

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

**INITIAL WRITTEN SUBMISSION OF THE UNITED STATES**

November 3, 2014

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160	Governmental Accord 1319 (April 9, 1968)



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<b>Short title</b>	<b>Full Citation</b>
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Bananas III (Panel)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/R, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R
<i>Guatemala – Cement I (AB)</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998
<i>India – Patents (US)(AB)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998
<i>Italy – Agricultural Machinery (GATT)</i>	GATT Panel Report, <i>Italian Discrimination Against Imported Agricultural Machinery</i> , L/833, adopted 23 October 1958
<i>Japan – Alcoholic Beverages II (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US – FSC (Article 21.5 – EC)(AB)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010
<i>US – Countervailing and Anti-Dumping Measures (AB)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R, adopted 22 July 2014

## I. INTRODUCTION

1. The effective enforcement of laws relating to international labor rights comprises a critical element of the agreement concluded by the Parties to the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”). The Preamble to the CAFTA-DR memorializes the Parties’ resolution to “[protect], enhance, and enforce basic workers’ rights”, and an important element in achieving this object and purpose of the CAFTA-DR is Chapter Sixteen (Labor). A key obligation in Chapter Sixteen is the obligation of each Party to effectively enforce its domestic labor laws.
2. This submission demonstrates that Guatemala has breached its obligation under Article 16.2.1(a) of the CAFTA-DR by failing to effectively enforce its labor laws, through a sustained and recurring course of inaction, in a manner affecting trade between the Parties.
3. Guatemala’s failures involve workers at over a dozen companies, each in one of four of Guatemala’s major exporting sectors: shipping, apparel, steel and agriculture. At each company, Guatemalan products are either exported to the United States or other CAFTA-DR Parties, or compete in Guatemala with imports from the United States or other CAFTA-DR Parties.
4. The instances that demonstrate Guatemala’s failures recounted and carefully documented in this submission occurred over the course of many years. They involve longstanding complaints of violations of the Guatemalan Labor Code – the foundation of Guatemalan labor law. These instances involve Guatemalan labor laws directly related to the right of association, to the right to organize and bargain collectively, and to acceptable conditions of work.
5. The evidence shows at least 189 instances in which Guatemala has failed to effectively enforce its statutes and regulations directly related to workers’ right of association and right to organize and bargain collectively by not securing compliance with court orders requiring employers to reinstate and compensate workers they wrongfully dismissed for union activities, and to pay a fine for their retaliatory action.
6. The evidence shows at least 197 instances in which Guatemala has failed to effectively enforce its statutes and regulations directly related to acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, by not conducting investigations in accordance with the Labor Code and by not imposing the requisite penalties when it has identified employer violations.
7. The evidence shows at least 16 instances in which Guatemala has failed to effectively enforce its statutes and regulations directly related to the right to organize and to acceptable conditions of work by not registering unions or instituting conciliation processes in a timely fashion.
8. That is, in at least 402 separate instances, Guatemala has failed to effectively enforce its labor laws. With respect to each of the U.S. claims, the instances cited represent a “sustained or recurring” course of inaction “affecting trade between the Parties.” Therefore, the United States respectfully requests that the Panel find that Guatemala has acted inconsistently with its obligation under Article 16.2.1(a) of the CAFTA-DR.

## II. PROCEDURAL HISTORY

9. On July 30, 2010, the United States requested cooperative labor consultations with Guatemala pursuant to CAFTA-DR Article 16.6.1. In its request, the United States stated that Guatemala was failing to meet its obligations under Article 16.2.1(a) with respect to the effective enforcement of Guatemalan labor laws directly related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work. The request specifically stated that the United States had identified significant failures by Guatemala to enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the CAFTA-DR Parties, including: (1) the MOL’s failure to investigate alleged labor law violations; (2) the MOL’s failure to take enforcement action once it had identified a labor law violation; and, (3) the judicial system’s failure to enforce labor court orders in cases involving labor law violations.

10. The consultations request was made after the Office of Trade and Labor Affairs (“OTLA”) of the U.S. Department of Labor, the U.S.-designated contact point for the CAFTA-DR Labor Chapter, received on April 23, 2008, a public submission from the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) and six Guatemalan labor organizations: the Union of Port Quetzal Company Workers (STEPQ); the Union of Izabal Banana Workers (SITRABI); the Union of International Frozen Products Workers (SITRAINPROCSA); the Coalition of Avandia Workers; the Union of Fribo Company Workers (SITRAFRIBO); and, the Federation of Food and Similar Industries Workers of Guatemala (FESTRAS). The public submission alleged that Guatemala was failing to effectively enforce its labor laws.

11. On January 16, 2009, OTLA issued findings and recommendations regarding the public submission. Among its findings, OTLA found that Guatemala’s Ministry of Labor (“MOL”) in several instances had failed to carry out inspections.<sup>1</sup> OTLA also indicated that its “findings suggest serious problems with respect to the enforcement of court orders, most notably protective orders against retaliatory firing and reinstatement orders following unlawful dismissals of union members.”<sup>2</sup>

12. Despite repeated attempts by the United States to address with Guatemala the concerns identified in OTLA’s 2009 Report prior to requesting consultations under Article 16.6.1 of the CAFTA-DR, Guatemala failed to take measures to improve the enforcement of its labor laws.

13. The United States and Guatemala held consultations on September 8-9, 2010, and on December 6, 2010, but were unable to resolve the matter.

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<sup>1</sup> Public Report of Review of Office of Trade and Labor Affairs U.S. Submission 2008-01, Guatemala (January 16, 2009), p. ii (Exhibit 47).

<sup>2</sup> Public Report of Review of Office of Trade and Labor Affairs U.S. Submission 2008-01, Guatemala (January 16, 2009), p. iii (Exhibit 47).

14. On May 16, 2011, the United States requested a meeting of the Free Trade Commission under CAFTA-DR Article 20.5.2. The Commission met on June 7, 2011, but was unable to resolve the dispute.

15. On August 9, 2011, the United States requested the establishment of a panel under CAFTA-DR Article 20.6.1. The Panel was constituted on November 30, 2012.

16. Pursuant to CAFTA-DR Article 20.10.4, the terms of reference of the Panel are: “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.”

### III. ARGUMENT

17. The United States demonstrates in this submission that Guatemala has breached Article 16.2.1(a) of the CAFTA-DR in three ways:

- a) By failing to secure compliance with court orders requiring employers to reinstate and compensate workers wrongfully dismissed for union activities, and to pay a fine for their retaliatory action;
- b) By failing to conduct investigations in accordance with the Labor Code and by failing to impose the requisite penalties when the Ministry of Labor has identified employer violations; and,
- c) By failing to register unions or institute conciliation processes within the time required by law.

18. In each case, these failures occurred through a sustained and recurring course of inaction in a manner affecting trade between the Parties. As such, each of these groups of failures constitutes a separate breach of Article 16.2.1(a). We will discuss each of these in turn.

#### **A. GUATEMALA HAS FAILED TO EFFECTIVELY ENFORCE ITS LABOR LAWS DIRECTLY RELATED TO THE RIGHT OF ASSOCIATION AND TO THE RIGHT TO ORGANIZE AND BARGAIN COLLECTIVELY BY NOT SECURING COMPLIANCE WITH COURT ORDERS, IN BREACH OF CAFTA-DR ARTICLE 16.2.1(A)**

19. Article 16.2.1(a) of the CAFTA-DR provides:

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.

20. A breach of Article 16.2.1(a) thus requires a Party to establish four elements, namely that: 1) the laws in question are “labor laws” within the meaning of the CAFTA-DR; 2) the responding Party has failed to effectively enforce those laws; 3) the responding Party’s failure occurs through a sustained or recurring course of action or inaction; and 4) the failure has occurred in a manner affecting trade between the Parties. The sections below discuss each element in turn.

### **1. The Laws at Issue Are “Labor Laws” Under Article 16.8**

21. The Parties to the CAFTA-DR have committed not to fail to effectively enforce their respective “labor laws.”<sup>3</sup> Under customary rules of interpretation of public international law, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“Vienna Convention”), the text of Article 16.2.1(a) is to be interpreted in good faith in accordance with the ordinary meaning to be given to its words in their context and in the light of the CAFTA-DR’s object and purpose.<sup>4</sup> In addition, under Article 31(4) of the Vienna Convention: “A special meaning shall be given to a term if it is established that the parties so intended.”

22. The CAFTA-DR provides a defined meaning for the term “labor laws.” Article 16.8 defines “labor laws” to mean, in relevant part, “a Party’s statutes or regulations, or provisions thereof, that are directly related to” five internationally recognized labor rights:

- (a) the right of association;
- (b) the right to organize and bargain collectively;
- (c) a prohibition on the use of any form of forced or compulsory labor;
- (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and
- (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.<sup>5</sup>

23. The CAFTA-DR defines “statutes and regulations” with respect to Guatemala as the “laws of its legislative body or regulations promulgated pursuant to an act of its legislative body that are enforceable by action of the executive body.”<sup>6</sup> In this case, the relevant “laws of [Guatemala’s] legislative body” are set out in the Guatemalan Labor Code (“Labor Code”). The Labor Code is a set of statutes originally passed into law by the Guatemalan legislature by decree in 1961 and supplemented or amended regularly through the legislative process.<sup>7</sup> Regulations are promulgated by the Office of the President or, more often, by the Ministry of Labor (MOL).<sup>8</sup>

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<sup>3</sup> CAFTA-DR, Art. 16.2.1(a).

<sup>4</sup> United Nations, Vienna Convention on the Law of Treaties, United Nations Treaty Series, vol. 1155, p. 331, (May 23, 1969), Art. 31.

<sup>5</sup> CAFTA-DR, Art. 16.8.

<sup>6</sup> CAFTA-DR, Art. 16.8.

<sup>7</sup> Decree 1441 (May 5, 1961) (Exhibit 48). These statutes come into effect through the issuance of a legislative decree. Certain other legal provisions outside the Code, such as the Judicial Organization Law or the Criminal Procedures Law, have a role in the procedural aspects of the judicial process under the Labor Code. The

24. This first part of the submission concerns Guatemala’s failure to enforce certain statutes and regulations directly related to the “right of association” and the “right to organize and bargain collectively”. The laws at issue with respect to these rights include Articles 10, 62(c), 209, 223, 379 and 380 of the Guatemalan Labor Code. As discussed below, these Articles protect workers from reprisals by employers for exercising their right of association and right to organize and bargain collectively. In particular, these provisions prohibit employers from dismissing workers for participating in the formation of a union or for undertaking to resolve employment differences through the statutory conciliation process.

25. The Labor Code forbids, in Article 10, “reprisals of any kind against workers designed to partially or fully prevent them from exercising their rights under the Constitution, [the Labor] Code, its Regulations, or other labor or social welfare laws, or because they have exercised or attempted to exercise such rights.”<sup>9</sup>

26. Article 10 applies to two types of reprisals of relevance here. First, absent good cause, employers are expressly prohibited from dismissing workers “for participating in the formation of a union.”<sup>10</sup> This protection, as codified in Article 209, is in effect from the moment the workers inform the General Labor Inspectorate in writing that they are forming a union until 60 days after the registration of the union.<sup>11</sup> This protection is related to the prohibition on employers found in Article 62(c) against forcing or trying to force employees to withdraw from unions.<sup>12</sup> Members of a union’s executive committee and provisional executive committee enjoy additional protections. Article 223 of the Code prohibits employers from dismissing such members absent good cause “during their terms of office or during the 12-month period after their term has expired.”<sup>13</sup>

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Constitution likewise makes reference to the internationally recognized labor rights, to which Guatemalan law gives domestic effect. These conventions have been adopted into law and are treated as statutes. Political Constitution of the Republic of Guatemala (2002), Art. 102(t) (Exhibit 124).

<sup>8</sup> The Ministry of Labor issues regulations called Ministerial Accords elaborating upon the standards found in the Labor Code.

<sup>9</sup> Guatemalan Labor Code (“GLC”), Art. 10 (“It is forbidden to take reprisals of any kind against workers designed to partially or fully prevent them from exercising their rights under the Constitution, this Code, its Regulations, or other labor or social welfare laws, or because they have exercised or attempted to exercise such rights.”). The entire Code is provided as Exhibit 49.

<sup>10</sup> GLC, Art. 209 (“Workers may not be dismissed for participating in the formation of a union. They shall enjoy protection from being removed from the moment they inform the General Labor Inspectorate, by any written means directly or through the Inspectorate’s delegation in their jurisdiction, that they are forming a union, and they shall enjoy that protection up to sixty days after the registration of that union.”).

<sup>11</sup> GLC, Art. 209.

<sup>12</sup> GLC, Art. 62(c).

<sup>13</sup> GLC, Art. 223(d) (“The members of the Executive Committee shall not be removed from their employment during their terms of office or during the twelve-month period after their term has expired. Said members shall not be discharged during the aforementioned period unless there is good cause for their discharge, duly demonstrated by the employer in a regular trial in the labor court of competent jurisdiction; The benefit provided in this paragraph shall also be enjoyed by all the members of the Provisional Executive Committee of a union or association that is in the organization process. To be entitled to such benefit, they shall notify the General Labor Inspectorate of their election, whereupon the benefit shall take effect[.]”).

27. Second, employers are also prohibited from engaging in reprisals or impeding the exercise of workers' rights during the statutory conciliation process undertaken to resolve a collective conflict between a group of workers and the employer. After a worker or group of workers submits a list of grievances underlying the collective conflict to a labor court, all employees are protected from dismissal absent the permission of the court. Employers must obtain authorization from the labor court prior to terminating an employment contract during that period.<sup>14</sup>

28. Accordingly, Articles 10, 62(c), 209, 223, 379 and 380 of the Labor Code generally provide for the protection of the right of association and the right to bargain collectively by restricting certain employer actions and providing recourse to employees whose rights are infringed. As such, these laws are "directly related to" the rights of association and to bargain collectively, and therefore are "labor laws" within the meaning of Article 16.8 of the CAFTA-DR.

## **2. Guatemala Has Failed To Effectively Enforce Labor Code Articles 10, 62(c), 209, 223, 379 and 380**

### **a) "A Party Shall Not Fail To Effectively Enforce"**

29. The central tenet of CAFTA-DR Article 16.2.1(a) is each Party's obligation to effectively enforce its labor laws. According to its dictionary definition, to "enforce" means to "compel," such as to compel obedience or to require the operation, observance, or protection of law.<sup>15</sup> The terms "effectively" and "effective" are defined as "with great effect" and "productive of results."<sup>16</sup> It follows that to "effectively enforce" a law, a government must compel compliance with the law in a way that produces results, putting an end to the conduct that was contrary to the law. Finally, to "fail" to meet an obligation means to "miss attainment" or to "fall short" of the obligatory outcome, or to "neglect" the obligation.<sup>17</sup> As part of Article 16.2.1(a), which takes the converse, the obligation to "not fail" to effectively enforce requires each Party to follow through with its commitment to put an end to conduct contrary to law; it must attain compliance.

30. The context of Article 16.2.1(a) supports this interpretation of "effectively enforce." For example, Article 16.1.1 requires that Parties strive to ensure that "labor principles" and certain "internationally recognized labor rights" are "protected by its law." Further, Article 16.2.2 requires each Party to strive to ensure that it does not waive or derogate from its labor laws as an

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<sup>14</sup> GLC, Art. 379 ("As soon as the list of grievances is submitted to the respective judge, the dispute shall be considered submitted for the sole purpose of barring the employer and workers from taking any reprisals whatsoever against each other or impeding the exercise of their rights."); GLC, Art. 380 ("Following submission of the list of grievances, any termination of employment contracts at the company where the dispute arose, even in the case of workers who have not signed the list of grievances or were not party to the respective dispute, must be authorized by the judge, who shall respond to this motion, and the final decision in the case shall not prejudice whether the dismissal is found to be just.").

<sup>15</sup> Webster's Third New International Dictionary, Unabridged (2003), definition of "enforce."

<sup>16</sup> Webster's Third New International Dictionary, Unabridged (2003), definitions of "effectively" and "effective."

<sup>17</sup> Webster's Third New International Dictionary, Unabridged (2003), definition of "fail."

encouragement to trade or investment. This context, in light of the object and purpose of the Agreement, further suggests that the Parties’ commitment to effectively enforce their respective labor laws is designed to prevent incursions or limitations on those rights in a manner affecting trade.

31. The emphasis on “enforcement” in the CAFTA-DR begins as early as the Agreement’s preamble, in which the Parties make clear that one of the objects and purposes of the CAFTA-DR is to “protect, enhance, and enforce basic workers’ rights and strengthen their cooperation on labor matters.” This object and purpose is then realized through the various provisions of Chapter 16, including in particular the obligations contained in Articles 16.1 and 16.2.

32. In sum, by agreeing under the CAFTA-DR that each Party “shall not fail to effectively enforce” its labor laws, each Party has committed to take those actions necessary to compel compliance with its labor laws so as to enforce those laws with substantial effect or result. Therefore, where a Party’s enforcement undertakings do not achieve remediation of labor law violations, that Party has failed to effectively enforce its labor laws.

b) Enforcement of Articles 10, 62(c), 209, 223, 379 and 380 under Guatemalan Law

33. With respect to enforcement of Articles 10, 62(c), 209, 223, 379 and 380, Guatemala has established certain mechanisms to compel compliance with these and other labor laws. Despite the existence of these mechanisms, Guatemala has failed to effectively enforce these laws within the meaning of Article 16.2.1(a).

34. As described below, Guatemala relies upon both its administrative system, through the Guatemalan Ministry of Labor, and its judicial system, through the Guatemalan labor courts, to enforce Articles 10, 62(c), 209, 223, 379 and 380 of the Labor Code.

35. Guatemalan law provides procedures for workers to file claims with the Ministry of Labor regarding incidents or conditions that they believe constitute labor violations<sup>18</sup> and obligates the Ministry of Labor to investigate those claims.<sup>19</sup> Labor inspectors of the Ministry’s General Labor Inspectorate (GLI) are required to intervene in all labor difficulties and disputes about which they receive notice.<sup>20</sup> The GLI “as part of its duty to monitor strict compliance with labor and social welfare laws and regulations” must “urge or carry out the examination and

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<sup>18</sup> “Labor and social and welfare violations comprise all acts or omissions committed against the provisions of [the] Code or of any other labor or social welfare law that are penalized with a fine.” GLC, Art. 269.

<sup>19</sup> GLC, Art. 278 (the GLI, “through its corps of inspectors . . . , shall ensure that employers . . . comply with and respect the laws, collective, agreements, and regulations”); GLC, Art. 274 (the MOL “must monitor the development, improvement, and application of all legal provisions relating to these matters that are not under the jurisdiction of the courts”); and, GLC, Art. 204 (“All labor and health authorities shall cooperate to ensure proper enforcement of the provisions of this chapter and its regulations”).

<sup>20</sup> GLC, Art. 281(e).



completion of procedures regarding labor offenses reported by labor inspectors and social workers and ensure that the respective penalties are imposed.”<sup>21</sup>

36. The Guatemalan judiciary also plays an important role in enforcing the country’s labor laws. The labor courts are specialized standing courts within the judicial system. They adjudicate claims brought directly by individual workers, employers or the Ministry of Labor; impose penalties where appropriate; as well as oversee the dispute resolution system created by the Code to resolve conflicts between workers and employers (“conciliation”).

37. When an employer improperly dismisses a worker in violation of the above-referenced laws, the worker may petition a labor court for an order requiring the employer to reinstate him or her and to pay any lost wages or benefits.<sup>22</sup> Where the court decides such a case in favor of the worker, it also imposes a fine on the employer for the violation.<sup>23</sup> An employer that fails to comply with such an order is subject to disciplinary measures, additional fines and criminal sanction.<sup>24</sup>

38. Where a worker is dismissed for participating in union formation, the Code requires the worker to be reinstated within 24 hours.<sup>25</sup> The Code also mandates that the employer be penalized with a fine and that the employer pay the missing wages and economic benefits owed to the worker.<sup>26</sup>

39. Where an employer has dismissed workers during the protected conciliation period, the Code again requires that the employer “immediately repair the damage done to the workers [through reinstatement] and pay the salaries and benefits they would have received;”<sup>27</sup> the court shall also impose a fine.<sup>28</sup>

40. Under both circumstances, if the employer fails to remedy the violation after seven days, the court is required to increase the fine by 50 percent.<sup>29</sup> If the failure to comply persists, the labor judge shall refer the matter for criminal sanction to the Public Ministry, the agency responsible for criminal prosecution of Guatemalan law.<sup>30</sup>

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<sup>21</sup> GLC, Art. 280.

<sup>22</sup> GLC, Art. 380.

<sup>23</sup> GLC, Art. 380.

<sup>24</sup> GLC, Arts. 272(g).

<sup>25</sup> GLC, Art. 209.

<sup>26</sup> GLC, Art. 209.

<sup>27</sup> GLC, Arts. 379, 380.

<sup>28</sup> GLC, Arts. 379, 380.

<sup>29</sup> GLC, Arts. 209, 379, 380. GLC Article 426 describes how fines and back pay are to be collected, and under what time constraints. It first obliges the judge to order payment within three days of issuing the decision on the merits. After a 24-hour opportunity to request rectification of any calculation errors, the party paying the fine must do so within three days at risk of seizure of its assets. Following any seizure of assets, the Code provides that an auction will take place within ten days.

