inaction has happened, so as to allow the defending party to know what the period is that it has to look at when beginning to prepare its defence.

106. Guatemala submits that it would be impossible to know whether an action or inaction is "sustained" or "recurring" without taking into consideration those actions or inactions over a long period of time. That period of time must be representative of a general trend or recurrence. To be representative, the period must be long enough.

107. The US panel request simply fails to indicate the reference period that the United States has set to demonstrate the alleged failures to effectively enforce labor laws. As a matter of fact, the US panel request paraphrases the language of Article 16.2.1(a) without any further indication. This lack of precision fundamentally violates Guatemala's right to due process, as it does not know what the case it has to answer is.

108. A simple indication of the reference period would allow Guatemala to review if there are any cases of labor laws that were not effectively enforced and assess whether that would constitute a "sustained" or "recurring" course of action or inaction. As the US panel request is drafted, Guatemala has no idea where to start its research and how to prepare its defence.

109. Bearing in mind that the United States did not define the measures at issue; nor explained in precise terms its claims; Guatemala certainly is unable to even consider what could be the "sustained" or "recurring" course of "actions" or "inactions" that is has to start looking at.

110. Therefore, the US panel request also fails to explain the problem clearly by not indicating the reference period in which it is claiming that there is a "sustained" or "recurring" course of action or inaction.

F. The concepts of "action" and "inaction" are mutually exclusive and disconnected from the alleged failures to effectively enforce labor laws

111. The term "action" has many ordinary meanings. One of those ordinary meanings is "[t]he process or condition of acting or doing".[59] In contrast, the term "inaction" means "[a]bsence of action, inertness, sluggishness".[60] Both terms are mutually exclusive.

112. A failure to effectively enforce a specific labor law cannot be the result of a sustained or recurring course of *action* and, *at the same time*, the result of a sustained or recurring course of *inaction*. If that possibility exists, it has to be clearly indicated in the panel request.

113. As the US panel request is drafted, it only states that "[the] failures constitute a sustained or recurring course of action or inaction by the Government of Guatemala". With this statement, Guatemala cannot determine if it is being accused of "actions" or "inactions" to effectively enforce labor laws. This uncertainty only adds to the uncertainty already created by the lack of identification of the measures at issue and the lack of precise indication of the US claims. Therefore, the US panel request neither is clear with respect to the reference of "actions" or "inactions".

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[58] The New Shorter Oxford English Dictionary on Historical Principles; Edited BY Lesley Brown; Clarendon Press; Oxford, Vol. 2; 1993; page 2510.
[59] The New Shorter Oxford English Dictionary on Historical Principles; Edited BY Lesley Brown; Clarendon Press; Oxford, Vol. 1; 1993; page 22.
[60] The New Shorter Oxford English Dictionary on Historical Principles; Edited BY Lesley Brown; Clarendon Press; Oxford, Vol. 1; 1993; page 1331.

G. There is no indication of the trade being affected.

114. Article 16.2.1(a) also requires that the alleged failures of effective enforcement happen "in a manner affecting trade between the Parties". There is, therefore, a clear causal link between the alleged failures of effective compliance and the affectation of trade between the Parties. Article 16.2.1(a) does not refer to *any* affectation of trade between the Parties, but the affectation that is *caused* by the alleged failures of effective compliance.

115. In this regard, the panel request must include, at minimum, a reference to the sectors or specific tariff lines that the complainant considers are being affected by the claimed failures of effective compliance of specified labor laws.

116. The US panel request does not make any other reference besides the assertion that "sustained or recurring failure to effectively enforce…labor laws is in a manner affecting trade between the Parties". With this assertion, considered altogether with the uncertainties and lack of precision described above, leaves Guatemala without any indication as to where to start its research of potential affectation of trade and whether that potential affectation of trade can be attributed to the alleged failures of effective enforcement of labor laws.

117. Consequently, the US panel request is unclear with respect to the element of affectation of trade. This lack of precision affects Guatemala's right to due process and its ability to defend itself.

VI. GUATEMALA HAS SUFFERED PREJUDICE

118. While Guatemala notes that a deficient panel request will fail to meet the requirements of Article 20.6.1 in the light of Article 16.2.1(a), regardless of whether the respondent is able to defend itself,[61] the deficiencies of the US panel request have in fact and, with no doubt, prejudiced Guatemala's ability to defend itself in this dispute.