<sup>30</sup> GLC, Art. 380.

41. The reinstatement and compensation order shall include the appointment of an executor to ensure that the worker is properly reinstated:

The judge shall act immediately upon learning *ex officio* or through a complaint of the failure to follow the indicated procedure. In the latter case, the judge's order to reinstate must be issued within 24 hours of the court's receipt of the complaint, and, in that order, the judge shall appoint a court employee to act as the executor of the order and enforce the reinstatement.<sup>31</sup>

42. Should an employer fail to comply with a court order, including the payment of court-ordered fines, the court shall impose disciplinary measures, namely additional fines of six to 18 times the minimum monthly wage, and referral to the criminal process.<sup>32</sup> The worker, as a party to the case, should be notified of any such referral by the labor court.

43. An employer who disobeys a reinstatement order is subject to criminal sanction.<sup>33</sup> Judges must report certain violations or omissions in civil or administrative cases by certifying them to the Public Ministry for criminal prosecution:

[w]hen the proceedings . . . indicate that a violation has occurred that is penalized by [labor laws] . . . the judge, when issuing his decision, shall order certification [to the Public Ministry] as appropriate and shall refer the certification to the court that must rule on the matter.<sup>34</sup>

44. In other words, where applicable, it falls on the labor judge to refer the matter to criminal proceedings. Likewise, the Guatemalan Code of Criminal Procedure requires officers and public employees, including judges, to report “crimes against the public” which include non-compliance with court orders.<sup>35</sup>

45. Absent an appeal or vacatur of an order, once a court issues a reinstatement order, the court executor is to ensure that the worker returns to the worker's prior post with appropriate back pay and that the employer pays the fine also ordered by the court. Where an employer refuses to reinstate or pay the worker appropriately, criminal sanctions should be pursued to be able to realize the relief provided by the order. To not pursue or effectuate these actions is to deny workers the rights afforded by these Articles.

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<sup>31</sup> GLC, Art. 380.

<sup>32</sup> GLC, Arts. 270-272; see also Guatemalan Judicial Organizations Law (March 28, 1989), Art. 179 (“Coercive measures will be imposed by the Courts so that their rulings are obeyed, against persons who have refused to obey them within the corresponding time periods, with the exception of a warning which will be imposed from the first ruling that establishes the mandate of the judge.”) (Exhibit 54).

<sup>33</sup> Guatemalan Penal Code (July 27, 1973), Art. 414 provides: “Whoever openly disobeys an order of an official, authority or agent of authority, issued in the legitimate exercise of his or her duties, will be sanctioned with a fine of 50,000 quetzals” [approx. 6500 USD] (Exhibit 53).

<sup>34</sup> GLC, Art. 364.

<sup>35</sup> Guatemalan Code of Criminal Procedure (December 7, 1992), Art. 298 states: “The following must report any knowledge they have about crimes against the public . . . without delay: (1) Officers and public employees that become aware of the fact in the exercise of their duties” (Exhibit 52).

46. As noted above, the Ministry of Labor is required to initiate the sanction process in the labor court where an employer has not complied with its warning. Likewise, some cases concerning labor violations are brought by workers to the courts, after the administrative process has been exhausted.<sup>36</sup>

47. Guatemalan workers also have an opportunity to resolve collective conflicts -- that is, those that could lead to a strike, work stoppage, or similar conflict<sup>37</sup> -- through the alternative conflict resolution process of conciliation overseen by the labor court. When a group of workers submits a list of grievances, the labor court is obligated to take steps to set up a conciliation tribunal, including representatives from both sides.<sup>38</sup> This process is intended to move very quickly – within a matter of days.

48. In addition to commencing a conciliation, the submission of the list of grievances triggers an additional protection for workers, prohibiting employers from carrying out reprisals or creating any impediment to the workers’ exercise of their rights while the conflict resolution process is ongoing.<sup>39</sup> Should an employer nevertheless dismiss workers during the protected conciliation period, the court shall penalize the employer with a fine<sup>40</sup> and require that the employer “immediately repair the damage done to the workers and pay the salaries and benefits they would have received.”<sup>41</sup>

49. The labor courts apply a similar sanction in case of employer violations of Article 209 of the Code concerning reprisals for union formation. Courts must order employers that they have found to be non-compliant to reinstate the worker, reimburse him or her for lost wages, and pay a fine. If the employer persists in this conduct for more than seven days, the court shall increase the fine by 50 percent.<sup>42</sup>

50. The labor courts are responsible for enforcing their own orders through court-appointed executors, among other means.<sup>43</sup> Article 380 of the Code, addressing reinstatement of workers

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<sup>36</sup> Legal Expert Report of Alejandro Argueta (October 14, 2014), p. 5 (Exhibit 50).

<sup>37</sup> “Collective conflict of an economic character” is a term of art in the Labor Code, referring to the conflict between employers and workers arising out of the employer’s treatment of the workers, including working conditions, as articulated in Title VII of the Labor Code. It is defined in Title VII and Title XII, which addresses the resolution of a collective conflict, as a conflict that could lead to a work stoppage or strike.

<sup>38</sup> GLC, Arts. 377, 381.

<sup>39</sup> GLC, Art. 379 (“As soon as the list of grievances is submitted to the respective judge, the dispute shall be considered submitted for the sole purpose of barring the employer and workers from taking any reprisals whatsoever against each other or impeding the exercise of their rights.”).

<sup>40</sup> GLC, Arts. 379, 380.

<sup>41</sup> GLC, Arts. 379, 380.

<sup>42</sup> GLC, Art. 209. GLC Article 426 describes how fines and back pay are to be collected, and under what time constraints. It first obliges the judge to order payment within three days of issuing the decision on the merits. After a 24-hour opportunity to request rectification of any calculation errors, the party paying the fine must do so within three days at risk of seizure of its assets. Following any seizure of assets, the Code provides that an auction will take place within ten days.

<sup>43</sup> GLC, Art. 269 (“The authority that has imposed the penalty shall immediately proceed to enforce collection of the fine as set forth in Articles 426 through 428 of this Code”); GLC, Art. 283 (“Conflicts related to labor and social welfare shall be subject to the exclusive jurisdiction of the Labor and Social Welfare Courts, which shall adjudicate

wrongfully dismissed during conciliation, provides: “the judge’s order to reinstate must be issued within 24 hours of the court’s receipt of the complaint, and, in that order, the judge shall appoint a court employee to act as the executor of the order and enforce the reinstatement.”<sup>44</sup> For example, three court executors in Guatemala City are charged with verifying compliance with all such reinstatement orders in the Guatemala City area and coordinating with executors in other departments to verify compliance throughout the country.<sup>45</sup>

51. Should an employer fail to comply with a court order, including the payment of court-ordered fines, the labor court should impose disciplinary measures, namely the imposition of additional fines<sup>46</sup> and reporting the non-compliance to the Public Ministry for possible criminal sanction.<sup>47</sup>

52. The non-reinstatement of the worker or non-payment of compensation and fines owed is evidence of a failure to effectively enforce the law, namely one or more of Articles 10, 62(c), 209, 223, 379 and 380.

c) By Not Compelling Compliance with Court Orders, Guatemala Has Failed to Effectively Enforce Articles 10, 62(c), 209, 223, 379 and 380 of the Labor Code

53. The facts discussed below demonstrate that Guatemala failed to effectively enforce certain of its labor laws directly related to the right of association and to the right to organize and bargain collectively. Specifically, the evidence demonstrates that: (1) employers dismissed workers for forming a union in violation of Articles 10, 62(c), 209 and 223, or for seeking to resolve claims through conciliation in violation of Articles 10, 62(c), 223, 379 and 380; (2) Guatemalan courts issued orders for reinstatement and back pay; and, (3) in most cases, contrary to the statutory requirements, no effective action was undertaken by Guatemala to ensure compliance with the order or to otherwise ensure remediation of the violation.

Industria de Representaciones de Transporte Marítimo (“ITM”)

54. On February 19, 2008, a Guatemalan labor court found that a shipping company called Industria de Representaciones de Transporte Marítimo (“ITM”) had violated Article 209 of the Guatemalan Labor Code by dismissing 14 stevedores who had been engaged in the formation of a union.<sup>48</sup> The labor court ordered that each stevedore be reinstated with back pay and benefits,

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such conflicts and enforce the resulting decisions”); GLC, Art. 425 (“Judgments shall be executed by the judge who issued them in the Trial Court.”).

<sup>44</sup> GLC, Art. 380.

<sup>45</sup> Accord 26-2012, Guatemalan Supreme Court (May 29, 2012) (Exhibit 51).

<sup>46</sup> GLC, Art. 272(a).

<sup>47</sup> GLC, Art. 364; Code of Criminal Procedure, Art. 298(1) (Exhibit 52); Penal Code, Art. 414 (Exhibit 53). See also Judicial Organizations Law, Art. 179 (“Coercive measures will be imposed by the Courts so that their rulings are obeyed, against persons who have refused to obey them within the corresponding time periods, with the exception of a warning which will be imposed from the first ruling that establishes the mandate of the judge”) (Exhibit 54).

<sup>48</sup> 14 reinstatement orders (February 19, 2008) (Exhibit 55); Letter from the Ministry of Labor with attached information regarding the union confederation UNSITRAGUA to B (January 21, 2009) (Exhibit 56).

and the court imposed a fine on ITM.<sup>49</sup> ITM refused to reinstate any of the 14 workers, nor did it pay the wages and benefits owed to them.<sup>50</sup>

55. In response to ITM’s failure to comply, the labor court certified each of the 14 stevedores’ cases to the Public Ministry for possible criminal sanction.<sup>51</sup> The Public Ministry has not pursued a criminal penalty, nor has the labor court increased the penalties against the company due to the continued non-compliance, as provided for under the law.<sup>52</sup> Accordingly, Guatemala has failed to effectively enforce Articles 10, 62(c) and 209 which protect workers from reprisals and require that the workers be reinstated and receive the wages and benefits owed to them.

#### Negocios Portuarios, S.A., (“NEPORSA”)

56. Between June 2008 and September 4, 2008, a Guatemalan labor court found that another shipping company, Negocios Portuarios, S.A., (“NEPORSA”) wrongly dismissed 40 stevedores in retaliation for their participation in the formation of a union.<sup>53</sup> The court issued reinstatement orders for 40 NEPORSA stevedores, mandating that the workers return to their jobs and receive back pay and benefits, and fined NEPORSA.<sup>54</sup> NEPORSA failed to reinstate the workers or provide the wages and benefits ordered by the court.<sup>55</sup>

57. For each order, in response to the company’s non-compliance, the court certified the matter to the Public Ministry for possible criminal sanction.<sup>56</sup> The Public Ministry has not pursued a criminal penalty, nor has the labor court increased the penalties against the company, as provided for under the law.<sup>57</sup> Accordingly, Guatemala has failed to effectively enforce Articles 10, 62(c) and 209 with respect to these workers.

#### Operaciones Diversas (“ODIVESA”)

58. On June 24, 2008, and August 25, 2008, a Guatemalan labor court found that shipping company Operaciones Diversas (“ODIVESA”) wrongfully dismissed on May 15, 2008, at least

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<sup>49</sup> 14 reinstatement orders (February 19, 2008) (Exhibit 55).

<sup>50</sup> Statements from A, B, C, D, E, F (May 29 - June 1, 2014) (Exhibits 1-6); email communication from NNN, Coordinators’ Committee, UNSITRAGUA Histórica (October 15, 2014) (stating that none of the stevedores has been reinstated) (Exhibit 58).

<sup>51</sup> Letter from the Ministry of Labor with attached information regarding the union confederation UNSITRAGUA to B (January 21, 2009) (Exhibit 56).

<sup>52</sup> See GLC, Arts. 270-272.

<sup>53</sup> 40 reinstatement orders (February 19, 2008) (Exhibit 57).

<sup>54</sup> 40 reinstatement orders (February 19, 2008) (Exhibit 57).

<sup>55</sup> Four of the dismissed stevedores have attested to their non-reinstatement. Statement of G (May 31, 2014) (Exhibit 7); Statement of D (May 30, 2014) (Exhibit 4); Statement of H (May 29, 2014) (Exhibit 8); and, Statement of B (May 29, 2014) (Exhibit 2). See also email communication from NNN, Coordinators’ Committee, UNSITRAGUA Histórica (October 15, 2014) (stating that none of the stevedores has been reinstated) (Exhibit 58).

<sup>56</sup> Letter from the Ministry of Labor with attached information regarding the union confederation UNSITRAGUA to B (January 21, 2009) (Exhibit 56).

<sup>57</sup> See GLC, Arts. 270-272.

11 stevedores who, it concluded, had engaged in union-forming activities.<sup>58</sup> The labor court found that, for each of the 11 stevedores, ODIVESA's dismissal of the worker violated Articles 209 and 223 of the Labor Code, which protect the executive committee and workers participating in the formation of the union from dismissal.<sup>59</sup> The labor court ordered that each stevedore be reinstated with back pay and benefits and that ODIVESA be fined.<sup>60</sup>

59. As of October 15, 2014, six stevedores remained to be reinstated.<sup>61</sup>

60. The labor court did not refer the matter for possible criminal sanction or increase the penalties due to the continued noncompliance, as provided for under the law.<sup>62</sup> Accordingly, Guatemala has failed to effectively enforce Articles 10, 62(c), and 209 with respect to these workers.

### Fribo

61. On April 1, 2009, a Guatemalan labor court concluded that an apparel manufacturer called Fribo had illegally dismissed 24 workers for their involvement in the formation of a workers' union on March 17, 2009.<sup>63</sup> The court ordered that the workers be reinstated with back pay, and fined the company.<sup>64</sup>

62. On July 10, 2009, 15 of the 24 workers were reinstated; however, they were not paid the back pay or benefits mandated by their reinstatement order.<sup>65</sup> Even when reinstated, many of these workers were posted to positions with less pay.<sup>66</sup> The failure to reinstate the remaining workers and provide them back pay and benefits, and, for the workers that were reinstated, the failure to provide back pay and benefits and to reinstate the workers at their former pay levels, was in violation of Articles 10, 62(c), and 209.

63. By not taking further action to increase the penalties against the company or refer the matter to the Public Ministry for criminal sanction, Guatemala failed to effectively enforce Articles 10, 62(c), and 209 with respect to these workers.

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<sup>58</sup> Letter from the Ministry of Labor with attached information regarding the union confederation UNSITRAGUA to B (January 21, 2009) (Exhibit 56). 11 reinstatement orders (June 24, 2008, and August 25, 2008) (Exhibit 59).

<sup>59</sup> 11 reinstatement orders (June 24, 2008, and August 25, 2008) (Exhibit 59).

<sup>60</sup> 11 reinstatement orders (June 24, 2008, and August 25, 2008) (Exhibit 59).

<sup>61</sup> Email communication from NNN, Coordinators' Committee, UNSITRAGUA Histórica (October 15, 2014) (stating that none of the stevedores has been reinstated) (Exhibit 58). Three of the dismissed stevedores have attested to their non-reinstatement at ODIVESA as of that date. Statement of I (May 28, 2014) (Exhibit 9); Statement of J (May 28, 2014) (Exhibit 10); and, Statement of F (May 29, 2014) (Exhibit 6). The other five stevedores agreed to settle with ODIVESA for lesser amounts than what they were owed.

<sup>62</sup> See GLC, Arts. 270-272.

<sup>63</sup> Reinstatement Order (April 1, 2009) (Exhibit 60); Statement of K, L, M, N, O (June 24, 2014) (Exhibit 11).

<sup>64</sup> Reinstatement Order (April 1, 2009) (Exhibit 60); Statement of K, L, M, N, O (June 24, 2014) (Exhibit 11).

<sup>65</sup> Adjudication (July 10, 2009), p. 2 (Exhibit 61); Statement of K, L, M, N, O (June 24, 2014), pp. 2-3 (Exhibit 11).

<sup>66</sup> Statement of P (March 24, 2010), p. 1 (Exhibit 12); Statement of Q (March 24, 2010), p. 1 (Exhibit 13); Statement of R (March 24, 2010), p. 1 (Exhibit 14).

64. Further, on August 21, 2009, the company paid part of the salaries and benefits owed to its workers.<sup>67</sup> While under the law the workers were entitled to reinstatement and full back pay, Guatemalan officials urged the workers to accept the reduced payment rather than to seek the full amount of the relief to which they were entitled.<sup>68</sup> Some workers agreed to settle their differences with the company for these lesser amounts,<sup>69</sup> often at the urging of Guatemala, contrary to the workers' rights and Article 12 of the Labor Code.<sup>70</sup>

65. Accordingly, by not compelling compliance to ensure that workers receive the benefits owed to them, Guatemala has failed to effectively enforce Articles 10, 62(c), and 209 with respect to these workers.

66. Just as Guatemala failed to effectively enforce Articles 10, 62(c), 209 and 223 of the Labor Code through the sustained and recurring course of inaction involving the five companies discussed above, Guatemala has also failed to effectively enforce Articles 10, 62(c), 223, 379 and 380 of the Labor Code, as illustrated by experiences at the following five companies, which took illegal reprisal actions against their workers in the context of the conciliation process.

Representaciones de Transporte Marítimo, S.A. (“RTM”)

67. On July 22, 2010, workers from Representaciones de Transporte Marítimo, S.A. (“RTM”) commenced a conciliation process to resolve a conflict between the RTM workers and the company, submitting their list of grievances to a labor court.<sup>71</sup> On August 18 and 19, 2010, the employer dismissed in reprisal at least 12 workers representing the workers in the conciliation process.<sup>72</sup>

68. On August 19, 23, and 25, 2010, a Guatemalan labor court found that RTM had dismissed each of the 12 workers in contravention of Article 379.<sup>73</sup> The court ordered that each be reinstated and paid outstanding wages and benefits.<sup>74</sup> The court also fined RTM.<sup>75</sup>

69. As of May 2014, RTM had not reinstated six of the dismissed stevedores or paid them back wages or benefits.<sup>76</sup> Further, for four of the August 2010 court orders, RTM failed to pay the court-imposed fine.<sup>77</sup>

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<sup>67</sup> The company closed on that day. Statement of K, L, M, N, O (June 24, 2014), p. 3 (Exhibit 11).

<sup>68</sup> Statement of K, L, M, N, O (June 24, 2014), p. 3 (Exhibit 11).

<sup>69</sup> Statement of K, L, M, N, O (June 24, 2014), p. 3 (Exhibit 11).

<sup>70</sup> Statement of K, L, M, N, O (June 24, 2014), p. 3 (Exhibit 11). GLC, Art. 12 (“Any act or stipulation that entails the waiver, limitation or alteration of the rights granted to employees under the Constitution of the Republic, this Code, its regulations and all other labor and social welfare laws is ipso jure null and void”).

<sup>71</sup> 12 reinstatement orders (August 19, 23, 25, 2010) (Exhibit 62).

<sup>72</sup> 12 reinstatement orders (August 19, 23, 25, 2010) (Exhibit 62); Statement of S (May 31, 2014) (Exhibit 15); Statement of G (May 31, 2014) (Exhibit 7); Statement of U (May 28, 2014) (Exhibit 16); Statement of I (May 28, 2014) (Exhibit 9); Statement of J (May 28, 2014) (Exhibit 10); Statement of V (May 28, 2014) (Exhibit 17).

<sup>73</sup> 12 reinstatement orders (August 19, 23, 25, 2010) (Exhibit 62).

<sup>74</sup> 12 reinstatement orders (August 19, 23, 25, 2010) (Exhibit 62).

<sup>75</sup> 12 reinstatement orders (August 19, 23, 25, 2010) (Exhibit 62).

70. The court failed to refer the violations for criminal sanctions or to increase the fines for noncompliance with its orders<sup>78</sup>, as provided for under the law.<sup>79</sup> This inaction demonstrates Guatemala's failures to effectively enforce Articles 10, 62(c), 379 and 380, which protect workers from reprisals for participating in the conciliation process.

### Mackditex

71. On September 13, 2011, workers at apparel manufacturer Mackditex commenced a conciliation process by submitting a list of grievances to a labor court.<sup>80</sup> Shortly thereafter, on October 6, 7, and 8, 2011, Mackditex dismissed 17 workers who were involved in the submission of the list of grievances.<sup>81</sup>

72. On October 11, 2011, the Ministry of Labor issued a report finding that the dismissals of the 17 workers violated Article 379 of the Labor Code.<sup>82</sup> On November 21, 2011, a Guatemalan labor court ordered that Mackditex reinstate the workers and pay them their wages and benefits for the period of their dismissal.<sup>83</sup> Nearly three years following the issuance of the reinstatement orders, the workers have not been reinstated.<sup>84</sup>

73. The court failed to refer the violations for criminal sanctions or to increase the fines for noncompliance with its orders, as provided for under the law.<sup>85</sup> This inaction demonstrates Guatemala's failure to effectively enforce Articles 10, 62(c), 379 and 380, which protect the workers from reprisals for participating in the conciliation process.

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<sup>76</sup> Statement of S (May 31, 2014) (Exhibit 15); Statement of G (May 31, 2014) (Exhibit 7); Statement of U (May 28, 2014) (Exhibit 16); Statement of I (May 28, 2014) (Exhibit 9); Statement of J (May 28, 2014) (Exhibit 10); Statement of V (May 28, 2014) (Exhibit 17).

<sup>77</sup> The court failed to serve one of its orders of reinstatement and fines on the employer. Legal Expert Report of Alejandro Argueta (July 23, 2014), p. 5 (Exhibit 63).

<sup>78</sup> Legal Expert Report of Alejandro Argueta (July 23, 2014) (Exhibit 63).

<sup>79</sup> See GLC, Arts. 272 and 380; Code of Criminal Procedure, Art. 298 (Exhibit 52); and Penal Code, Art. 414 (Exhibit 53).

<sup>80</sup> Collective Conflict, List of Grievances (September 13, 2011) (Exhibit 64).

<sup>81</sup> Request for Reinstatement (October 12, 2011) (Exhibit 65); Statement of W and Z (June 25, 2014), pp. 1-2 (Exhibit 18); Statement of Y, Z, AA (June 25, 2014), p. 1 (Exhibit 19); Inspector's Report (October 11, 2011), p. 2 (Exhibit 66).

<sup>82</sup> Inspector's Report (October 11, 2011) (Exhibit 66). The Ministry also concluded that the employer violated Article 209, which prohibits dismissals for participation in the formation of a union as these workers had also been involved in the creation of the Mackditex union.

<sup>83</sup> Reinstatement Order (November 21, 2011) (Exhibit 67).

<sup>84</sup> Statement of W and Z (June 25, 2014), p. 2 (Exhibit 18); Statement of Y, Z, AA (June 25, 2014), p. 7 (Exhibit 19).

<sup>85</sup> See GLC, Arts. 272 and 380; Code of Criminal Procedure, Art. 298 (Exhibit 52); and Penal Code, Art. 414 (Exhibit 53).



### Alianza

74. On March 25, 2010, a group of workers from another apparel manufacturer, Alianza, commenced a conciliation through the labor court.<sup>86</sup> The same day, the court ordered that the workers not be terminated absent judicial authorization in accordance with the Labor Code.<sup>87</sup> On March 26, 2010, Alianza dismissed the 33 workers who had initiated the conciliation the day before, in violation of Article 379.<sup>88</sup> The same day, the labor court issued an order for Alianza to reinstate the improperly dismissed workers<sup>89</sup> and fined the company in accordance with the Code, giving Alianza seven days to comply.<sup>90</sup>

75. Alianza did not reinstate any of the 33 workers; 30 eventually signed settlements with the employer for less pay, contrary to what the court had ordered.<sup>91</sup>

76. The experience of the Alianza workers again demonstrates the labor courts' failure to take the necessary action to ensure compliance with their orders, as provided for under the law.<sup>92</sup> This inaction demonstrates Guatemala's failure to effectively enforce Articles 10, 62(c) and 379, which protect the workers from reprisals for participating in the conciliation process.

### Avandia

77. On November 13, 2006, six workers at apparel manufacturer Avandia filed a list of grievances with a labor court on behalf of themselves and 24 other workers.<sup>93</sup> On the same day, the court issued a resolution accepting the list of grievances and recognizing the collective conflict.<sup>94</sup>

78. The following day, nine workers were dismissed in violation of Article 379.<sup>95</sup> On November 22, 2006, a labor court ordered their reinstatement.<sup>96</sup> On August 6, 2007, Avandia reinstated two of the nine workers, but assigned them to lesser paying positions.<sup>97</sup>

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<sup>86</sup> Collective Conflict, List of Grievances (March 24, 2010) (Exhibit 68).

<sup>87</sup> Reinstatement Order (March 26, 2010) (Exhibit 69).

<sup>88</sup> Reinstatement Order (March 26, 2010) (Exhibit 69).

<sup>89</sup> Reinstatement Order (March 26, 2010) (Exhibit 69).

<sup>90</sup> Reinstatement Order (March 26, 2010) (Exhibit 69).

<sup>91</sup> Statement of BB and CC (July 2, 2014) (Exhibit 21); Statement of III and MMM (July 2, 2014), p. 2 (Exhibit 22); Statement of HHH (July 2, 2014), p. 2 (Exhibit 23); Statement of III, KKK, LLL (July 2, 2014), p. 2 (Exhibit 24); Statement of III and JJJ (July 2, 2014), p. 1 (Exhibit 25). See also Corruption and Greed: Alianza Fashion Sweatshop in Guatemala, Institute for Global Labour and Human Rights, (January 2014), available in Spanish at <http://www.globallabourrights.org/reports/alianza-fashion-guatemala-2014>, p. 21 (Exhibit 70). The factory closed in March 2013. Adjudication (March 21, 2013) (Exhibit 71).

<sup>92</sup> See GLC, Arts. 272 and 380; Code of Criminal Procedure, Art. 298 (Exhibit 52); and Penal Code, Art. 414 (Exhibit 53).

<sup>93</sup> Collective Conflict, List of Grievances (November 13, 2006) (Exhibit 191).

<sup>94</sup> Resolution (November 13, 2006) (Exhibit 73).

<sup>95</sup> Reinstatement Order (November 22, 2006) (Exhibit 74).

<sup>96</sup> Reinstatement Order (November 22, 2006) (Exhibit 74).

79. The court never addressed the workers' allegation later presented to it that they were improperly reinstated, in violation of the law and the court's prior order. The seven remaining workers were never reinstated. Accordingly, Guatemala has failed to effectively enforce Articles 10, 62(c), 379 and 380 with respect to these workers.

### Solesa

80. After the union of workers at the Solesa rubber plantation commenced a conciliation process in early 2010, several workers received threats from the employer for their participation in the conciliation.<sup>98</sup> On September 1, 2010, Solesa dismissed 49 workers who had been involved in filing the conciliation list of grievances.<sup>99</sup>

81. On November 8, 2010, a labor court ordered reinstatement for all 49 wrongfully dismissed workers.<sup>100</sup> On November 24, 2010, Solesa appealed the reinstatement orders.<sup>101</sup> On March 8, 2011, the appellate court upheld the orders with respect to 31 of the workers.<sup>102</sup> On April 8, 2011, the labor court ordered that the reinstatement orders be effectuated and that the workers be paid in full within five days, with the threat of increased fines if the orders were not carried out.<sup>103</sup> Solesa did not comply.

82. Proceedings in this case have continued into 2014. As of October 3, 2014, Solesa had not reinstated 21 workers; two more workers with unexecuted reinstatement orders passed away.<sup>104</sup> When workers sought further assistance from the court in obtaining relief,<sup>105</sup> the court failed to take additional action. When the workers asked the court to proceed with partial liquidation of the company's assets,<sup>106</sup> the court again declined to take action, saying that the workers lacked the necessary documentation.<sup>107</sup>

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<sup>97</sup> Reinstatement Order (August 8, 2007) (Exhibit 75).

<sup>98</sup> Petition (May 8, 2014) (describing the pressures put on the union since February 2010), p. 1 (Exhibit 77); undated copies of threats (Exhibit 78). The list of grievances referenced the employer's failure to make social security payments, forcing the workers to work approximately 12 hours a day, seven days a week, failing to pay minimum wage, and a lack of access to drinking water. See also a complaint prepared by an NGO, CIDH Complaint (July 27, 2012) (Exhibit 79).

<sup>99</sup> The CIDH complaint makes reference to 49 affected persons. See CIDH Complaint (July 27, 2012), pp. 8-10 (Exhibit 79). For purposes of this submission, the United States refers to a representative case file from one of the affected persons: Mr. OOO. See statement of GGG (October 3, 2014) (describing how all 49 persons were and continue to be similarly situated as Mr. OOO) (Exhibit 20).

<sup>100</sup> Complaint (March 8, 2011) (Exhibit 82).

<sup>101</sup> Solesa appeal of reinstatement order in the case of Mr. OOO (November 24, 2010) (Exhibit 81).

<sup>102</sup> Complaint (March 8, 2011) (Exhibit 82). See also CIDH Complaint (July 27, 2012), pp. 12-15 (Exhibit 79).

<sup>103</sup> Decision in the case of Mr. OOO (April 8, 2011) (Exhibit 83).

<sup>104</sup> Email from counsel for the union to the U.S. Department of Labor (April 4, 2014) (Exhibit 84). Statement of GGG (October 3, 2014) (Exhibit 20).

<sup>105</sup> Impeachment complaint by Mr. OOO (January 18, 2013), p. 5 (Exhibit 85).

<sup>106</sup> Letter from Mr. OOO to the court (October 25, 2011) (filed October 27, 2011) (Exhibit 86).

<sup>107</sup> Decision in the case of Mr. OOO (October 28, 2011) (Exhibit 87).

83. The court has not increased the penalty for Solesa, nor has it referred the matter to the Public Ministry for criminal sanction, as provided for under law.<sup>108</sup> This inaction demonstrates Guatemala’s failure to effectively enforce Articles 10, 62(c), 379 and 380 with respect to these workers.

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84. At each company referred to above, workers were wrongfully dismissed in violation of one or more of the laws that protect workers’ ability to associate, organize and bargain collectively, namely, Articles 10, 62(c), 209, 223, 379 and 380. As discussed, in most cases, workers were not reinstated and did not receive the pay and benefits to which they were entitled, or they were not reinstated under the terms to which they were entitled. Put simply, the companies were not compelled by Guatemala to comply with Guatemalan law. In each of the above instances, Guatemala therefore failed to effectively enforce its applicable labor laws within the meaning of Article 16.2.1(a).

### 3. Guatemala’s Failures Constitute a Sustained or Recurring Course of Inaction

85. The evidence described above constitutes a sustained and recurring course of inaction by Guatemala within the meaning of Article 16.2.1(a).

#### a) “Through a Sustained or Recurring Course of Action or Inaction”

86. As set out above, CAFTA-DR Article 16.2.1(a) requires that a Party to the CAFTA-DR “not fail to effectively enforce its labor laws, *through a sustained or recurring course of action or inaction.*”<sup>109</sup> This qualifying phrase identifies the type of failures for which a CAFTA-DR Party may be held accountable under Article 16.2.1(a), limiting that set to those failures to effectively enforce that constitute a sustained or recurring course of action or inaction. An understanding of this qualifying phrase again begins with the ordinary meaning of the terms in accordance with the customary rules of interpretation.

87. The term “course” with regard to the action or inaction of a Party refers to a “manner of conducting oneself” or a “way of acting: behavior.”<sup>110</sup> Thus, a course of *action* can be understood as conducting oneself in an active or affirmative manner, whereas a course of *inaction* is conducting oneself without acting, or through omission.

88. Article 16.2.1(a) modifies the “course” taken by the Party with the adjectives “sustained” and “recurring”, which have different but related meanings. The ordinary meaning of the term “sustained” is “maintained at length without interruption, weakening, or losing in power or

<sup>108</sup> See GLC, Arts. 272 and 380; Code of Criminal Procedure, Art. 298 (Exhibit 52); and Penal Code, Art. 414 (Exhibit 53).

<sup>109</sup> Emphasis added.

<sup>110</sup> Webster’s Third New Int’l Dictionary, Unabridged (2003), definition of “course.”

quality: prolonged, unflagging.”<sup>111</sup> A “sustained course” therefore refers to a consistent or ongoing course of action or inaction.

89. “Recurring,” on the other hand, means “coming or happening again.”<sup>112</sup> The verb “to recur”, when used in relation to an event or occasion, means “to happen, take place or appear again: occur again usu. after a stated interval or according to some regular rule; occur or appear again; periodically, or repeatedly.”<sup>113</sup> “Recurring” also implies that the occurrences will be related or of the same nature. It differs from a sustained course of action or inaction, however, with respect to its contemplation of interruption between occurrences.

90. The CAFTA-DR uses the disjunctive “or” between these terms, indicating that a failure could be either sustained or recurring, and need not be both. However, if supported by the facts, a course of action or inaction in practice could be both sustained and recurring.

b) Guatemala’s Failures Constitute a Sustained and Recurring Course of Inaction

91. As described above, the evidence establishes that Guatemala has failed to effectively enforce Articles 10, 62(c), 209, 223, 379 and 380 of its Labor Code through both a sustained course of inaction and a recurring course of inaction.

92. The above evidence shows a sustained course of inaction, in that Guatemala consistently and repeatedly failed to enforce court orders beginning in 2008 and continuing through 2014. Specifically, over the past six years, Guatemala has consistently and repeatedly failed to effectively enforce Articles 10, 209 and 223 of the Labor Code, which protect workers against reprisals for taking part in the formation of a union, and Article 62(c), which prohibits employers from “forcing or trying to force” workers to withdraw from unions. This course of inaction can be seen in multiple experiences for workers at ITM, NEPORSÁ, ODIVESA, and Fribo.<sup>114</sup> The United States has demonstrated that at least 89 workers from these companies have not received the remediation owed to them under court orders, over a period of six years without interruption: 65 workers were affected in 2008, 24 in 2009, and the failures to receive proper reinstatement continues unresolved through 2014 evincing a consistent and ongoing course of inaction on the part of Guatemala for its workers.

93. Over the past six years, Guatemala has also consistently failed to effectively enforce Articles 10, 223, 379 and 380 of the Labor Code, which protect workers from reprisals during the conciliation process, as well as Article 62(c). Since 2010, the experiences of workers from Mackditex, Alianza, RTM, and Solesa<sup>115</sup> demonstrate Guatemala’s ongoing failure to effectively enforce these Labor Code provisions with respect to at least 111 workers, which has been sustained over a period of four years: 94 in 2010, 17 in 2011, and these failures continued

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<sup>111</sup> Webster’s Third New Int’l Dictionary, Unabridged (2003), definition of “sustained.”

<sup>112</sup> Webster’s Third New Int’l Dictionary, Unabridged (2003), definition of “recurring.”

<sup>113</sup> Webster’s Third New Int’l Dictionary, Unabridged (2003), definition of “recur.”

<sup>114</sup> See paragraphs 54-66 above.

<sup>115</sup> See paragraphs 67-76 and 80-83 above.

through 2014 with the non-enforcement of previously issued court orders related to the conciliation process.

94. The above evidence also demonstrates a recurring course of inaction, in that Guatemala has failed to effectively enforce its labor laws not just with respect to one worker or one company, or in isolated instances. Rather, Guatemala’s failures to compel compliance with court orders in the context of unionizing activities and conciliation proceedings happened repeatedly, first in 2006 in the case of Avandia; again in 2008 with ITM, NEPORSA, and ODIVESA; in 2009 in the case of Fribo; in 2010 with RTM, Alianza, and Solesa; and in 2011 in the case of Mackditex. In all, these failures affected over 209 individual workers from nine different companies.

95. This pattern of inaction with respect to enforcing court orders constitutes both a sustained course of inaction and a recurring course of inaction, within the meaning of Article 16.2.1(a).

#### **4. Guatemala’s Failures Occurred in a Manner Affecting Trade**

96. The sustained and recurring failure by Guatemala to enforce the Guatemalan labor laws at issue in this dispute have influenced the conditions of competition (specifically, the supply of, and relationship to, labor) of Guatemalan companies that engage in trade, including exports, with CAFTA-DR Parties such as the United States. Consequently, for the reasons set out below, Guatemala’s failures have occurred “in a manner affecting trade between the Parties.”

##### **a) “In a Manner Affecting Trade Between the Parties”**

97. CAFTA-DR Article 16.2.1(a) requires that “a Party shall not fail to effectively enforce its labor laws . . . *in a manner affecting trade between the Parties.*” The phrase “in a manner affecting trade” must be interpreted according to the ordinary meaning of the words in context and in light of the object and purpose of the CAFTA-DR.<sup>116</sup> Taking each word in turn, the word “manner” is defined as “a way of doing something or the way in which a thing is done or happens.”<sup>117</sup> The term “affecting” is similarly broad in its application. The word “affect” means to “influence; make a material impression”<sup>118</sup> or to “change.”<sup>119</sup>

98. The term “trade” includes “commerce” or the “buying and selling or exchange of commodities for profit; esp[ecially] between nations.”<sup>120</sup> The concept of “trade” is not limited to traditional exchanges of goods and services across borders. It is a broader concept that comprises cross-border economic activity generally and competition among and between cross-border actors.

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<sup>116</sup> Article 31 of the Vienna Convention on the Law of Treaties, United Nations Treaty Series, vol. 1155, p. 331, (May 23, 1969).

<sup>117</sup> The American Heritage Desk Dictionary, p. 514 (4<sup>th</sup> ed. 2003).

<sup>118</sup> The New Shorter Oxford English Dictionary, p. 36 (5<sup>th</sup> ed. 2002).

<sup>119</sup> The American Heritage Desk Dictionary, p. 14 (4<sup>th</sup> ed. 2003).

<sup>120</sup> The New Shorter Oxford English Dictionary, p. 3357.

99. As this is a case of first impression, no past CAFTA-DR dispute settlement findings are available to provide further guidance as to the meaning of this phrase. The Panel may, however, find interpretations of similar language by other international dispute settlement tribunals to be informative in coming to its own interpretation. These tribunals have found occasion to interpret “affecting trade” such that it may encompass any measures having a bearing on conditions of competition.

100. In 1958, a panel established under the *General Agreement on Tariffs and Trade* (“GATT”) examined the meaning of “affecting” in Article III:4 of the GATT aimed at laws “affecting [the] internal sale, offering for sale, purchase, transportation...” of imported products.<sup>121</sup> In reviewing the scope of this provision, the panel found that the selection of the word “affecting” suggests that the drafters intended the article to cover “not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the *conditions of competition* between the domestic and imported products on the internal market.”<sup>122</sup>

101. The World Trade Organization (“WTO”) Appellate Body also commented on the phrase “affecting trade” in reviewing the application of Article 1.1 of the *General Agreement on Trade in Services* (“GATS”).<sup>123</sup> The Appellate Body observed that “affecting” has “a broad scope of application” and that use of the term “reflects the intent of the drafters to give a broad reach” to the obligation in question.<sup>124</sup> The Appellate Body upheld the panel’s finding in that case, in which it stated that the GATS includes the phrase “affecting trade in services” to “ensure that the disciplines of the GATS would cover any measure bearing upon *conditions of competition* in supply of a service, regardless of whether the measure directly governs or indirectly affects the supply of the service.”<sup>125</sup>

102. Likewise, here, a similar reading of “in a manner affecting trade” is supported by both the text in context and the object and purpose of the CAFTA-DR. The Parties to the CAFTA-DR stipulated that, in establishing a free trade area, their objectives were to, *inter alia*, “promote conditions of fair competition in the free trade area.”<sup>126</sup> Interpreting “in a manner affecting trade” to cover any course of action or inaction having a bearing upon conditions of competition between CAFTA-DR Parties is consistent with this objective.

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<sup>121</sup> Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833-7S/60, adopted October 23, 1958, para. 5.

<sup>122</sup> Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833-7S/60, adopted October 23, 1958, para. 12 (emphasis added).

<sup>123</sup> Article I:1 of the General Agreement on Trade in Services provides that “[t]his Agreement applies to measures affecting trade in services.”

<sup>124</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted September 25, 1997, para. 220; see also Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted January 29, 2002, para. 210.

<sup>125</sup> Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted September 25, 1997, para. 7.281 (emphasis added).

<sup>126</sup> CAFTA-DR, Article 1.2 (emphasis added).

103. In light of the above, the ordinary meaning of the phrase “in a manner affecting trade” in Article 16.2.1(a) encompasses any course of action or inaction by a Party that has a bearing on, influences or changes – i.e., affects – cross-border economic activity, including by influencing conditions of competition within and among the CAFTA-DR Parties.

b) Guatemala’s Failure Occurred in a Manner Affecting Trade Between the Parties

104. The United States will demonstrate below that, through Guatemala’s failure to effectively enforce its labor laws, Guatemalan companies face different conditions of competition than they would face were the laws effectively enforced. As a result, the competitive conditions between Guatemalan companies and companies in other CAFTA-DR Parties have been altered from the agreed terms of the CAFTA-DR. In this respect, Guatemala’s failures have occurred “in a manner affecting trade between the Parties” within the meaning of Article 16.2.1(a). For example, Guatemala’s failures to effectively enforce its labor laws bears upon the conditions of competition in trade between the CAFTA-DR Parties because it both directly and indirectly changes the relationship between Guatemalan companies and one of their important industrial inputs – i.e., labor.

105. Guatemala and the United States share a significant trading relationship. The United States is Guatemala’s largest trading partner. On average between 2007 and 2013, Guatemala’s trade with the United States comprised 34 percent of its total traded goods, and nearly 40 percent of Guatemala’s exports were sent to the United States.<sup>127</sup> Guatemala also has a strong trading relationship with the other CAFTA-DR countries. Between 2007 and 2013, Guatemala’s trade with CAFTA-DR countries other than the United States comprised 21.6 percent of its total trade.<sup>128</sup> These countries received 30 percent of Guatemala’s exports.<sup>129</sup>

106. During the time periods discussed above, each of the nine companies discussed above engaged in trade within the CAFTA-DR markets in two significant ways: (1) they exported or participated in export activities with CAFTA-DR Parties; and, (2) they competed with imports from CAFTA-DR Parties within the Guatemalan economy.

107. From the apparel industry, Alianza, Fribo and Mackditex manufactured apparel that was exported for sale in the United States by U.S. brands and retail chains.<sup>130</sup> During the time periods discussed above, the garment factories employed hundreds of workers, making a major contribution to the Guatemalan export economy. Between 2007 and 2013, Guatemala’s exports

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<sup>127</sup> Data retrieved from Global Trade Information Services (“GTIS”) database, <http://www.gtis.com>, last visited on October 28, 2014. GTIS publishes monthly updates of official merchandise trade data of over 80 countries/regions. See also “Study of the National Economy 2008,” Banco de Guatemala, p. 55, <http://www.banguat.gob.gt/en/docs/EconomyStudy2008.pdf>.