119. As it is the case for this dispute, the United States decided when to bring its complaint for assessment of this Panel and took as much time as it needed to prepare its offensive case. The time for preparation was even greater if the Panel considers the several suspensions of the proceedings that took place over the last years.

120. By contrast, Guatemala will have a very short deadline to respond to the US first written submission. According to the proposed calendar, Guatemala will have only 28 days to respond.

121. For this reason, it is critical that the panel request provides Guatemala with sufficient clarity as to the case it has to answer in advance of receiving the complainant's first written submission. This due process requirement "is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings".[62]

122. The Appellate Body has explained that, in determining claims of prejudice, "[t]he fundamental issue … is whether a defending party was made aware of the claims presented by the complaining party, sufficient to allow it to defend itself".[63]

123. In the present case, Guatemala cannot even speculate as to the possible nature and scope of the measures at issue and the US claims. As explained earlier, the US panel request fails to describe the measures at issue and fails to inform the defendant of the claims presented by the complaining party. In other words, the US panel request is extremely broad and vague and it does not constitute a solid basis for a dispute.

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[61] Appellate Body Report, *China – Raw Materials*, para. 233.
[62] Appellate Body Report, *Thailand – H-Beams*, para. 95
[63] Appellate Body Report, *Thailand – H-Beams*, para. 95.

124. After carefully reviewing the US panel request, Guatemala can only conclude that the United States is claiming that Guatemala is failing to effectively enforce *any or all* labor laws, with respect *to any or all* labor rights, through the sustained or recurring course of *action or inaction* by the Ministry of Labor or Labor Courts, *among others*, in a manner that is affecting *some or all* trade of goods *and/or* services. Put another way, Guatemala can expect *anything* in the US first written submission and would have only 28 days to prepare its defence.

125. More importantly, the Panel's jurisdiction would be also unclear. If the Panel were to accept the US panel request as it is, the Panel would then have to determine its terms of reference in view of the first written submission and further communications of the United States. That would be in clear contradiction with Article 20.10.4 of the CAFTA-DR. Panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues –if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed".[64]

VII. RULINGS SOUGHT BY GUATEMALA

126. For the reasons explained above, Guatemala respectfully requests the Panel to make a preliminary procedural ruling to find that this dispute is not properly presented before it, as the US panel requests does not meet the minimum requirements to present the problem clearly. Therefore, the Panel must find that it does not have the authority to proceed with the analysis of the merits of this dispute.

127. The faulty US panel request is built upon the broadness and vagueness of the request for cooperative consultations. Neither the US panel request nor the US request for cooperative consultations under Chapter 16 of the CAFTA-DR can be "cured" by any previous or subsequent communication. Even less at this stage of the proceedings.

128. However, this preliminary procedural ruling, in no way, precludes the United States from seeking consultations again with Guatemala under Chapter 16 of the CAFTA-DR and requesting again the establishment of an Arbitral Panel in due course, after fulfilling all its procedural obligations.

129. From a procedural and more immediate perspective, Guatemala respectfully requests the Panel to suspend the timetable provided to the Parties on 26 September 2014 and to establish an expedite procedure to discuss this request for a preliminary procedural ruling.

130. This expedite procedure should provide the United States and Guatemala with ample opportunities to comment on each other's positions.

131. In this regard, Guatemala proposes that the Panel follows the procedures set forth in paragraphs 7 and 8 of the Rules of Procedure by which this request would be considered to be the "initial written submission". The United States would have then the opportunity to file its own "initial written submission". Later on, and sequentially, Guatemala and the United States would have the opportunity to file rebuttal submissions. If the Panel considers it necessary, it could convene a hearing after which it may circulate written questions to the Parties. Finally, the Parties would have an opportunity to present supplementary written submissions and their responses to the Panel's questions. In benefit of transparency and due process, Guatemala also requests an opportunity to receive and make comments to an "Initial Report" from the Panel regarding this request for a preliminary procedural ruling.

132. Guatemala thanks in advance to the Members of the Arbitral Panel for considering positively this request.

[64] Appellate Body Report, *Mexico – HFCS*, para. 36.