<sup>128</sup> GTIS database, last visited October 28, 2014.

<sup>129</sup> GTIS database, last visited October 28, 2014.

<sup>130</sup> Institute for Global Labour and Human Rights Report (January 2014), available in Spanish at <http://www.globallabourrights.org/reports/alianza-fashion-guatemala-2014> (Exhibit 70); Registration of Fribo in Merchants’ Register (Exhibit 158); Statement of W, Z (June 25, 2014) (Exhibit 18).

of apparel averaged over 1.2 billion USD annually.<sup>131</sup> Guatemala's exports of apparel comprised 14 percent of its total goods exports to the world, and 97 percent of Guatemala's apparel exports went to CAFTA-DR countries. Of these, 94 percent went to the United States, while 3 percent went to the other CAFTA-DR countries.<sup>132</sup> Guatemala's failure to effectively enforce Articles 10, 62(c), 209, 223, 379 and 380 allowed these apparel manufactures to evade the costs associated with the compliance of these laws. Consequently, Guatemala's failures affected the conditions of competition that these apparel exporters experienced compared to the conditions that would have been in place had Guatemala effectively enforced its laws.

108. The four shipping companies discussed in this section provided stevedore services under contract to the quasi-governmental Empresa Portuaria Quetzal, which runs the Port of Quetzal. The Port of Quetzal is the largest Guatemalan port on the Pacific Ocean and was responsible for about 20 percent of all foreign trade by sea for the Central American region in 2012.<sup>133</sup> Guatemala's enforcement failures allowed the companies to forgo the cost of complying with Articles 10, 62(c), 209, 223, 379 and 380. In turn, Guatemala's enforcement failures altered the conditions of competition for the stevedore companies and their ability to provide services to the shipping industry as a whole, as well as the fees they charge for these services and thus the conditions of competition for those shipping goods using those services. Because Guatemala's failures affected the conditions of competition for these companies vis-à-vis their competitors, the failures occurred in a manner affecting trade.

109. With respect to the agricultural sector, Solesa is a major exporter of rubber produced on its farm Finca la Soledad. Guatemala is the leading exporter of natural rubber in the Americas, and the fifth leading exporter in the world.<sup>134</sup> Significant portions of these exports are destined for the United States and Costa Rica, another CAFTA-DR country.<sup>135</sup> Rubber is a highly competitive commodity and therefore changes in productions costs, including labor costs, can significantly alter the conditions of competition among producers. Here, Guatemala's failures allowed the farm owners to evade the labor costs that would have been present had Guatemala effectively enforced Articles 10, 62(c), 209, 223, 379 and 380 of the Labor Code. Thus, again Guatemala's enforcement failures occurred in a manner affecting trade.

110. In sum, by violating Articles 10, 62(c), 209, 223, 379 and 380 of the Labor Code, these companies benefit from the resulting conditions of competition, including inappropriately reduced labor costs. Due to Guatemala's failure to compel compliance with court orders and ensure that improperly dismissed unionized workers are reinstated and compensated – and that employers are properly fined – the employers evade, first, the costs of paying the workers' wages

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<sup>131</sup> GTIS database, last visited October 28, 2014.

<sup>132</sup> GTIS database, last visited October 28, 2014.

<sup>133</sup> Annual Plan 2014, Quetzal Port Company, available at <http://www.puerto-quetzal.com/web/guest/lai05>, p. 7, (Exhibit 90).

<sup>134</sup> Overview of the Guatemalan Natural Rubber Industry, Grupo Agroindustrial Occidente, available at: <http://www.grupoagroindustrial.net/index.php/es/proveedores/2-uncategorised/83-situacion-del-caucho-en-guatemala-eng>. (Exhibit 159).

<sup>135</sup> Overview of the Guatemalan Natural Rubber Industry, Grupo Agroindustrial Occidente, available at: <http://www.grupoagroindustrial.net/index.php/es/proveedores/2-uncategorised/83-situacion-del-caucho-en-guatemala-eng>. (Exhibit 159).



and benefits, as well as related fines; second, the costs associated with workers who are capable, through the support of a union, to advocate for better pay and improved working conditions than non-unionized workers, and third, the costs associated with workers who have access, through the support of a union, to the enforcement mechanisms for Guatemala’s labor laws. In this respect, Guatemala’s failure to effectively enforce the relevant labor laws affected the conditions of competition. Guatemala’s failure, through a sustained or recurring course of inaction, to secure compliance with court orders and effectively enforce Articles 10, 62(c), 209, 223, 379 and 380 of the Labor Code therefore occurred in a manner affecting trade within the meaning of Article 16.2.1(a) of the CAFTA-DR.

## **5. Conclusion**

111. Based on the foregoing, the United States respectfully requests that the Panel find that Guatemala has acted inconsistently with its obligation under Article 16.2.1(a) by failing to effectively enforce labor laws directly related to the right of association and the right to organize and bargain collectively by not acting to compel compliance with court orders.

### **B. GUATEMALA HAS FAILED TO EFFECTIVELY ENFORCE ITS LABOR LAWS DIRECTLY RELATED TO ACCEPTABLE CONDITIONS OF WORK BY NOT CONDUCTING INSPECTIONS AS REQUIRED AND BY NOT IMPOSING OBLIGATORY PENALTIES, IN BREACH OF CAFTA-DR ARTICLE 16.2.1(A)**

112. Guatemala also has failed to effectively enforce certain of its labor laws directly related to acceptable conditions of work. In this area, Guatemala’s failures involve inaction and deficient action on the part of inspectors from the Ministry of Labor’s General Labor Inspectorate (GLI) who have not carried out inspections to properly determine whether an employer has violated Guatemalan labor laws. Guatemala’s failures also involve the inspectors’ not taking action to impose penalties after finding violations.

113. This section documents how, between 2006 and 2014, employees at Koa Modas, Mackditex, Santa Elena, Las Delicias & other coffee farms, and Tiki Industries and other palm oil farms, filed dozens of complaints about the lack of acceptable working conditions at their respective worksites, alleging that their employers were not abiding by the labor laws in the area of acceptable conditions of work, particularly in respect of hours, wages, and occupational safety and health.

114. Despite having received these complaints, Guatemala did not act upon them to determine whether a violation of its labor laws had occurred. This lack of action constitutes a failure to ensure compliance with the labor laws implicated in the complaints.

#### **1. The Laws at Issue Are “Labor Laws” Under Article 16.8**

115. This section concerns Guatemala’s failure to enforce certain statutes and regulations directly related to the “acceptable conditions of work with respect to minimum wages, hours of

work, and occupational safety and health.” The laws at issue with respect to these rights include at least 16 provisions of the Labor Code. As discussed below, these Articles are intended to ensure that workers are provided with safe and appropriate equipment, limit the length of a work day, guarantee workers a minimum wage, and ensure that employers provide certain basic amenities. They are set forth either as requirements for the employer, as entitlements of employees, or as prohibitions on certain employer actions in different provisions of the Code.

116. The relevant articles are Article 27, regarding contractual records of working hours and wages; Article 61, regarding general obligations on employers for every employment relationship, Articles 92-93, regarding full and biweekly or monthly payment of wages; Article 103, regarding minimum wages; Article 116-118, regarding limitations on work schedules; Article 121-122, regarding overtime pay and the daily maximum of permissible hours of work; Articles 126-130 and 134, regarding weekly days of rest, holidays, and vacations; and Article 197, regarding minimum mandatory measures for employers regarding safety and health.

117. With respect to wages, Article 103 provides that “[a]ll workers are entitled to receive a minimum wage that covers their normal material, moral, and cultural needs and that allows them to meet their responsibilities as heads of family.”<sup>136</sup> This provision applies to all non-public employees.<sup>137</sup> Moreover, workers must be paid in full at least biweekly (for manual workers).<sup>138</sup>

118. With respect to hours of work, the Code sets out limits for hours to be worked in one day and ensures that employees can enjoy vacations and holidays.<sup>139</sup> All workers are entitled to one paid “day of rest following every week of work.” A week of work may be defined as either five or six days on a company-by-company basis.<sup>140</sup> An employer must remunerate a worker for overtime work, defined as work performed beyond the time limits established in the work schedule or beyond any limit in the labor contract, at a rate of at least 150 percent of the minimum wage or wage stipulated by the contracting parties above the minimum wage.<sup>141</sup>

119. Workers may work on holidays or on days of rest only at companies where work is “inherently continuous or of a very special nature . . . or in very specific individual cases” to be determined by the Ministry; for this work, they are to receive the overtime pay rate.<sup>142</sup> Workers are also entitled to at least 15 days of paid vacation after each year of continuous service.<sup>143</sup> Vacation pay must be paid in advance.<sup>144</sup>

120. Employers are required to adopt necessary measures to:

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<sup>136</sup> GLC, Art. 103. See also Governmental Accord 1319 (April 9, 1968) (Exhibit 160).

<sup>137</sup> GLC, Arts. 103 & 104.

<sup>138</sup> GLC, Arts. 92 & 93.

<sup>139</sup> GLC, Arts. 116, 122, 126-134.

<sup>140</sup> GLC, Art. 126.

<sup>141</sup> GLC, Art. 121.

<sup>142</sup> GLC, Art. 128.

<sup>143</sup> GLC, Art. 130.

<sup>144</sup> GLC, Art. 134.

- a) Prevent work accidents, ensuring that machinery, equipment and processes are as safe as possible and are maintained in good working order and condition for use, for which purpose inspections and maintenance are to be performed on an ongoing basis;
- b) Prevent occupational illnesses and eliminate the causes thereof;
- c) Prevent fires;
- d) Provide a healthy working environment;
- e) Provide appropriate protective clothing and equipment whenever necessary to prevent work accidents and minimize risks;
- f) Install and maintain safety and protective devices on machinery and in facilities to prevent such machinery and facilities from posing any risk to employees;
- g) Warn employees of the health risks and physical dangers inherent in the work;
- h) Conduct ongoing occupational health and safety training activities for employees;
- i) Ensure that the number of sanitary facilities available to male and female employees are proportionate to the number of employees of each sex, are maintained in proper sanitary conditions and include hand-washing facilities;
- j) Ensure that facilities intended for the preparation and consumption of food and sources of potable water for employees are of sufficient capacity and are maintained in proper sanitary conditions;
- k) Equip workplaces, when necessary, with separate facilities for men and women to change clothes;
- l) Maintain a first-aid kit with the necessary items to provide first aid.<sup>145</sup>

121. In addition, Article 61 requires employers to follow certain basic procedures, such as: to treat employees with due consideration, to refrain from any verbal or physical abuse; to provide employees in a timely manner the utensils, instruments and materials they need to perform the agreed-upon jobs, ensuring that such tools, instruments, and materials are of good quality and replacing them as soon as they are no longer effective; to provide certain amenities to farm workers who live on the land; and, to ensure, for commercial or industrial establishments, that there are sufficient chairs for employees to use during breaks.<sup>146</sup>

122. Accordingly, Articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197 of the Labor Code generally provide for the protection of acceptable conditions of work by restricting and requiring certain employer actions. As such, these laws are “directly related to” rights

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<sup>145</sup> GLC, Art. 197.

<sup>146</sup> GLC, Art. 61.

concerning minimum wages, hours of work, and occupational safety and health and therefore are “labor laws” within the meaning of Article 16.8 of the CAFTA-DR.

**2. Guatemala Has Failed To Effectively Enforce Labor Code Articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197**

- a) Requirements to Effectively Enforce Articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197

123. The Ministry of Labor is charged with enforcing the above-referenced labor laws under Article 278 of the Labor Code:

The General Labor Inspectorate, through its corps of inspectors and social workers, shall ensure that employers, workers, and union organizations comply with and respect these laws.

124. Proper inspections are an inherent and fundamental element of effective enforcement. The Organization for Economic Cooperation and Development has recognized that “[i]nspections are one of the most important ways to enforce regulations and to ensure regulatory compliance”.<sup>147</sup> And according to World Bank guidelines, when successful, a proper inspection will “focus[] on reducing non-compliance, and end[] with the resolution of any compliance problems.”<sup>148</sup> Without such proper inspections, violations remain undetected by the authorities and the law cannot be enforced.

125. Despite having procedures in place to enforce the abovementioned laws, including with respect to comprehensive inspections, Guatemala has failed to enforce these laws effectively. As discussed further below, at Las Delicias and dozens of other coffee plantations, at Koa Modas and at Mackditex, the GLI failed to inspect as required in response to workers’ complaints. At the worksites of Las Delicias, Koa Modas, Mackditex, Santa Elena, Tiki Industries and other palm oil plantations, GLI inspectors noted violations by the employers or issued them warnings during inspections, but never imposed the appropriate sanctions. In the absence of appropriate responses by Guatemala, the wage and hour laws, as well as the occupational safety and health laws, have not been effectively enforced.

126. Articles 278, 274, and 204 empower the General Labor Inspectorate to act on workers’ complaints.<sup>149</sup> Article 281(e) requires the GLI to intervene in all labor difficulties and disputes

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<sup>147</sup> OECD Report, Best Practice Principles for Regulatory Enforcement: Regulatory Enforcement and Inspections (May 2014), available at <http://www.oecd.org/gov/regulatory-policy/enforcement-inspections.htm>, p. 3.

<sup>148</sup> World Bank Group, Good Practices for Regulatory Inspections: Guidelines for Reformers (December 2005), p. 10 (Exhibit 97).

<sup>149</sup> GLC, Art. 278 (“GLI, through its . . . inspectors . . . , shall ensure that employers . . . comply with . . . the laws, collective, agreements, and regulations”). See also Art. 274 (The MoL “must monitor the development, improvement, and application of all legal provisions that are not under the jurisdiction of the courts”) and Art. 204 (“All labor and health authorities shall cooperate to ensure [that health and safety laws are followed]”).

about which it receives notice.<sup>150</sup> The GLI must further order the “verification” of an alleged labor violation<sup>151</sup> “as soon as possible”:

As soon as the [GLI] learns of the commission of one of the acts referred to in this Chapter, either through direct knowledge or through a report, it shall issue a decision ordering that the appropriate verification be carried out as soon as possible. All authorities are required to lend it any assistance it needs for that purpose.<sup>152</sup>

127. According to Article 61(f), employers have an obligation to permit labor authorities to conduct such inspections and oversight, and employees may be represented by up to two workers during the inspection.<sup>153</sup> It is also a violation of Article 281(c) of the Code for an employer to refuse inspection without justification; “unjustified resistance” is to be reported to a labor court.<sup>154</sup> Article 281(m) further provides the Ministry with the power to summon an employer to the offices of the Ministry as part of the investigation of a worker’s complaint.<sup>155</sup>

128. Inaction upon receipt of a labor complaint is contrary to Guatemalan regulation, in particular the Ministry of Labor *Protocol on Best Practices of Work Inspection* (“Protocol”), which sets out obligations and recommendations for GLI inspectors.<sup>156</sup> Under the Protocol, inspectors are required to attend to a complaint “immediately”; to analyze and detail all documentation at the work site that is required to verify a complaint – contracts, wage book, communications, files, rules, etc.; to speak with and interview an appropriate cross-section of persons of interest at the work site; to interview representatives of any union; and, to determine whether it is necessary to bring in technical or professional support in respect of security and hygiene or another specialization; among other directives.<sup>157</sup> The Protocol also includes optional, but encouraged, recommendations to enhance the quality of the inspection, including a recommendation to prepare a detailed questionnaire for each person interviewed.<sup>158</sup>

129. Where an inspector finds a labor violation by the employer in the course of an inspection, the Labor Code requires that the inspector write a report and advise the employer to comply

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<sup>150</sup> GLC, Art. 281(e).

<sup>151</sup> “Labor and social and welfare violations comprise all acts or omissions committed against the provisions of [the] Code or of any other labor or social welfare law that are penalized with a fine.” GLC, Art. 269.

<sup>152</sup> GLC, Art. 419. See also Protocol of Best Practices for Inspections in Guatemala (“Protocol”) (2008), pp. 1-2 (When an inspector receives a file, he or she “immediately shall verify that it was assigned to him or her to be able to act on it”); p. 2 (“Immediately, he or she shall study the case substantiating the law, that is to say, he or she should determine the applicable law to the situation under analysis and conform to it while carrying out the inspection.”) (Exhibit 91).

<sup>153</sup> GLC, Art. 61(f).

<sup>154</sup> GLC, Art. 281(c). See also Ministerial Accord 106-2011 (May 26, 2011) (Exhibit 92).

<sup>155</sup> GLC, Art. 281(m).

<sup>156</sup> The Protocol was enacted into law by Ministerial Accord 128-2009 (July 8, 2009) (Exhibit 93). The Protocol constitutes part of the ordinary procedures of the General Labor Inspectorate. See Article 1 of Ministerial Accord 128-2009 (July 8, 2009) (Exhibit 93); Legal Expert Report of Alejandro Argueta (April 15, 2014), p. 4 (Exhibit 94).

<sup>157</sup> Protocol, Art. I (Exhibit 91).

<sup>158</sup> Protocol, Art. I (Exhibit 91).

within a time frame to be determined by the inspector.<sup>159</sup> The GLI is required to re-inspect following any report finding noncompliance with the law. If the employer has not complied with the remediation as directed by the inspector, the GLI must petition a labor court to sanction the employer under the penalty provisions of the Labor Code.<sup>160</sup>

130. Failure to appear at the offices of the Ministry in response to an inspector's summons, if ordered to do so, is also a violation of the Code.<sup>161</sup> Violation of this obligation is to result in the imposition of a warning for a first-time offender, and a fine if the employer fails to heed the warning or is not a first-time offender.<sup>162</sup>

b) By Not Investigating as Required by Law, Guatemala Has Failed to Effectively Enforce its Labor Laws Directly Related to Acceptable Conditions of Work

131. The facts in this section show individual workers, or groups of workers, filing complaints with the GLI regarding potential violations of the Labor Code, followed by inaction or ineffective action by Guatemala to inspect and verify the alleged labor law violation. Each of these instances constitutes a failure to effectively enforce the relevant labor laws within the meaning of Article 16.2.1(a).

Seventy coffee farms

132. Since 2006, workers from 70 coffee farms jointly filed more than 80 complaints with the Ministry of Labor regarding minimum wage (Article 103), mistreatment (Article 61), or health and safety conditions (Article 197).<sup>163</sup> Despite these many complaints alleging violations of Guatemala's labor laws, Guatemala failed to inspect the worksites in such a way as to determine whether the employer had violated the relevant laws.

133. First, in response to the workers' more than 80 complaints, an inspection often did not occur until several weeks after the workers filed their complaint.<sup>164</sup> Inspectors have regularly refused to inspect unless workers paid for the inspector's transportation. For example, on a number of occasions the Ministry has told workers that it will inspect only if the workers provide the Ministry with the gas money needed to get to the worksite.<sup>165</sup> Typically, the day the inspectors planned to visit the farm, they called the workers asking to collect the money; without

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<sup>159</sup> GLC, Art. 281(l); see also GLC, Art. 416.

<sup>160</sup> GLC, Art. 281(l).

<sup>161</sup> GLC, Art. 281(m).

<sup>162</sup> GLC, Art. 281(m), referring to the penalties set out in GLC, Art. 272(g).

<sup>163</sup> Statement of RR, SS, TT, UU, VV (June 30, 2014), p. 3 (Exhibit 26). MSICG complaint to Ministry of Labor (August 12, 2008) (Exhibit 95).

<sup>164</sup> MSICG complaint to Ministry of Labor (August 12, 2008) (Exhibit 95). The workers attest that they waited over a month for the inspector to visit the farm on three occasions in 2013 and again in early 2014. Statement of RR, SS, TT, UU, VV (June 30, 2014), p. 3 (Exhibit 26).

<sup>165</sup> Statement of RR, SS, TT, UU, VV (June 30, 2014), p. 3 (Exhibit 26).

payment, the inspections did not occur.<sup>166</sup> Workers have paid 150 quetzals (approximately 20 USD, or equivalent to two and a third days' work at minimum wage) on at least 10 different occasions for the inspectors' gas.<sup>167</sup> Forcing workers to pay, in effect, for inspections undermines effective enforcement of the underlying labor laws by reducing the likelihood that inspections will occur, and thereby precluding detection, sanction and remediation where inspections do not occur.

134. When inspectors did appear at the farm, the inspectors did not carry out inspections in such a way so as to determine whether there has been a violation of the law. While at the farms, the inspectors often did not speak with the workers, nor did they inspect the work areas.<sup>168</sup> When inspectors did interview workers, they often interviewed them in the presence of the employers.<sup>169</sup> Inspectors typically did not include any record of conversations with workers in their reports. In some instances inspectors amended reports when facts were disputed by employers; workers were not given the opportunity to review the reports of inspectors.<sup>170</sup>

135. Inspections performed in this way – after a prolonged period of time and not in accordance with the regulatory Protocol or the basic tenets of the Labor Code – prevent inspectors from gathering the information necessary to properly identify and evaluate violations of the applicable labor laws. The insufficient inspections performed in response to complaints by workers on these coffee farms therefore demonstrate a failure to effectively enforce Articles 61, 92-93, 103, 116, 128, and 134.

### Koa Modas

136. Workers at Koa Modas reported similar failures to enforce the law at their factory worksite. In response to the workers' complaints, Ministry inspectors often visited the factory and met only with representatives of Koa Modas management.<sup>171</sup> When the inspectors did talk to employees, they spoke with employees chosen by the employer and not to the complainants.<sup>172</sup> On at least one occasion, workers noted that one of the inspectors was sleeping during the

<sup>166</sup> Statement of RR, SS, TT, UU, VV (June 30, 2014), p. 3 (Exhibit 26).

<sup>167</sup> Statement of RR, SS, TT, UU, VV (June 30, 2014), p. 3 (Exhibit 26). Minimum wage in 2014 for agricultural workers is 75 quetzals or approximately 9.83 USD per day. Ministry of Labor, Minimum Wage website, <http://www.mintrabajo.gob.gt/index.php/salariominimo.html> (Exhibit 96).

<sup>168</sup> Such a practice is contrary to the procedures set out in the Protocol which direct an inspector to consider interviewing a broad cross-section of representatives at the work site. Protocol, Art. I (Exhibit 91).

<sup>169</sup> Statement of RR, SS, TT, UU, VV (June 30, 2014), p. 3 (Exhibit 26); Statement of QQQ (August 10, 2014), p. 3 (Exhibit 27); Statement of RRR (August 9, 2014), p. 3 (Exhibit 28).

<sup>170</sup> Statement of RR, SS, TT, UU, VV (June 30, 2014), p. 3 (Exhibit 26). Also in the palm oil sector, inspectors have ignored allegations by workers about violations, leaving out comments by workers from their reports; see, e.g., Statement of UUU (October 11, 2014), p. 2 (Exhibit 32).

<sup>171</sup> Statement of DD (June 27, 2014) (Exhibit 34); Statement of EE (June 27, 2014) (Exhibit 35); and, Statement of FF (June 27, 2014) (Exhibit 36).

<sup>172</sup> Statement of DD (June 27, 2014) (Exhibit 34); Statement of EE (June 27, 2014) (Exhibit 35); and, Statement of FF (June 27, 2014) (Exhibit 36).

inspection.<sup>173</sup> On another occasion, a supervisor at Koa Modas instructed the workers to make and provide gifts to give to the inspectors.<sup>174</sup>

137. In 2008 and 2009, Koa Modas frequently sent workers home early for performing “insufficient work.”<sup>175</sup> The workers were then forced to make up this time, working over 200 hours overtime without being paid at the overtime rate in violation of Articles 121 and 122.<sup>176</sup> The workers reported this situation to the Ministry.<sup>177</sup> The MOL did not undertake an investigation in response to this complaint.<sup>178</sup> Instead, an inspector told the workers in return that he “could not do anything for them because the company did not have enough money to pay them more.”<sup>179</sup> This lack of response to worker complaints constitutes a failure to effectively enforce the laws underlying the workers’ concerns, in particular Articles 61, 121 and 122.

### Mackditex

138. Workers at apparel manufacturer Mackditex reported that during inspections inspectors only met with employees selected by the employer, and that these employees were chosen because they would support the employer’s position with respect to the worker complaints.<sup>180</sup> Such inspections are inconsistent with the purpose of inspections as set out in the Code as well as with Article I of the Protocol, which notes the importance of carrying out a number of interviews to facilitate the collection of information “of the highest quality and as objectively as possible.”<sup>181</sup> Moreover, such inspections constitute a failure to effectively enforce the underlying laws directly related to acceptable conditions of work such as Articles 61, 92-93, 103, 116-118, 121-122, 126-130, 134 and 197.

139. The experiences of the workers at the 70 coffee farms, at Koa Modas and at Mackditex demonstrate that Guatemala did not carry out appropriate inspections as provided for under Articles 204, 274, and 278 of the Labor Code, and therefore failed to detect, sanction and remediate violations of the relevant labor laws. This lack of inspections, or lack of sufficient inspections, constitutes a failure to effectively enforce Articles 61, 92-93, 103, 116-118, 121-122, 126-130, 134 and 197 of its Labor Code within the meaning of Article 16.2.1(a) of the CAFTA-DR.

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<sup>173</sup> Statement of GG (October 13, 2014) (Exhibit 37).

<sup>174</sup> Statement of EE (June 27, 2014) (Exhibit 35).

<sup>175</sup> Statement of NN, OO, PP and QQ (July 2, 2014), p. 2 (Exhibit 38).

<sup>176</sup> Statement of NN, OO, PP and QQ (July 2, 2014), p. 2 (Exhibit 38).

<sup>177</sup> Statement of NN, OO, PP and QQ (July 2, 2014), p. 2 (Exhibit 38).

<sup>178</sup> Statement of DD (June 27, 2014) (Exhibit 34); Statement of EE (June 27, 2014) (Exhibit 35); and, Statement of FF (June 27, 2014) (Exhibit 36).

<sup>179</sup> Statement of NN, OO, PP and QQ (July 2, 2014), p. 2 (Exhibit 38).

<sup>180</sup> Statement of W and Z (June 25, 2014), p. 4 (Exhibit 18).

<sup>181</sup> Protocol, Art. I (Exhibit 91).



c) By Not Imposing Penalties as Required by Law, Guatemala Has Failed to Effectively Enforce its Labor Laws Directly Related to Acceptable Conditions of Work

140. Guatemala also has failed to effectively enforce its labor laws directly related to acceptable conditions of work by failing to sanction violations of the law or ensure compliance by employers. The evidence below sets out the repeated instances in which Guatemala, through its GLI inspectors, has identified employer violations at the worksite but has not acted in such a way as to secure compliance with the law.

Seventy coffee farms

141. On August 12, 2008, an umbrella organization of farm worker unions and federations, the Movimiento Sindical, Indígena y Campesino Guatemalteco (“MSICG”), filed a complaint with the MOL, indicating that 70 coffee farms were paying workers less than the legally established minimum wage and neglecting to provide the legally required weekly day of rest, in violation of Articles 103 and 116.<sup>182</sup> MSICG’s complaint requested that the MOL conduct emergency inspections of these farms to remedy the problems.<sup>183</sup>

142. Four to five months after MSICG filed its complaint, a representative of the MOL stated in a public forum that the Ministry had conducted inspections and confirmed that some of these farms did not pay the minimum wage as required by Article 103.<sup>184</sup> The MOL never responded to MSICG’s complaint directly, and no further actions were taken.

143. On January 13, 2014 a worker at Las Delicias, a farm with about 117 workers,<sup>185</sup> filed a written complaint with the Ministry alleging that Las Delicias was not paying workers the minimum wage to which they were entitled under GLC Article 103.<sup>186</sup> When the Ministry arranged for a hearing regarding the complaint, the company did not participate as required by Article 281(m) of the Code.<sup>187</sup> Although Articles 281 and 272 of the Labor Code provide that an employer be warned or sanctioned for its non-appearance at a hearing, the Ministry took no such action against Las Delicias.

144. On March 25, 2014, the Ministry again attempted to hold a hearing with Las Delicias workers and the company.<sup>188</sup> This time the company sent a representative. The company representative who participated in that hearing admitted that the company was not paying the workers the minimum wage.<sup>189</sup> The Ministry warned the employer that it needed to raise wages

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<sup>182</sup> MSICG complaint to Ministry of Labor (August 12, 2008) (Exhibit 95).

<sup>183</sup> MSICG complaint to Ministry of Labor (August 12, 2008) (Exhibit 95).

<sup>184</sup> Statement of ZZZ (April 20, 2010), p. 2 (Exhibit 39).

<sup>185</sup> Email from RR to U.S. Dept. of Labor (October 17, 2014) (Exhibit 156).

<sup>186</sup> Letter to General Labor Inspectorate (January 13, 2014) (Exhibit 98).

<sup>187</sup> Inspection Report (March 11, 2014) (Exhibit 99).

<sup>188</sup> Inspection Report (March 11, 2014) (Exhibit 99).

<sup>189</sup> Adjudication (March 25, 2014) (Exhibit 100).

in the next 30 business days to avoid further action taken against it.<sup>190</sup> The Ministry took no further action to enforce the minimum wage law when the 30 days had passed without the company having taken the necessary steps. The employer was still not paying minimum wage as of October 2014.<sup>191</sup>

145. As described above, Guatemala failed to inspect, or performed insufficient inspections of the 70 coffee farms, and in particular, the Las Delicias farm. These failures prevented Guatemala from identifying, sanctioning and remediating violations of the applicable laws directly related to acceptable conditions of work, inconsistent with its enforcement obligations in Article 16.2.1(a) of the CAFTA-DR.

#### African palm oil plantations

146. On December 9, 2011, a group of community organizations representing workers at four companies producing African palm oil (Tiki Industries, the National Agroindustrial Company (NAISA), Palm Reforestation (REPSA), and Ixcán Palms) submitted a complaint to the Ministry of Labor alleging that the companies failed, *inter alia*, to provide workers with documentation verifying their employment as required by Article 27 of the Labor Code; failed to pay minimum wage in violation of Article 103; forced workers to work overtime without additional compensation contrary to Article 121; and, exposed workers to chemicals without information about their health effect in violation of Article 197(g).<sup>192</sup> The complaint requested that the Ministry undertake an inspection of working conditions at the four companies, which together employ about 13,000 workers.<sup>193</sup>

147. On February 28, 2012, MOL inspectors visited the Tiki Industries work site after the workers' organization agreed to pay for the inspectors' gas.<sup>194</sup> They attempted also to visit REPSA, Ixcán, and NAISA, but were denied entry.

148. The inspectors were accompanied by the Office of the UN High Commissioner for Human Rights in Guatemala, the Guatemalan Human Rights Prosecutor, and representatives from three of the community organizations representing the workers.<sup>195</sup> The result of those

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<sup>190</sup> Adjudication (March 25, 2014) (Exhibit 100).

<sup>191</sup> Email from RR to U.S. Dept. of Labor (October 15, 2014) (Exhibit 157).

<sup>192</sup> Written complaint to the Ministry of Labor regional director (December 9, 2011), pp. 2-3 (Exhibit 101).

<sup>193</sup> Written complaint to the Ministry of Labor regional director (December 9, 2011), p. 5 (Exhibit 101). Statement of AAAA, (June 26, 2014), p. 3 (Exhibit 40).

<sup>194</sup> On or around January 11, 2012, in the absence of any reply from the Ministry, representatives for the workers appeared before the Ministry to demand that the inspection be carried out. The Ministry said that while it had a vehicle to carry out the inspection, it had no gas and demanded that the workers pay for the gas if they wanted an inspection. The director of the office indicated that the Ministry could carry out an inspection only if gas money was provided by the workers. Statement of AAAA, (June 26, 2014), p. 1 (Exhibit 40). According to a UN report on labor inspections in Guatemala, inspectors' visits to the several palm oil farms in the area were subsequently suspended until March 8 due to lack of funds for gas. Report of the Mission in the Municipality of Sayaché, Petén, Office of the UN High Commissioner for Human Rights in Guatemala (February 27, 2012 – March 1, 2012), p. 1 (Exhibit 102).

<sup>195</sup> Report of the Mission in the Municipality of Sayaché, Petén, Office of the UN High Commissioner for Human Rights in Guatemala (February 27, 2012 – March 1, 2012), p. 1 (Exhibit 102).

inspections, and Guatemala’s subsequent failure to remediate the identified violations thereafter, are described below.

### Tiki Industries

149. During the inspectors’ visit to Tiki Industries on February 28, 2012, the company’s legal representative told the inspector that the inspector was not permitted to speak with any workers. The inspector asked the representative for documentation so that the inspector could confirm the company’s compliance with the law regarding payment of wages (Article 103); the rest period requirement (Article 126); and the availability of health and safety equipment (Article 197), among other provisions of the Labor Code. The company representative refused to provide the documentation requested by the inspector, stating that he was not authorized to provide any information.<sup>196</sup> According to the inspector’s report, Tiki was given a warning which indicated that if the company persisted in this conduct, the inspector would refer the case to the Public Ministry for criminal sanction.<sup>197</sup>

150. The Ministry’s own records show that Tiki Industries has not complied with the warning issued to it in February 2012.<sup>198</sup> Despite this non-compliance, the Ministry took no further enforcement action such as to refer the matter to the court as required by the Code. Accordingly, Guatemala has failed to effectively enforce Articles 61(f), 103, 126, 197 and Article I of the Protocol.

### REPSA

151. On February 29, 2012, the labor inspectors made another attempt to visit REPSA. The inspectors were able to enter the premises, but proceeded to meet with employers alone in a private room. During this time, the UN and the community organizations interviewed 150 REPSA workers.<sup>199</sup> Workers told the UN team that sometimes they were paid per bunch of fruit cut, rather than a daily wage. The total sum when paid by the bunch is about 40 quetzals or 35 quetzals a day, slightly more than half the minimum wage.<sup>200</sup> For those on 21-day contracts, they received only about 43 quetzals per day, roughly two-thirds the required minimum wage at the time. Women and children were paid still less than these figures. The workers often worked two or three hours beyond the scheduled work time without additional pay, in violation of Article 121 of the Code. The workers also reported that they fumigate the fields without protection,

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<sup>196</sup> Adjudication (February 28, 2012) (Exhibit 104). See also Report of the Mission in the Municipality of Sayaché, Petén, Office of the UN High Commissioner for Human Rights in Guatemala (February 27, 2012 – March 1, 2012), p. 1 (Exhibit 102) and Summary of Field Inspection Activities of the African Palm Enterprises, Carried out in the Municipality of Sayaché, Petén, on February 27, 28, and 29 and March 1, 2012, CONDEG, (“Summary Report”) p. 2 (Exhibit 103). According to the UN, the information about the inspections were based on post-inspection interviews with the inspectors.

<sup>197</sup> Adjudication (February 28, 2012) (Exhibit 104).

<sup>198</sup> Response from MOL office in Petén listing 25 inspections of African Palm companies (March 20, 2014) (Exhibit 105).

<sup>199</sup> Statement of AAAA, (June 26, 2014), p. 2 (Exhibit 40). See also Summary Report, p. 6, (Exhibit 103).

<sup>200</sup> Summary Report, p. 6 (Exhibit 103). The minimum wage for agricultural workers in 2012 was 68 quetzals or 8.91 USD in 2012. Gazette of Central America (December 30, 2011) (Exhibit 89).

including gloves, overalls, or hats, contrary to the requirements of Article 197 of the Code. In the absence of this protective gear, the workers have suffered burns to their skin.

152. After meeting with the company representatives, the inspectors stated they needed more time to complete the inspection and announced they would return to the plantation another day. Thereafter, the Ministry suspended visits to the region, citing a lack of funding.<sup>201</sup>

153. The Ministry took no further action to inspect, sanction or remediate violations of Article 103, 121, and 197 against REPSA, and therefore failed to effectively enforce these laws within the meaning of Article 16.2.1(a) of the CAFTA-DR.

### NAISA

154. Still on February 29, 2012, inspectors were not able to gain entry to the NAISA worksite. Representatives of the UN, however, were able to speak with workers that day. The workers complained of several violations of the Labor Code, including payment of roughly half the minimum wage in violation of Article 103, not having been granted any vacation time in violation of Article 130, and not having protective equipment for the fumigation activities they were carrying out, in violation of Article 197.<sup>202</sup> The inspectors did not return to NAISA to investigate these allegations, despite the MOL's statutory obligations to do so and the responsibility of inspectors to respond to complaints as set out in the Code.<sup>203</sup>

155. Further efforts by workers and the community to seek enforcement by Guatemala of the underlying labor laws at the African palm oil companies were unsuccessful.<sup>204</sup> On March 31, 2014, the community organization representing the workers at Tiki Industries asked the Ministry

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<sup>201</sup> Statement of AAAA (June 26, 2014), p. 2 (Exhibit 40). See also Summary Report, p. 6 (Exhibit 103).

<sup>202</sup> Summary Report, pp. 7-8 (Exhibit 103). The UN report provided its report commenting on the aforementioned visits to the African palm plantations to the Ministry. Among its findings regarding the inspections, the authors stated that, in their view, inspectors acted overly passively in inspections. Report of the Mission in the Municipality of Sayaché, Petén," Office of the UN High Commissioner for Human Rights in Guatemala, pp. 1-2 (Exhibit 102).

<sup>203</sup> GLC, Art. 278 ("GLI, through its inspectors, shall ensure that employers comply with the laws, collective, agreements, and regulations"). See also Art. 274 ("the MOL must monitor the development, improvement, and application of all legal provisions that are not under the jurisdiction of the courts") and Art. 204 ("All labor and health authorities shall cooperate to ensure that health and safety laws are followed").

<sup>204</sup> On May 8, 2012, after seeing no changes to their working conditions as a result of the MOL inspections, more than 12,000 workers staged a protest that blocked the streets of Sayaché, Guatemala for six days. The President of Guatemala responded by calling for a "dialogue table" to be set up to address the complaints of the workers. These "tables" have been used by Guatemala to supplant its own enforcement mechanisms in many circumstances, giving an impression that these matters have been taken up by the highest levels of government when they in fact have produced very few sustainable outcomes. To date, the dialogue table between the palm oil workers and their employers has convened three times, most recently in April 2013, with no resolutions. Workers from the four companies and their representatives also met with Labor Minister Carlos Contreras on June 22, 2012, where they had an opportunity to present their workplace grievances. The Minister said that he recognized the importance of receiving their statutory minimum wage, but he encouraged the use of the dialogue table as a means of resolving their concerns, telling the workers they should be grateful that they have a job. "Brief summary of meeting with Minister Contreras that took place in the Municipality of Sayaché, Petén, on June 22, 2012, with worker representatives from the palm companies, supporting agriculture organizations and municipal authorities," CONDEG (June 22, 2012) (Exhibit 109).

to verify compliance with the warnings issued to the palm oil companies and to initiate a sanction process if violations were confirmed.<sup>205</sup>

156. As of June 2014, the Ministry had not replied or taken action in response. By failing to secure the companies' compliance with Article 103, Article 130, and Article 197, Guatemala has failed to effectively enforce those provisions.

### Fribo

157. On September 3, 2007, three workers from Fribo submitted a complaint to the Ministry of Labor regarding unpaid leave in violation of Articles 129 and 134 of the Code.<sup>206</sup> On September 5, 2007, the GLI visited the factory to conduct an inspection, but was turned away in the absence of the company's legal representative. The inspectors' report warns the company that the inspectors would refer the case to the court for sanction if it failed to permit access.<sup>207</sup> On September 12 and 20, 2007, the inspectors attempted two additional inspections but were turned away. The inspectors' report states that the company failed to comply with the September 5 warnings, characterizes the company's action as obstruction, and informs the company that the GLI will refer the case to the labor court for sanctions.<sup>208</sup>

158. On September 24, 2007, when the inspectors returned once more to the Fribo factory, the company representative had no information about having paid outstanding wages.<sup>209</sup> The inspectors informed the company that they would seek sanctions for the company's failure to cooperate. They found, further, that the company had not complied with the warning issued on September 20 to pay wages.<sup>210</sup>

159. Despite this commitment in the inspectors' report to take action against the company to enforce the laws, the Ministry took no further action for these violations.

160. Two years later, during an inspection on July 10, 2009, the GLI noted at least seven occupational safety and health-related violations at the worksite of 400 employees and gave the company 10 days to pay wages owed to the reinstated workers and 30 days to fix the remaining violations.<sup>211</sup> On July 22, 2009, the GLI conducted a follow-up inspection, but it did not verify whether Fribo complied with the requirements that it pay workers' outstanding wages and cure occupational safety and health violations.<sup>212</sup> On July 27, 2009, the GLI inspectors again visited the worksite to follow up on the July 10, 2009, inspection but Fribo asked the Ministry to wait to verify compliance. While the Ministry informed the company that all warnings issued on July 10

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<sup>205</sup> Letter from CONDEG to Minister Contreras (March 31, 2014) (Exhibit 110).

<sup>206</sup> Adjudication (September 3, 2007) (Exhibit 111); Statement of K, L, M, N, O (June 24, 2014), p. 2 (Exhibit 11).

<sup>207</sup> Adjudication (September 5, 2007) (Exhibit 111).

<sup>208</sup> Adjudication (July 27, 2009) (Exhibit 114).

<sup>209</sup> Adjudication (September 24, 2007) (Exhibit 112).

<sup>210</sup> Adjudication (September 24, 2007) (Exhibit 112).

<sup>211</sup> Adjudication (July 10, 2009) (Exhibit 61).

<sup>212</sup> Adjudication (July 22, 2009) (Exhibit 113).

were still in effect, it nevertheless chose not to verify Fribo’s compliance with its occupational safety and health-related violations.<sup>213</sup>

161. The GLI never inspected to ensure compliance with the warnings issued on July 10, 2009 regarding the health and safety violations or outstanding payments,<sup>214</sup> and therefore failed to effectively enforce Articles 103, 130, 129 and 134 of the Labor Code.

#### Alianza

162. On March 19, 2013, the Ministry of Labor summoned Alianza to attend a conciliatory meeting in response to a complaint filed by 16 workers regarding unpaid wages and other outstanding compensation.<sup>215</sup> Alianza representatives did not attend the conciliatory meeting. The Ministry never took enforcement action following this meeting to investigate the complaint further or to take steps to sanction Alianza for its failure to appear at the conciliatory meeting.

163. Guatemala failed to effectively enforce Articles 103 and 121 of the Labor Code.

#### Mackditex

164. On August 31, 2011, 18 Mackditex workers were told by their employer that they would be forced to “take vacation” because there was no work for them to do at the factory; for this time they would be paid only the vacation pay as calculated by Article 134.<sup>216</sup> On September 1, 2011, the workers filed a complaint with the MOL, alleging that they had been suspended from work without proper pay in violation of GLC Articles 92, 93, and 134.<sup>217</sup>

165. On September 16, 2011, when inspectors visited the Mackditex facilities, they confirmed that some workers had not been paid, though they had returned to work. According to the inspectors’ report, the inspectors arranged that they would return to verify payment at a later time.<sup>218</sup> This verification has never taken place and the company never paid the workers. Guatemala’s failure to follow-up on these known violations to ensure compliance with the relevant labor laws constitutes a failure to effectively enforce these laws within the meaning of Article 16.2.1(a) of the CAFTA-DR.

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<sup>213</sup> Adjudication (July 27, 2009) (Exhibit 114)

<sup>214</sup> Fribo closed in August 2009. Statement of K, L, M, N, O (June 24, 2014), p. 3 (Exhibit 11).

<sup>215</sup> Adjudication (March 19, 2013) (Exhibit 131).

<sup>216</sup> Adjudication (September 1, 2011) (Exhibit 115); Statement of W and Z (June 25, 2014), p. 1 (Exhibit 18).

<sup>217</sup> Adjudication (September 1, 2011) (Exhibit 115); Statement of W and Z (June 25, 2014), p. 6 (Exhibit 18).

<sup>218</sup> Adjudication (September 16, 2011) (Exhibit 116).

Koa Modas

166. In early March 2013, the workers of Koa Modas filed a complaint with the GLI alleging labor violations of, *inter alia*, Articles 61, 197, and 92-93, related to harassment, occupational safety and health, failure to pay wages, and improper deductions of wages.<sup>219</sup>

167. On March 8, 2013, when the Ministry summoned the employer to a joint meeting to address the workers' complaints, Koa Modas did not appear.<sup>220</sup> In total, Koa Modas did not appear at seven conciliatory meetings to which it was summoned by the Ministry between March and December 2013 in response to the complaints made by the workers.<sup>221</sup>

168. At no point did the Ministry take steps with the labor court pursuant to Article 281(m) of the Labor Code to impose sanctions on the employer for the employer's non-appearance at the meetings.<sup>222</sup> As a result, the GLI failed to complete its investigation and failed to ensure that the company was in compliance with Articles 61, 197, and 92-93.

169. Also in October 2013, in the context of a conciliation process, the workers and their employer signed a collective agreement in which the employer committed to resolving the workers' concerns about a lack of potable water and not receiving their regular bonuses. To date, the commitments in the agreement incumbent on the employer have not been realized. Under Article 197(j) of the Labor Code, workers have a right to potable water and the Ministry of Labor has an obligation to inspect and verify compliance with associated labor violations, including a lack of potable water.

170. The Ministry took no action to verify that the employer complied with the conciliation agreement or that the labor violations, including the requirement to have potable water, had been remedied. As a result, it failed to effectively enforce Article 197(j).<sup>223</sup>

171. Again in February 2014, workers filed a complaint with the Ministry alleging that Koa Modas was violating health and safety standards, including due to lack of potable water, lack of adequate ventilation, inadequate evacuation routes, lack of adequate and sufficient restrooms, and improper presence of company guards in the restrooms in violation of Articles 61 and 197 of the Labor Code.<sup>224</sup> On February 21, 2014, the Ministry conducted an inspection and verified that

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<sup>219</sup> This was one of over 180 complaints the union has filed since it was formed. See Statement of NN, OO, PP and QQ (July 2, 2014), p. 4 (Exhibit 38).

<sup>220</sup> Ministry of Labor Conciliatory Meeting Report (March 8, 2013) (Exhibit 117).

<sup>221</sup> Ministry of Labor Conciliatory Meeting Reports (March 8, 2013) (Exhibit 117); (April 19, 2013) (Exhibit 118); (April 26, 2013) (Exhibit 119); (June 5, 2013) (Exhibit 120); (June 7, 2013) (Exhibit 121); (December 4, 2013) (Exhibit 122); (December 12, 2013) (Exhibit 123).

<sup>222</sup> Ministry of Labor Conciliatory Meeting Reports (March 8, 2013) (Exhibit 117); (April 19, 2013) (Exhibit 118); (April 26, 2013) (Exhibit 119); (June 5, 2013) (Exhibit 120); (June 7, 2013) (Exhibit 121); (December 4, 2013) (Exhibit 122); (December 12, 2013) (Exhibit 123). Statement of GG (October 13, 2014), p. 7 (Exhibit 20).

<sup>223</sup> Statement of GG (October 13, 2014), p. 7 (Exhibit 20).

<sup>224</sup> Statement of NN, OO, PP and QQ (July 2, 2014), p. 4 (Exhibit 38).

the company had violated the Labor Code.<sup>225</sup> Still, as of July 2014, these conditions remained unaddressed.<sup>226</sup>

172. The Ministry took no further action to bring the matter to a labor court as provided in Article 281(l) or to otherwise sanction the company or bring it into compliance with the law, and thus failed to effectively enforce Articles 61 and 197 of the Labor Code within the meaning of Article 16.2.1(a) of the CAFTA-DR.

#### Santa Elena<sup>227</sup>

173. On June 5, 2014, 29 workers of Santa Elena coffee plantation filed a complaint with the Ministry about the treatment and wellbeing of the workers at the farm.<sup>228</sup> The workers' complaint concerned a change made by the company in the way the workers were instructed to apply herbicides to the crops of the farm.<sup>229</sup> The workers indicated that the change in method put them at risk, because they did not have the protective equipment required to perform the tasks safely, as required by Article 197 of the Labor Code.<sup>230</sup>

174. When the labor inspectors visited the farm on June 6, 2014, they met with workers and the employer, but did not examine the fumigation process or the part of the farm where it was being applied.<sup>231</sup> They informed both sides that they would convene a hearing on June 16, 2014.<sup>232</sup> On June 16, 2014, a health and safety officer carried out an inspection and made over 25 findings regarding necessary improvements to health and safety, giving the employer three weeks to implement changes under threat of sanction for violations of the Code.<sup>233</sup> On July 7, 2014, the health and safety officer was not permitted to verify the employer's compliance when she returned on July 7, 2014. Guatemala thus has failed to secure the employer's compliance with Articles 61 and 197, the relevant health and safety provisions of the Labor Code.

#### Serigrafia

175. In June and July 2012, the workers of Serigrafia screen printing factory filed several complaints with the MOL regarding reprisals they alleged the company took against them for having organized a union among their 210 workers.<sup>234</sup> These reprisals included threats about

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<sup>225</sup> Adjudication (February 21, 2014) (Exhibit 125).

<sup>226</sup> Statement of NN, OO, PP and QQ (July 2, 2014) (Exhibit 38).

<sup>227</sup> The submission discusses the Santa Elena coffee plantation, intending to encompass also its "sister" plantation, El Ferrol, under the same ownership. Workers from El Ferrol also were affected by the developments documented here and joined in the filing of complaints.

<sup>228</sup> Adjudication (June 6, 2014) (Exhibit 126). Statement of HH (October 20, 2014) (Exhibit 42).

<sup>229</sup> Statement of WW, XX, YY, ZZ, AAA, BBB, CCC, DDD, EEE (June 30, 2014), p. 1 (Exhibit 41).

<sup>230</sup> Statement of WW, XX, YY, ZZ, AAA, BBB, CCC, DDD, EEE (June 30, 2014), p. 1 (Exhibit 41). The employer also violated the collective bargaining agreement by so doing.

<sup>231</sup> Adjudication (June 16, 2014) (Exhibit 127).

<sup>232</sup> Adjudication (June 16, 2014) (Exhibit 127).

<sup>233</sup> Report, Department of Hygiene and Occupational Safety (June 16, 2014) (Exhibit 128).

<sup>234</sup> Statement of II (June 26, 2014) (Exhibit 43). Email from II (October 14, 2014) (discussing the 210 workers at the start of 2013) (Exhibit 129).



losing their jobs, decreased pay, video surveillance, and a lack of bonuses contrary to Articles 121 and 103, among others.<sup>235</sup> Despite having filed these complaints, the MOL did not investigate accordingly when it conducted an inspection at the worksite on January 29, 2013.<sup>236</sup> On another occasion, an inspector was thought to be drunk during an inspection.<sup>237</sup>

176. The MOL convened approximately 15 meetings between the workers and the company to resolve the issues raised by the workers.<sup>238</sup> The workers raised the employer's alleged violations of the Code at these meetings, but the employer failed to appear at seven of these meetings contrary to Article 281(m).<sup>239</sup>

177. The MOL did not take any action to compel or penalize the employer for failing to attend to resolve the alleged violations.<sup>240</sup> Accordingly, Guatemala failed to effectively enforce Articles 103 and 121 of the Labor Code.

### **3. Guatemala's Failures Constitute a Sustained or Recurring Course of Inaction**

178. As can be seen from the above discussions, the evidence establishes that Guatemala has failed to effectively enforce Articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197 of its Labor Code through both a sustained and a recurring course of inaction.

179. The above evidence shows that Guatemala consistently and repeatedly failed to inspect work sites in an effective way from 2006 to 2014.

180. In particular, with respect to four employers – Las Delicias, Tiki Industries, REPSA, and NAISA – the Government failed to effectively enforce Article 103 of the Code concerning provision of a minimum wage by not investigating or not imposing a penalty. These failures persisted between 2008 and 2014. For two other employers discussed above – Tiki Industries and REPSA – the Government failed to effectively enforce Articles 121 and 122 of the Code concerning restrictions on or pay for overtime work. These instances persisted between 2012 and 2014. And with respect to two other employers – Mackditex and Fribo – the Government failed to effectively enforce Articles 92, 93 and 134 of the Code concerning pay and vacation. These instances persisted between 2007 and 2011.

181. Similarly, with respect to five employers discussed above – Koa Modas, Santa Elena, Tiki Industries, REPSA, and NAISA – the Government failed to effectively enforce Article 197

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<sup>235</sup> Statement of II (June 26, 2014), p. 2 (Exhibit 43); Statement of JJ (June 26, 2014), p. 2 (Exhibit 44); and, Statement of KK (June 26, 2014), p. 1 (Exhibit 45).

<sup>236</sup> Interviews with II and GG (June 12, 2014 & June 18, 2014), p. 2 (Exhibit 130).

<sup>237</sup> Statement of II (June 26, 2014), p. 2 (Exhibit 43); Statement of JJ (June 26, 2014) (Exhibit 44), p. 2; and, Statement of KK (June 26, 2014), p. 1 (Exhibit 45).

<sup>238</sup> Interviews with II and GG (June 12, 2014 & June 18, 2014), p. 2 (Exhibit 130).

<sup>239</sup> Interviews with II and GG (June 12, 2014 & June 18, 2014), p. 2 (Exhibit 130).

<sup>240</sup> The company closed the factory on February 2, 2013. It is suspected that the company sent the names of workers who unionized to other companies in the area to prevent them from getting hired. Statement of II (June 26, 2014), p. 2; Statement of JJ (June 26, 2014), p. 2; and, Statement of KK (June 26, 2014), p. 2 (Exhibit 45).

of the Code concerning occupational safety and health. These instances persisted between 2012 and 2014. For two other employers discussed above – Tiki and REPSA – the Government failed to effectively enforce Article 61 of the Code concerning general obligations on employers regarding conditions of work. These instances persisted between 2012 and 2014.

182. Finally, the record demonstrates nine instances in which the Ministry of Labor failed to apply the required enforcement mechanism for employers refusing to appear as part of an investigatory hearing. Under Article 281(m) of the Code, the MOL is empowered to conduct hearings to investigate and remedy labor law violations. The MOL is obligated to refer a matter to a labor court for sanction where a party fails to appear. On eight occasions in 2013, representatives of Koa Modas and Alianza failed to appear in response to a summons in violation of Article 281(m) of the Code. The Ministry took no action to sanction any of these employers on these nine occasions.

183. In sum, on multiple occasions spanning over 75 worksites and several years, dozens of workers' complaints were not investigated nor was compliance with violations ensured. Thus, through this sustained and recurring course of inaction, Guatemala has failed to effectively enforce its labor laws by failing to inspect, or by failing to sufficiently inspect, reported violations. And where Guatemala determined that an employer had violated the Labor Code, Guatemala failed to secure compliance with the Code as required by CAFTA-DR Article 16.2.1(a).

#### **4. Guatemala's Failures Occurred in a Manner Affecting Trade**

184. Guatemala's sustained and recurring course of inaction with respect to inspections as substantiated above occurred in a manner affecting trade among the CAFTA-DR Parties.

185. The 78 enterprises discussed above employ thousands of workers and contribute significantly to the trade between Guatemala and its CAFTA-DR partners, including the United States.

186. Between 2007 and 2013, Guatemala's exports of coffee<sup>241</sup> averaged about 1 billion USD annually. CAFTA-DR took 35 percent of these exports, of which 34 percent went to the United States.<sup>242</sup> Coffee produced by the farms identified above also competed with imports of coffee from other CAFTA-DR countries.

187. With respect to the apparel sector, as noted above in paragraph 107, between 2007 and 2013, 97 percent of Guatemala's apparel exports were destined for CAFTA-DR countries, and 94 percent of these came to the United States. Guatemalan imports from other CAFTA-DR countries also compete with the apparel products made by these companies.

188. Guatemala's palm oil exports averaged 173 million USD annually between 2007 and 2013, and comprised 2 percent of Guatemala's total goods exports to the world. Of these, 29

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<sup>241</sup> Including also tea and certain spices under GTIS data for HS2 chapter 9.

<sup>242</sup> GTIS data for HS2 chapter 9.

percent went to CAFTA-DR countries.<sup>243</sup> The expanding Guatemalan palm oil industry is dominated by a small number of companies, including those identified above. Palm oil produced by the sector also competes with imports from other CAFTA-DR countries in the Guatemalan market.

189. Guatemala’s failure to effectively enforce its labor laws by not conducting inspections as required under the law and by not imposing the appropriate penalties affects the conditions of competition within each of the abovementioned sectors, and throughout the CAFTA-DR market. By allowing these companies to violate Labor Code Articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197, through a sustained and recurring failure to effectively enforce these laws, Guatemala enables these enterprises to benefit from reduced labor costs. Particularly, the employers avoid the costs associated with paying the required minimum wage, paying the required overtime compensation, regulating the hours of work permitted in one day, and maintaining the minimum standards regarding occupational safety and health.

190. Based on the foregoing, Guatemala has failed to effectively enforce its labor laws in a manner affecting trade between the Parties within the meaning of Article 16.2.1(a) of the CAFTA-DR.

## 5. Conclusion

191. Based on the foregoing, Guatemala has failed to effectively enforce its labor laws directly related to acceptable conditions of work through inadequate inspections and a failure to impose penalties where violations were found. Therefore, the United States respectfully requests that the Panel find that Guatemala has acted inconsistently with its obligation under Article 16.2.1(a) with respect to Articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197 of the Labor Code.

### **C. GUATEMALA HAS FAILED TO EFFECTIVELY ENFORCE ITS LABOR LAWS DIRECTLY RELATED TO THE RIGHT OF ASSOCIATION, TO THE RIGHT TO ORGANIZE AND BARGAIN COLLECTIVELY, AND TO ACCEPTABLE CONDITIONS OF WORK BY NOT REGISTERING UNIONS IN A TIMELY FASHION OR INSTITUTING CONCILIATION PROCESSES, IN BREACH OF CAFTA-DR ARTICLE 16.2.1(A)**

192. This section presents instances in which either the Ministry of Labor, through the General Labor Directorate, failed to act in accordance with the Labor Code with respect to union registration, or Guatemalan labor courts failed to act in accordance with the Labor Code to organize a conciliation tribunal to resolve a dispute between workers and their employer. These failures to act have prevented workers from organizing and bargaining collectively to pursue their rights under the Labor Code regarding minimum wage, hours of work, and occupational safety and health. Consequently, this section demonstrates Guatemala’s failure to effectively enforce the labor laws related to the right of association and the right to organize and bargain collectively, as well as the labor laws related to acceptable conditions of work.

<sup>243</sup> GTIS data for HS6 codes 151110 and 151190.

193. The section is set out in two parts – the first addressing registration of unions before turning in the second to the conciliation processes.

### 1. Registration of Unions

a) The Laws at Issue are “Labor Laws” Under Article 16.8 of the CAFTA-DR

194. The labor laws at issue are Articles 217-219 (protecting the right to form a union), Article 211(a) and (b) (protecting freedom of association), and the several Code provisions discussed in Section B above – namely, Articles 61, 103, 116-118, 121-122, 126-130, and 197 – that guarantee employees acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. These provisions directly relate to the right to organize and bargain collectively as well as matters such as safe and appropriate equipment, limiting the length of a work day, paying no less than a minimum wage, and providing certain basic amenities. As a result, they are “labor laws” of Guatemala under subparagraphs (a), (b) and (e) of the definition of labor laws in Article 16.8 of the CAFTA-DR.

b) Requirements to Effectively Enforce Articles 211, 217-219 (protecting the right to form a union) and Articles 61, 103, 116-118, 121-122, 126-130, and 197 (ensuring acceptable conditions of work)

195. The GLD’s registration of unions in a timely fashion in accordance with the Labor Code is important to enforcing both (1) the laws protecting and guaranteeing union formation; and (2) the laws providing for acceptable conditions of work.

196. First, under Guatemalan law, the formation and registration of a union is the necessary first step for workers seeking to exercise their right of association and their right to bargain collectively through a union. Article 211 obligates the Ministry of Labor to implement a national policy “for the defense and development of unionism.”<sup>244</sup> As part of this obligation, it must “protect the free exercise of the right of free association.”<sup>245</sup> The GLD’s registration of unions in a timely fashion in accordance with the Labor Code is central to the exercise of these rights.

197. Second, unions serve to “regulat[e] the conditions under which work is to be performed;”<sup>246</sup> ensure the “financial and social well-being and personal dignity of the employee;”<sup>247</sup> and “[c]reate, administer or subsidize institutions, establishments, social projects and commercial activities that contribute to improving the employee’s standard of living.”<sup>248</sup> To accomplish this end, unions advocate on behalf of their constituents in a number of ways, including by representing workers in labor complaints submitted before the Ministry of Labor and other enforcement proceedings. To the extent a union is not registered, or is not registered in

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<sup>244</sup> GLC, Art. 211.

<sup>245</sup> GLC, Art. 211.

<sup>246</sup> GLC, Arts. 49, and 214(a).

<sup>247</sup> GLC, Art. 214(c).

<sup>248</sup> GLC, Art. 214(d).

a timely fashion, the workers are denied their legal right to union representation during the course of these important enforcement proceedings. Thus, the GLD's registration of unions in a timely fashion in accordance with the Labor Code constitutes an important part of enforcing the laws providing for a minimum wage (Article 103); a daily work schedule (Articles 116-118); rest days, holidays, and annual vacations (Articles 126-130); overtime pay and limitations on hours of work (Articles 121-122); safeguards for occupational safety and health (Article 197); union formation (Article 218); and, due consideration for the treatment of workers (Article 61).

198. Article 218 of the Guatemalan Labor Code requires the Ministry of Labor, specifically the General Labor Directorate, to register a union within 10 business days of receiving an application.<sup>249</sup> A union cannot begin to perform its basic functions – protecting and improving working conditions—and does not achieve legal status until the GLD completes the union's registration.<sup>250</sup>

199. The GLD may deny union applications only in case of verified errors or defects that cannot be remedied.<sup>251</sup> In case of errors or defects, the GLD must communicate those immediately to the applicant so that it may challenge them or formulate a new application.<sup>252</sup>

200. Within 15 days of registration, the Ministry must publish a summary of the resolution approving the by-laws in the official gazette and recognize the legal standing of the union.<sup>253</sup> Union formation is intended to move quickly to ensure that unionized workers are not denied access to their statutorily defined rights.<sup>254</sup>

c) By Not Registering Unions in a Timely Fashion, Guatemala Has Failed to Effectively Enforce its Labor Laws Directly Related to Union Formation and Acceptable Conditions of Work

201. The evidence below shows a sustained and recurring course of inaction in which Guatemala has not registered unions within the time required by the Labor Code, and in this respect failed to effectively enforce the Labor Code provisions protecting the right to form a union (Articles 211, 217-219) and acceptable conditions of work (Articles 61, 103, 116-118, 121-122, 126-130, 197). Through the inaction during these periods, Guatemala has breached its obligation under Article 16.2.1(a) of the CAFTA-DR.

Mackditex

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<sup>249</sup> GLC, Art. 218(d).

<sup>250</sup> GLC, Art. 217 (“Unions and associations shall have the authority to begin their activities as soon as they are registered with the Public Registry of Unions and Associations.”)

<sup>251</sup> GLC, Art. 218(d).

<sup>252</sup> GLC, Art. 218(d). The GLD is also obligated to ensure that a summary of its resolution approving the union's bylaws is published in the official gazette within 15 days of the union's registration pursuant to GLC, Art. 218(d). The Code sets out that the union's executive committee must also be registered “without delay,” according to Article 219.

<sup>253</sup> GLC, Art. 218(d).

<sup>254</sup> GLC, Arts. 49 and 214(a).

202. On November 18, 2010, a representative of workers seeking to form a union at Mackditex submitted a request to the GLD, requesting that the GLD examine the attached copy of the constitution and draft union statutes to ensure that they conform to the legal requirements.<sup>255</sup>

203. The GLD did not act for three months, despite the statutory requirement to review the application within 10 business days.

204. On January 19, 2011, the union representative sent supplemental union registration documentation to the GLD<sup>256</sup> to expedite the process. From that time forward, the workers appeared before the GLD at least twice a month to verify the status of their application.<sup>257</sup>

205. The GLD delayed the registration process by requesting documents apparently not required by the Code.<sup>258</sup> It was only on June 21, 2012, that the GLD officially registered the union, after over a year and a half of attempts.<sup>259</sup>

206. In the case of the Mackditex workers, the GLD failed to register the union with the Public Registry of Unions and Associations within 10 days of receiving the union formation documents. This inaction constituted a failure to effectively enforce laws directly related to the right of association and the right to organize and bargain collectively and directly related to acceptable conditions of work.

#### Koa Modas

207. In December 2011, a group of workers at Koa Modas organized to form a union and filed constituting documents with the Ministry of Labor's GLD.<sup>260</sup> This filing was the first of a series of exchanges between the GLD and the workers as the GLD imposed a number of additional steps, not set out in the law, on the workers in the process.

208. On January 17, 2012, the union was notified of a request from the MOL to modify its constituting act and bylaws.<sup>261</sup> On January 20, 2012, a representative on behalf of the union re-submitted the documents to the GLD incorporating the requested changes.<sup>262</sup> On February 2,

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<sup>255</sup> Complaint (November 18, 2010) (Exhibit 140).

<sup>256</sup> Complaint (January 19, 2011) (Exhibit 141).

<sup>257</sup> Statement of W and Z (June 25, 2014), p. 1 (Exhibit 18).

<sup>258</sup> Statement of Y, Z, AA (June 25, 2014), p. 1 (Exhibit 19).

<sup>259</sup> Gazette of Central America (August 22, 2012) (Exhibit 142).

<sup>260</sup> Memorial from SITRAKOAMODASSA presenting union constituting document to Ministry of Labor (December 20, 2011) (Exhibit 143).

<sup>261</sup> Memorial from SITRAKOAMODASSA presenting amended constituting act and bylaws to the MOL, stamped received January 20, 2012 (Exhibit 144).

<sup>262</sup> Memorial from SITRAKOAMODASSA presenting amended constituting act and bylaws to the MOL, stamped received January 20, 2012 (Exhibit 144).

2012, the GLD denied registration on the basis that the papers were not valid because the union's lawyer was not listed as counsel for the union.<sup>263</sup>

209. On February 14, 2012, the workers resubmitted the union's constituting act and the union's bylaws to correct the "errors" as perceived by the GLD.<sup>264</sup> On March 7, 2012, the GLD made further requests that the union amend its bylaws in six areas, including re-numbering sections and adjusting capitalization.<sup>265</sup> On March 20, 2012, the union submitted the necessary amendments to the GLD.<sup>266</sup> Finally, on April 12, 2012, the Ministry issued a resolution recognizing the union as a legal entity and approving its bylaws. On May 18, 2012, the resolution was published in the official gazette. The resolution indicated that the Government would publish its recognition of the union in the official gazette within 15 days of the union's inscription in the book of legal entities.<sup>267</sup>

210. It was not until June 12, 2012, however, that the MOL published the union's registration in the official gazette thereby recognizing its legal status, six months after the union initially filed its paperwork in December 2011.<sup>268</sup> On February 7, 2013, the GLD registered the union's executive committee, seven months after the registration of the union.<sup>269</sup>

211. The situation with respect to Koa Modas demonstrates the GLD's failure to register unions in a timely manner. Had the GLD registered the union in accordance with the time frames mandated by law, the workers of Koa Modas would have been able to exercise their rights under GLC Articles 49 and 214 (to enter into collective bargaining agreements) months earlier than the April 12, 2012, registration date. This inaction by Guatemala constitutes a failure to effectively enforce the labor laws providing for union formation (Articles 211, 217-219) and acceptable conditions of work (Articles 61, 103, 116-118, 121-122, 126-130 and 197).

### Serigrafia

212. On August 8, 2012, more than 20 workers at the Serigrafia screen printing factory presented their union formation documents to the GLD.<sup>270</sup>

213. The GLD failed to register the union for more than six weeks, far beyond the 10 business day statutory limit. Not until September 20, 2012, did the GLD register the union.<sup>271</sup> On

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<sup>263</sup> Memorial from the National Department of Workers Protection (February 2, 2012) (Exhibit 145).

<sup>264</sup> Memorial from SITRAKOAMODASSA presenting amended bylaws to Ministry of Labor (February 14, 2012) (Exhibit 146).

<sup>265</sup> Memorial from the National Department of Workers Protection, Guatemala (March 7, 2012) (Exhibit 155).

<sup>266</sup> Memorial from SITRAKOAMODASSA presenting amended bylaws to MOL, stamped received March 20, 2012; the amended bylaws (Exhibit 147).

<sup>267</sup> Resolution, (April 12, 2012) (Exhibit 148); Resolution, Supreme Court (February 28, 2013) (Exhibit 149).

<sup>268</sup> Gazette of Central America (June 12, 2012) (Exhibit 150).

<sup>269</sup> Resolution approving formation of executive committee (February 7, 2013) (Exhibit 151).

<sup>270</sup> Constituting document of union, (August 8, 2012) (Exhibit 152).

<sup>271</sup> Ministry of Labor resolution approving registration of union (September 20, 2012) (Exhibit 153); Statement of KK (June 26, 2014), p. 2 (Exhibit 45).

November 15, 2012, the Ministry published the summary of the resolution approving the bylaws of the union in the official gazette.<sup>272</sup> The Ministry failed to publish the summary within 15 days of registration, contrary to Article 218(d) of the Labor Code.

214. The GLD's inaction in the case of Serigrafia is another failure to effectively enforce the labor laws governing the right of association and the right to organize and bargain collectively, as well as wages, hours of work, and occupational safety and health.

215. In failing to complete the union formation process within the required time for the workers at these various enterprises, the GLD delayed workers' access to the rights afforded to them under the law, including to union representation in labor complaints submitted before the Ministry of Labor and other enforcement proceedings. In this respect, Guatemala failed to effectively enforce the applicable labor laws, including laws providing for a minimum wage (Article 103); a daily work schedule (Articles 116-118); overtime pay and limitations on hours of work (Articles 121-122); rest days, holidays, and annual vacations (Articles 126-130); safeguards for occupational safety and health (Article 197); due consideration for the treatment of workers (Article 61), and union formation (Articles 211, 217-219).

## 2. Conciliation Tribunals

### a) The Laws at Issue are "Labor Laws" Under Article 16.8

216. The labor laws at issue are Articles 377-396 (procedures for conciliating a labor dispute) and Articles 61, 103, 116-118, 121-122, 126-130, and 197. The conciliation process is a means for workers to exercise their right to bargain collectively, resolve employment differences, and pursue acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. Accordingly, they are labor laws within the meaning of Article 16.8 of the CAFTA-DR.

### b) Requirements to Effectively Enforce Articles 377-396 (protecting the right to conciliate labor disputes) and Articles 61, 103, 116-118, 121-122, 126-130, and 197 (ensuring acceptable conditions of work)

217. Workers may seek government intervention to ensure that these laws are enforced by filing a complaint with the Ministry as seen in Section B or, where the complaint involves a group of workers and could lead to a strike or work stoppage, by filing a list of grievances with a labor court to commence a statutory conciliation process. The court is required to ensure that the dispute is resolved through this process and the grievances are addressed; to the extent the grievances include violations of these provisions of the Code, the court ensures compliance by administering this process. That is, the administration of the conciliation process which the court is required to undertake as described below is a means of exercising the right to bargain

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<sup>272</sup> Ministry of Labor resolution approving registration of union (September 20, 2012) (Exhibit 153); Statement of KK (June 26, 2014), p. 2 (Exhibit 45).



collectively and of enforcing Articles 61, 103, 116-118, 121-122, 126-130, and 197, by resolving disputes about these issues between workers and their employer.

218. Upon the workers' filing of the list of grievances with the labor court, the labor court is required by Article 378 of the Labor Code to issue a decision acknowledging receipt of the list and order notification to the opposing party no later than the day after receipt.<sup>273</sup>

219. Following a labor court's receipt of the list of grievances, the court is required to proceed with the formation of a conciliation tribunal within 12 hours.<sup>274</sup> The conciliation tribunal is composed of a judge and delegates representing the employer and the workers.<sup>275</sup> The party commencing the conciliation is required to identify its delegates in its list of grievances.<sup>276</sup> The opposing party must appoint its delegates within 24 hours of the court notification of the conflict.<sup>277</sup>

220. If the opposing party fails to appoint its delegates, the court is obligated to admonish the party and to appoint the delegation.<sup>278</sup> Once the worker and employer delegations are selected and all jurisdictional issues are resolved (such as a "legal impediment or cause for recusal" for the tribunal members<sup>279</sup>), the conciliation tribunal must summon both delegations to appear within 36 hours.<sup>280</sup>

221. The conciliation process must be completed<sup>281</sup> in 15 or fewer days from the time the labor court receives the list of grievances.<sup>282</sup> The Code provides that courts shall impose penalties on judicial employees or officials who cause delay,<sup>283</sup> and fines for delegates of workers or employers who fail to appear for a conciliation hearing, absent reasonable causes.<sup>284</sup>

222. The level of urgency surrounding the resolution of collective conflicts is intended both to avoid work stoppages and also to ensure that workers are not denied the rights to which they are entitled under Guatemala's labor laws.

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<sup>273</sup> GLC, Art. 378.

<sup>274</sup> GLC, Arts. 377 & 382.

<sup>275</sup> GLC, Arts. 294, 382.

<sup>276</sup> GLC, Art. 377.

<sup>277</sup> GLC, Art. 382.

<sup>278</sup> GLC, Art. 382.

<sup>279</sup> GLC, Art. 383, 384.

<sup>280</sup> GLC, Art. 384, 385.

<sup>281</sup> The conciliation process may result in settlement, arbitration, or, if settlement and arbitration are unable to resolve the conflict, a party can request the Labor Court to rule on the legality of the matter. GLC, Arts. 386, 391, 397(1)(a), 394. No workers or employer may proceed with a strike or a lock-out without first obtaining a ruling from the court. GLC, Art. 394.

<sup>282</sup> GLC, Art. 393.

<sup>283</sup> GLC, Art. 393.

<sup>284</sup> GLC, Art. 388.

223. The labor court’s inaction in administering the conciliation process prevents enforcement of the law. As mandated, “[i]n no case shall the conciliation procedures last more than fifteen days.”<sup>285</sup> Delay or inaction beyond this timeframe deprives workers of finality for their conflict. Where their claims are validated, the court’s inaction prevents the enforcement of laws protecting wages and acceptable conditions of work to which they are entitled. In this respect, delay or inaction by the court during conciliation is a failure to effectively enforce GLC Articles 377-396 (the right to conciliate labor disputes), Article 61 (general obligations of employers), Article 103 (minimum wage), Articles 116-118 (limitations on work schedules), 121-122 (overtime pay and limitations on hours of work), Articles 126-130 (weekly day of rest; holidays; vacations), and Article 197 (minimum mandatory measures for employers regarding safety and health).

c) By Not Setting Up Conciliation Tribunals in a Timely Fashion, Guatemala Has Failed to Effectively Enforce its Labor Laws Directly Related to the Right to Bargain Collectively and Acceptable Conditions of Work

224. The facts described below demonstrate that the labor court, through a sustained or recurring course of inaction, failed to set up and advance the conciliation process within the mandated time frame, and in this respect failed to effectively enforce these provisions of the Labor Code. Through these failures, Guatemala has breached its obligation under Article 16.2.1(a) of the CAFTA-DR.

Las Delicias

225. In 2001, workers at Las Delicias farm submitted a list of grievances to the labor court in Malacatán.<sup>286</sup> In the list, they requested that the employer comply with the minimum wage law (Article 103), provide them with adequate tools (Articles 61 and 197), improve the conditions of work, improve medical conditions (Articles 61 and 197), and provide them with respect (Article 61).<sup>287</sup>

226. The court did not take any action to advance the conciliation resolution process nor did the court sanction the employer for not participating in the conciliation process. This list is still pending, after 13 years. When the workers went to the court in early 2014 to enquire about its status, they found the list “under a pile of papers.”<sup>288</sup> The court did not take any action thereafter.

227. The labor court failed to act, contrary to its obligation under Article 393 to establish the conciliation tribunal and ensure that the tribunal resolve the workers’ claims within 15 days from

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<sup>285</sup> GLC, Art. 393.

<sup>286</sup> Statement of RR, SS, TT, UU, VV (Las Delicias) (June 30, 2014), p. 2 (Exhibit 26).

<sup>287</sup> Statement of RR, SS, TT, UU, VV (Las Delicias) (June 30, 2014), p. 2 (Exhibit 26); while the collective conflict petition filed by the workers at Las Delicias date back to 2001, pre-dating Guatemala’s July 1, 2006, accession to CAFTA-DR, the failures of the court to resolve those petitions are sustained through the present.

<sup>288</sup> Statement of RR, SS, TT, UU, VV (Las Delicias) (June 30, 2014), p. 2 (Exhibit 26).

receiving the list of grievances.<sup>289</sup> The labor court's inaction resulted in a failure to effectively enforce GLC Articles 61, 103, and 197.

### Avandia

228. On November 13, 2006, six workers at Avandia filed a list of grievances with a labor court on behalf of themselves and 24 other workers. The list requested the establishment of a conciliation tribunal to resolve allegations of substandard conditions of work, including violations of Article 121 (payment of overtime), Articles 116-118 (regulation of work schedule), and Article 61(c) (prohibition of verbal or physical abuse) suffered by the 600 workers at the factory.<sup>290</sup> The workers requested payment of overtime wages, modifications to production quotas that would allow them to complete their work during the agreed work schedule, and a commitment from Avandia that it would not abuse workers verbally or physically.<sup>291</sup>

229. The court failed to take any action to establish a conciliation tribunal as required by the Code.

230. On August 29, 2007, another group of Avandia workers filed a list of grievances in a labor court. The court acknowledged receipt on the same day.<sup>292</sup> For this conflict, the workers sought redress for violations of Articles 116-118 (limitations on work schedules) and Article 197 (mandatory measures for occupational safety and health). The workers requested that they not be forced to work overtime and that Avandia respect their right of association and right to organize and bargain collectively.

231. Again, the court failed to establish a conciliation tribunal.<sup>293</sup>

232. In still another instance, on September 4, 2009, workers filed another list of grievances with a labor court. The workers' claims again included violations of Articles 116-118 (limitations on work schedules) and Article 197 (occupational safety and health). Among the requests made in the list were: no forced overtime, health and safety protections, and right of association.<sup>294</sup>

233. Upon receiving the list of grievances, the court is obligated under Articles 378 and 382 to form the conciliation tribunal within 12 hours and acknowledge receipt of the list within one day. The court failed to abide by both requirements.<sup>295</sup>

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<sup>289</sup> GLC, Art. 393.

<sup>290</sup> Collective Conflict, List of Grievances (November 13, 2006) (Exhibit 72).

<sup>291</sup> Collective Conflict, List of Grievances (November 13, 2006) (Exhibit 72).

<sup>292</sup> Collective Conflict, List of Grievances (August 29, 2007) (Exhibit 132).

<sup>293</sup> On May 25, 2009, almost two years after the commencement of the conciliation, and despite the failure of the labor court to establish a conciliation tribunal, the workers and Avandia agreed to a settlement of their claims and the workers withdrew the collective conflict. Adjudication (May 25, 2009) (Exhibit 133).

<sup>294</sup> Collective Conflict, List of Grievances (September 4, 2009) (Exhibit 134).

<sup>295</sup> The Court acknowledged the list of grievances five days after receipt. Resolution (September 9, 2009) (Exhibit 135).

234. In each of these instances, the evidence shows the labor court failing to establish the conciliation tribunal and resolve the workers' claims within 15 days from receiving the list of grievances.<sup>296</sup> By foreclosing or limiting the workers' access to the conciliation process, Guatemala failed to effectively enforce GLC Articles 61, 116-118, 121, and 197.

### Fribo

235. On August 18, 2007, a group of Fribo workers filed a list of grievances with a labor court articulating substandard conditions of work, including bathrooms without proper sanitary conditions, a lack of running water, padlocked bay doors, dangerous conditions causing many on-the-job accidents, inadequate dining areas, not receiving their social security benefits, and not receiving overtime pay.<sup>297</sup>

236. These claims allege violations by the employer of Articles 121, concerning compensation for overtime work, and Article 197, concerning occupational health and safety issues. More specifically with respect to the latter, Article 197 requires employers to take the necessary precautions to effectively protect the life, safety, and health of workers; prevent work accidents; provide a healthy working environment; install and maintain safety and protective devices on machinery; maintain bathrooms with sanitary conditions; and, ensure that facilities intended for the preparation and consumption of food and sources of potable water for employees are of sufficient capacity and are maintained in proper sanitary conditions. On August 24, 2007, the labor court acknowledged receipt of the workers' request to establish a conciliation tribunal. The Court's six day delay in acknowledging the workers' list of grievances violated Article 378 which requires the Court to take such action "no later than the day after receipt."

237. The court failed to take the steps set out in the Labor Code to set up a conciliation tribunal.<sup>298</sup> The conciliation tribunal was never constituted.

238. The labor court failed to follow the procedures of the Code by waiting almost a week before acknowledging the workers' list of grievances and then not constituting the conciliation tribunal (both contrary to the requirements of Articles 378 and 382). As a result of this inaction, the workers' claims were unaddressed and Guatemala failed to effectively enforce Articles 197 and 121.

### Ternium

239. On March 6, 2012, some of the nearly three hundred workers at the Ternium galvanized steel corporation filed a list of grievances with a labor court.<sup>299</sup> The list included mistreatment, including verbal abuse, in violation of GLC Article 61(c), extensive hours including 21-hour

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<sup>296</sup> GLC, Art. 393.

<sup>297</sup> Collective Conflict, List of Grievances (August 18, 2007), p. 5 (Exhibit 136). Statement of K, L, M, N, O (June 24, 2014), p. 1 (Exhibit 11).

<sup>298</sup> Notification Document, (August 24, 2007) (Exhibit 137); see also Statement of K, L, M, N, O (June 24, 2014), p. 1 (Exhibit 11).

<sup>299</sup> Collective Conflict, List of Grievances submitted by LL (March 6, 2012) (Exhibit 138); see also summary of the facts provided by the workers (Exhibit 139).

shifts in violation of GLC Articles 116, 117, and 118, threats of dismissal if workers refused to work on Sundays or if they tried to go to the Social Security office, and denial of vacation time in violation of Article 130.

240. The court failed to constitute the conciliation tribunal and consequently did not ensure the dispute was resolved within 15 days. Guatemala failed to effectively enforce GLC Articles 61, 116-118, and 130.

### **3. Guatemala’s Failures Constitute a Sustained or Recurring Course of Inaction**

241. The evidence establishes that Guatemala has failed to effectively enforce the laws protecting the right to form a union (Articles 211, 217-219), protecting the right to conciliate labor disputes (Articles 377-396), and guaranteeing acceptable conditions of work (Articles 61, 103, 116-118, 121-122, 126-130 and 197) through both a sustained course of inaction and a recurring course of inaction.

242. The record shows four instances in which the GLD failed to register unions within the time frame required by Articles 211 and 218 of the Labor Code. These instances occurred between 2010 and 2012 at Mackditex, Koa Modas, Ternium, and Serigrafia.

243. The record also shows multiple instances in which Guatemala failed to properly administer the conciliation process with respect to Article 197 of the Code, which provides minimum mandatory measures for occupational safety. The workers of both Fribo and Avandia commenced conciliation processes between 2006 and 2011 to resolve substandard conditions of work, including bathrooms without proper sanitary conditions, a lack of running water, padlocked bay doors, dangerous conditions, and inadequate dining areas. The labor court failed to administer the conciliation process for these grievances within the time required under the Labor Code. These two instances, combined with the Ministry of Labor’s inaction described in section III.B, illustrate Guatemala’s sustained and recurring course of inaction regarding the protections of Article 197.

244. The record shows three instances in which Guatemala failed to properly administer the conciliation process with respect to Article 121 of the Code (mandating payment for overtime work). The workers of Fribo and Avandia commenced conciliation on three separate instances between 2006 and 2009 to resolve claims of unpaid overtime. For each of these instances, the labor court failed to administer the conciliation process within the time required under the Labor Code. This occurred once for the workers of Fribo and twice for the workers of Avandia. Consequently, the labor court’s inaction with respect to these conciliation processes, together with Guatemala’s failure to enforce court orders relating to Article 121 described in section III.B above, illustrate Guatemala’s failure to enforce this law through a sustained and recurring course of inaction.

245. The record shows four instances in which Guatemala failed to act to ensure employers treated workers with due consideration and refrained from verbal or physical abuse as required by Article 61, subparagraph (c), and subparagraph (d), which requires employers to provide tools of good quality, provided they are not required to use their own. The workers of Avandia,

Ternium, and Las Delicias commenced conciliation on four separate instances between 2006 and 2014 to address claims involving violations of Article 61. On these four instances, the labor court failed to administer the conciliation process within the time required under the Labor Code. Thus, again, the labor court's inaction with respect to these conciliation processes, together with the failures described in section III.B above, illustrate Guatemala's failure to effectively enforce Article 61 through a sustained and recurring course of inaction.

246. The record shows one instance in which Guatemala failed to properly administer the conciliation process under the time frame required by the Code with respect to the Articles of the Code governing a daily work schedule (Articles 116-118). This instance occurred in 2012 at Ternium. This instance, together with the other instances of inaction regarding Articles 116-118 described in section III.B above, illustrate Guatemala's failure to effectively enforce these laws through a sustained and recurring course of inaction.

247. Finally, the record shows seven instances in which the Labor Court failed to constitute the conciliation tribunal subsequent to receiving the workers' list of grievances as required by Article 382. These seven instances occurred between 2006 and 2014 at Las Delicias, Avandia, Fribo and Ternium. For these instances, the workers advanced violations of the labor laws involving wage and hour (Articles 103, 116-118) and occupational safety and health (Articles 61, 197). Consequently, the labor court's repeated failures to constitute the tribunals illustrate Guatemala's failure to effectively enforce these articles through a sustained and recurring course of inaction.

248. Through this sustained and recurring course of inaction, Guatemala has failed to effectively enforce its laws directly related to the right of association and to bargain collectively, as well as the laws that the registration of unions and the conciliation processes were intended to enforce, including those related to union formation, collective bargaining, minimum wage, hours of work, and occupational safety and health.

#### **4. Guatemala's Failures Occurred in a Manner Affecting Trade**

249. Through the labor court's failure to resolve the conciliation process within the time mandated by the law, and the GLD's failure to register unions in the time mandated by law, Guatemala affected the conditions of competition within the CAFTA-DR market.

250. The seven enterprises discussed above were important in Guatemala's trade involving apparel, coffee and steel. Between 2007 and 2013, 97 percent of Guatemala's apparel exports were destined for CAFTA-DR countries, and 94 percent of these came to the United States. Guatemalan imports from other CAFTA-DR countries also compete with the apparel products made by these companies. Guatemala's exports of coffee<sup>300</sup> between 2007 and 2013 averaged about 1 billion USD annually. CAFTA-DR took 35 percent of these exports, of which 34

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<sup>300</sup> Including also tea and certain spices under GTIS data for HS2 chapter 9.

percent went to the United States.<sup>301</sup> Coffee produced by the farms identified above also competed with imports of coffee from other CAFTA-DR countries.

251. With respect to steel, Ternium is a multinational steel manufacturer with production centers in Guatemala, the United States and other Latin American countries. Ternium’s galvanized steel from Guatemala is exported both to other Central American countries and to the United States.<sup>302</sup> Ternium’s steel products would compete with imports from the United States and other CAFTA-DR Parties.

252. By failing to enforce Articles 211, 217-219, 377-396, 103, 116-118, 121-122, 126-130, and 197 of the Labor Code, Guatemala affected the conditions of competition among the producers in each of the above sectors within the CAFTA-DR market. Guatemala’s failures allowed each company to avoid the costs associated with effective conciliation processes, particularly where participating workers were prevented from obtaining the support of unions through delays in the registration process. Consequently, by not effectively enforcing its labor laws, Guatemala has altered the conditions of competition for these enterprises.

253. Therefore, Guatemala has failed to effectively enforce its labor laws directly related to the right of association and to organize and bargain collectively, as well as its labor laws directly related to acceptable conditions of work, through a sustained and recurring course of inaction, and in a manner affecting trade.

## 5. Conclusion

254. Based on the foregoing, the United States respectfully requests that the Panel find that Guatemala has acted inconsistently with its obligation under Article 16.2.1(a): failing to effectively enforce labor laws directly related to the right to organize and bargain collectively and acceptable conditions of work by failing to set up conciliation tribunals or register unions within the time provided by Guatemalan law.

## IV. THERE IS NO MERIT TO GUATEMALA’S REQUEST FOR A “PRELIMINARY PROCEDURAL RULING”

255. On October 10, 2014, Guatemala filed a request for a “preliminary procedural ruling” (“preliminary ruling”) as to whether the Panel has “the authority to proceed with the analysis of the merits of this dispute.”<sup>303</sup> In its request, Guatemala relies on Article 20.6.1 of the CAFTA-DR. However, Guatemala’s reliance is misplaced. The U.S. panel request accords with the provisions of Article 20.6.1.

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<sup>301</sup> GTIS data for HS2 chapter 9.

<sup>302</sup> Ternium website, <http://www.ternium.us/about/default> (last visited August 20, 2014) (Exhibit 154).

<sup>303</sup> Guatemala’s Preliminary Ruling Request, para. 5.

256. Article 20.6.1 of the CAFTA-DR provides that a Party requesting an arbitral panel “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.” The U.S. panel request satisfies this obligation.

257. In particular, the U.S. August 9, 2011 panel request provides, in relevant part:

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.<sup>304</sup>

258. The U.S. panel request satisfies the requirements of Article 20.6.1. As can be seen from an examination of the request on its face, it sets out “the reasons for the request,” including (1) an “identification of the measure” at issue, and (2) “an indication of the legal basis for the complaint.”

259. In understanding each of these elements of Article 20.6.1 and what they require, the customary rules of public international law concerning treaty interpretation, reflected in the Vienna Convention, provide guidance.<sup>305</sup>

260. As discussed above in section III.A., 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 light of its object and purpose.” Article 31(2) provides that context includes the text of the agreement at issue, including its preamble.

261. It may also be informative to refer to WTO dispute settlement reports addressing the application of these rules of interpretation within the context of WTO dispute settlement. While WTO findings are not binding on panels under the CAFTA-DR, they can nonetheless be helpful

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<sup>304</sup> U.S. Panel Request (August 9, 2011).

<sup>305</sup> Guatemala also accepts that Articles 31 and 32 of the Vienna Convention reflect customary rules of treaty interpretation under public international law. See Guatemala’s Preliminary Ruling Request, para. 10.



to understand what other dispute settlement entities consider to be a proper application of the Vienna Convention rules.<sup>306</sup>

262. Past WTO findings applying Vienna Convention Articles 31 and 32 have emphasized that, above all, interpretation should be based on the text of the treaty,<sup>307</sup> but the context of the treaty also plays a role. Those past WTO findings have also cautioned that the Vienna Convention principles of interpretation do not “condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended”.<sup>308</sup>

263. Under Article 31 of the Vienna Convention, it is first necessary to look to the ordinary meaning of the text of the provision in interpreting Article 20.6.1 of the CAFTA-DR.

264. By its plain terms, the “reason” for the request is the “statement offered in explanation or justification.”<sup>309</sup> Thus, the plain meaning of the phrase “reasons for the request” would by its ordinary meaning require a Party to make a statement explaining or justifying the panel request.

265. The text of Article 20.6.1 specifies that such reasons are to include: 1) an “identification of the measure or other matter at issue,” and 2) “an indication of the legal basis for the complaint.” As described below, the U.S. panel request included both of these elements.

#### **A. THE U.S. PANEL REQUEST IDENTIFIED THE MEASURE OR OTHER MATTER AT ISSUE**

266. Under Article 2.1 of the CAFTA-DR, a “measure” includes, but is not limited to, “any law, regulation, procedure, requirement, or practice.” By including concepts such as “procedure” and “practice” in addition to “law” and “regulation”, the definition suggests that the term encompasses a range of governmental instruments and behaviors. A procedure, for example, is defined as “a system of proceeding; conduct, behavior,”<sup>310</sup> while a practice would include a “usual or customary action or performance.”<sup>311</sup> Given the breadth of the illustrative list included in the definition, a “measure” under the CAFTA-DR could include an array of conduct on the part of a government, in addition to formal measures such as laws and other legal instruments.

267. WTO dispute settlement bodies have also considered the term “measure”. The WTO Appellate Body has explained that: “A measure can also be an omission or a failure to act on the

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<sup>306</sup> Guatemala agrees that reference to WTO dispute settlement findings can be useful. See for example, Guatemala’s Preliminary Ruling Request, paras. 17 and 18.

<sup>307</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted November 1, 1996, para. 24 (citing *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, (1994) I.C.J. Reports, p. 6 at 20).

<sup>308</sup> See Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted January 16, 1998, para. 45.

<sup>309</sup> Webster’s Third New International Dictionary, Unabridged (2003) (definition of “reason”).

<sup>310</sup> The New Shorter Oxford English Dictionary (1993), p. 2363.

<sup>311</sup> The New Shorter Oxford English Dictionary (1993), p. 2317.

part of a Member.”<sup>312</sup> In *US – Countervailing and Anti-Dumping Duties (China)*, for example, the Appellate Body identified the measure at issue as “a specific conduct and omission of the United States in these investigations and reviews, that is, the failure of its authorities to investigate and avoid double remedies.”<sup>313</sup>

268. The context provided by other provisions of the Agreement also supports the interpretation that a “measure” includes failures or inaction. As Guatemala itself acknowledges, “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.”<sup>314</sup> The United States agrees.

269. The fact that a measure, for purposes of a claim raised under Article 16.2.1(a) of the CAFTA-DR, also includes a failure by a Party to act is confirmed by the text of Article 16.2.1(a). That Article prohibits a Party from failing to effectively enforce its labor laws, “through a sustained or recurring course of action or inaction.”<sup>315</sup> Accordingly, a “measure” that may be the subject of a panel request for purposes of a dispute concerning Article 16.2.1(a) must include a failure by a Party through a course of action or inaction.

270. Based on the foregoing, the U.S. panel request clearly identifies the measure at issue. The panel request states that the matter at issue<sup>316</sup> 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 panel request clearly identifies the measure at issue as the failure to effectively enforce Guatemalan labor laws in three specific areas corresponding with the definition of labor laws in Chapter 16: (1) the right of association; (2) the right to organize and bargain collectively; and (3) acceptable working conditions.<sup>317</sup>

271. The panel request thus does not identify the failure to enforce “any or all labor laws” as Guatemala argues in its Preliminary Ruling Request.<sup>318</sup> Rather, the United States identifies the failure to enforce labor laws concerning three particular labor rights, which make up a limited realm of identifiable laws.

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<sup>312</sup> Appellate Body Report, *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted November 25, 1998, at footnote 47.

<sup>313</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R, adopted July 22, 2014, para. 4.14 (emphasis added).

<sup>314</sup> Guatemala’s Preliminary Ruling Request, para. 64.

<sup>315</sup> Emphasis added.

<sup>316</sup> Article 20.6.1 of the CAFTA-DR refers to “the measure or *other* matter at issue.” (Emphasis added.) The use of the term “other” makes clear that a measure is a “matter at issue.”

<sup>317</sup> Even if one considered that a “failure to act” is not a “measure” for purposes of Article 20.6.1, it would nonetheless be an “other matter at issue” in satisfaction of the CAFTA-DR requirement to identify a “measure or other matter at issue.” It is this failure that Article 16.2.1(a) addresses and that can be brought to dispute settlement, as is made clear by Articles 16.6.6 through 16.6.8.

<sup>318</sup> See, e.g., Guatemala’s Preliminary Ruling Request, para. 82.

272. Indeed, one would expect that Guatemala itself had identified those of its statutes and regulations that met the definition of “labor laws” for purposes of Article 16.8 in becoming a Party to the CAFTA-DR. Accordingly, Guatemala knows which of its laws are labor laws directly related to these three internationally recognized labor rights.

273. Further, the panel request identifies several examples of the types of inaction resulting in Guatemala having failed to effectively enforce Guatemala’s labor laws. These examples include: (1) the failure of the Ministry of Labor to investigate alleged labor law violations; (2) the failure of the Ministry of Labor to take enforcement action after identifying labor law violations; and (3) the failure of the Guatemalan courts to enforce Labor Court orders in cases involving labor law violations. While not limiting the scope of the U.S. panel request to the listed examples, the examples provide a further indication of the nature of the failures the United States intended to raise in its subsequent submissions. Specifically, these examples indicate the types of failures the United States alleges to have occurred, and the governmental entities the United States alleges to have been involved in those failures.

274. Guatemala’s preliminary ruling request fundamentally misunderstands the “measure” at issue in this dispute. Guatemala asserts that the “labor laws that are claimed to have been breached are the ‘measures at issue’” that “must be clearly identified.”<sup>319</sup>

275. However, the measure at issue under Article 16.2.1(a) is the failure by a Party to effectively enforce its labor laws. This failure is demonstrated through a course of action or inaction. The measures at issue are not the underlying labor laws of Guatemala. Article 16.2.1(a) plainly is concerned not with labor law instruments themselves, but the failure to effectively enforce those labor laws. One clear way to demonstrate this difference is that the United States is not claiming that any of Guatemala’s labor laws are in breach of the CAFTA-DR. Rather, the breach of the CAFTA-DR is Guatemala’s failure to effectively enforce those laws.

## **B. THE U.S. PANEL REQUEST INDICATED THE LEGAL BASIS OF THE COMPLAINT**

276. Guatemala claims that the U.S. panel request is deficient because it does not identify the time frame of the course of action or inaction, whether the matter involves action or inaction, and the precise sectors or tariff lines whose trade is being affected.<sup>320</sup> Guatemala misunderstands the nature of a panel request. The obligation to submit a sufficient panel request is not the same as the obligation to make a prima facie case in pleading one’s case. WTO dispute settlement findings provide helpful guidance in explaining that claims, not arguments, are what must be specified in a panel request.

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<sup>319</sup> Guatemala’s Preliminary Ruling Request, para. 63. Somewhat confusingly, elsewhere in its preliminary ruling request Guatemala concedes that 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.*” Guatemala’s Preliminary Ruling Request, para. 29.

<sup>320</sup> Guatemala’s Preliminary Ruling Request, para. 73.

277. In the context of the WTO, past findings have explained that the “legal basis of the complaint” is the claim or the “specific provision of the covered agreement that contains the obligation alleged to be violated”.<sup>321</sup> Furthermore, the WTO Appellate Body has distinguished between “claims” and “arguments,” explaining that “the claims, but not the arguments must all be specified sufficiently in the request for the establishment of a panel.”<sup>322</sup> These findings provide useful guidance in this dispute as well.

278. Here, the U.S. panel request identified the specific provision of the CAFTA-DR at issue: Article 16.2.1(a). This provision contains one obligation – a Party is not to fail to effectively enforce its labor laws. Guatemala argues that detailed explanations of the government inactions at issue, including the dates during which the failures occurred and the tariff lines affected by the failures, must be delineated in the panel request. Guatemala’s arguments are misplaced. Such explanations may form part of a Party’s arguments and evidence in making its case before a panel, but they are not required in order to have indicated the legal basis of the U.S. claim. Therefore, Guatemala’s request to find that the U.S. panel request did not comply with the requirements of Article 20.6.1 should be rejected.

### C. KEY DIFFERENCES EXIST BETWEEN THE CAFTA-DR AND THE WTO REQUIREMENTS

279. Guatemala, in its Preliminary Ruling Request, relies heavily on prior WTO dispute settlement findings regarding the requirements for panel requests under the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) of the WTO. But Guatemala fails to acknowledge the clear textual differences between the WTO requirements and the CAFTA-DR requirements in this respect.

280. Article 6.2 of the DSU requires that the complaining party’s panel request “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” By contrast, as discussed above, Article 20.6.1 of the CAFTA-DR requires a Party to set out in its panel request “the reasons for the request, including identification of the measure or other matter at issue and an indication of its legal basis.”<sup>323</sup>

281. Guatemala suggests that because “the CAFTA-DR provisions for the establishment of an arbitral panel are very similar to those for the establishment of a panel under the [WTO]”,<sup>324</sup> the same requirements should apply with respect to both tribunals.

282. Guatemala acknowledges that Article 20.6.1 does not require a panel request to be “sufficient to present the problem clearly” as does the DSU, but nonetheless proceeds to conflate

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<sup>321</sup> Appellate Body Report, *US—Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R, adopted July 22, 2014, para. 4.12 (internal citations omitted).

<sup>322</sup> Appellate Body Report, *EC—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted September 25, 1997, para. 143.

<sup>323</sup> Emphasis added.

<sup>324</sup> Guatemala’s Preliminary Ruling Request, para. 37.

the requirements of Article 20.6.1 of the CAFTA-DR with those of Article 6.2 of the DSU.<sup>325</sup> Guatemala errs in so doing.

283. The CAFTA-DR requirement to indicate the legal basis of the complaint is distinct from the DSU requirement to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The plain meaning of the term “indicate” is “to point out or point to” and “to state or express briefly.”<sup>326</sup> An “indication” is not the same as a “summary” as required under the DSU. A “summary” is a “brief statement that gives the most important information about something” or “an abstract, abridgement, or compendium especially of a preceding discourse.”<sup>327</sup> Further, the DSU requires that the summary be “sufficient to present the problem clearly.” This requirement further distinguishes the obligations under Article 20.6.1 and Article 6.2 of the DSU.

284. Because the requirements of a consultation request under Article 4.4 of the DSU are similar to those of Article 20.6.1 of the CAFTA-DR, it is useful to refer to how WTO dispute settlement proceedings have elaborated on the difference between an indication and a summary. For example, in discussing the relationship between Article 4.4 and Article 6.2 of the DSU, a WTO panel found that “an indication is something less than a summary sufficient to present the problem clearly.”<sup>328</sup> Similarly in this dispute, Guatemala’s attempt to conflate two distinct concepts should be rejected.

285. WTO findings may be useful guidance to the extent that certain terms in the relevant WTO agreement are the same as those in the CAFTA-DR. But interpretations of WTO provisions containing distinct language from that which is at issue in this dispute cannot be relied upon to import terms into Article 20.6.1 of the CAFTA-DR that are not present in the text.

#### **D. GUATEMALA’S DUE PROCESS ARGUMENTS LACK MERIT**

286. Guatemala’s due process concerns lack both legal and factual bases.

287. Guatemala contends in its preliminary ruling request that the U.S. panel request is inconsistent with Article 20.6.1 because it is so broad and vague that Guatemala “cannot even speculate as to the possible nature and scope” of the dispute, and therefore would suffer prejudice if it were required to respond. Guatemala’s contention is unfounded.

288. Nothing in the text of Article 20.6.1 of the CAFTA-DR indicates that consistency with that provision depends on a party’s ability to respond to the complaining party’s claims in subsequent submissions. Rather, Article 20.6.1 requires, first, that the Party deliver the request to the other Parties, and second, that the Party set out the reasons for the request, including the

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<sup>325</sup> See Guatemala’s Preliminary Ruling Request, paras. 39-41.

<sup>326</sup> Webster’s Third New International Dictionary, Unabridged (2003) (definition of “indicate”).

<sup>327</sup> Webster’s Third New International Dictionary, Unabridged (2003) (definition of “summary”).

<sup>328</sup> Panel Report, *US—Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted October 25, 2010, para. 7.43.

measure or other matter at issue and an indication of the legal basis. Therefore, by its terms, consistency with this provision depends on these two requirements having been met.

289. Further, Guatemala itself acknowledges that in *China – Raw Materials*, a decision on which Guatemala relies heavily to support other of its interpretative claims, the WTO Appellate Body expressly declined to impose a prejudice test when examining the sufficiency of panel requests under Article 6.2 of the DSU.<sup>329</sup>

290. In any event, Guatemala has had ample notice of the matter at issue after years of bilateral engagement in this case. Notably, the respective requests for consultations under Article 20.4, the meeting of the Free Trade Commission under Article 20.5.3, and the establishment of the panel under Article 20.6.1 are all subject to the same requirements.<sup>330</sup> The scope of those previous negotiations has informed Guatemala of the potential scope of the present dispute. The United States respectfully requests the Panel to consider these attendant facts and circumstances<sup>331</sup> in evaluating Guatemala's due process concerns.

#### **E. THE PANEL SHOULD REJECT GUATEMALA'S REQUEST**

291. The U.S. panel request complies with the obligations of Article 20.6.1 of the CAFTA-DR. The request identifies the measure at issue as Guatemala's failure to effectively enforce its labor laws relating to three specific labor rights, and the legal basis for the complaint as Article 16.2.1(a) of the CAFTA-DR.

292. Therefore, the United States respectfully requests the Panel to reject Guatemala's preliminary ruling request and proceed to decide the U.S. claims on their merits.

#### **V. CONCLUSION**

293. As the instances discussed above show, Guatemala has failed to enforce its labor laws through a sustained or recurring course of action or inaction in a manner affecting trade. Therefore, the United States respectfully requests that the Panel find that Guatemala has breached its obligations under Article 16.2.1(a) of the CAFTA-DR.

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<sup>329</sup> Guatemala's Preliminary Ruling Request, para. 118; Appellate Body Report, *China – Raw Materials*, para. 233.

<sup>330</sup> CAFTA-DR, Arts. 20.4.2, 20.5.3.

<sup>331</sup> WTO dispute settlement reports have found that a panel request should be considered in light of the attendant facts and circumstances. Such interpretations provide useful guidance for interpretation of the CAFTA-DR. *See* Appellate Body Report, *US—Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted December 19, 2002, para. 127.