BEFORE THE ARBITRAL PANEL

OF

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

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

Initial written submission of Guatemala

2 February 2015

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LIST OF ABBREVIATIONS

Abbreviation	Description
AB	Appellate Body
Adjudicación	An inspector's report of an inspection.
AFL-CIO	American Federation of Labor – Congress of Industrial Organizations
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
CAS	Court of Arbitration for Sports
Chapter 16	Chapter Sixteen (Labor) of the CAFTA-DR
Chapter 20	Chapter Twenty (Dispute Settlement) of the CAFTA-DR
DSB	Dispute Settlement Body of the WTO
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GLD	General Labor Directorate.
GLI	General Labor Inspection.
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILO	International Labor Organization
Labor Code	*Código de Trabajo de Guatemala*
Ministry of Labor	Ministry of Labor and Social Security of Guatemala
MRP	Decision of the Free Trade Commission Establishing Model Rules or Procedures, 23 February 2011.
NAFTA	North American Free Trade Agreement between the United States, Canada and Mexico
PCIJ	Permanent Court of International Justice
Political Constitution	The Political Constitution of the Republic of Guatemala (*La Constitución Política de la República de Guatemala*)
UNCITRAL	United Nations Commission on International Law
USD	US dollars
Vienna Convention	Vienna Convention on the Law of the Treaties
WTO	World Trade Organization

LIST OF EXHIBITS

Exhibit Number	Description of the Exhibit
GTM-3	List of exhibits with anonymous statements and/or redacted information and/or illegible pages.
GTM-4	Contains confidential information. Inspector's report describing resolutions by the appellate labor court in favor of ODIVESA.
GTM-5	General Labor Inspection's report on an operating plan of inspections performed in San Marcos, Suchitepéquez and Chimaltenango.
GTM-6	Contains confidential information. Examples of inspectors' reports linked to the information provided in Exhibit GTM-5.
GTM-7	Report by the Transportation Department and Fuels Coordination of the Ministry of Labor.
GTM-8	Contains confidential information. Examples of administrative and judicial documents that demonstrate that the two employees that filed the complaints on behalf of the workers of Mackditex, are the same employees that were representing the workers in all proceedings, including the inspections.
GTM-9	Contains confidential information. Inspector's report. October 7, 2011.
GTM-10	Contains confidential information. Inspector's report. October 11, 2011.
GTM-11	Contains confidential information. Inspector's request for the imposition of penalties against Mackditex.
GTM-12	Contains confidential information. Inspector's request for the imposition of penalties against Tiki Industries.
GTM-13	Contains confidential information. Inspector's report. June 1, 2012.
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GTM-27	Contains confidential information. Inspector's report. July 22, 2014.
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GTM-31	Contains confidential information. *Providencia*. December 22, 2011.
GTM-32	Contains confidential information. *Providencia*. February 2, 2012.

GTM-33	Tribunal resolution approving the collective agreement between Avandia and its employees.
GTM-34	Contains confidential information. Labor court resolution. August 24, 2007.
GTM-35	Contains confidential information. Report by the *Superintendencia de Administración Tributaria* –SAT-. January 27, 2015.
GTM-36	Certificate by the GLI. January 29, 2014.
GTM-37	Contains confidential information. Application. July 22, 2011.
GTM-38	Contains confidential information. *Providencia*. November 10, 2011.
GTM-39	Contains confidential information. *Providencia*. August 31, 2012.
GTM-40	Guatemala's Political Constitution
GTM-41	Organic Statute of the Public Ministry
GTM-42	Organic Statute of the Judicial Branch
GTM-43	Contains confidential information. *Providencia*. March 7, 2012.
GTM-44	Contains confidential information. Summary of Avandia 2007 proceedings. January 28, 2015.

I. INTRODUCTION

1. Guatemala is acting in conformity with its obligations under Chapter 16 (Labor) of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR). Contrary to the United States' unfounded assertions, Guatemala has not failed to effectively enforce its labor laws, much less failed to do so through a "sustained or recurring course of action or inaction" that is "affecting trade between the Parties". Guatemala has been, and continues to be, fully committed to effectively enforcing, protecting and enhancing basic workers' rights.

2. The United States is seeking to hold Guatemala internationally responsible on the basis of arguments that are legally flawed and allegations that are completely unsubstantiated.

3. The United States is fully aware that its case is flawed and attempts to shield its allegations from scrutiny by relying on anonymous statements and redacted documents that undermine Guatemala's ability to defend itself. About 85% of the evidence submitted by the United States is in the form of anonymous statements or redacted documents that procedurally and substantively do not have any probative value. Despite several requests by Guatemala and an exchange with the Panel on the matter, the United States persisted with its uncooperative approach and it did not submit an un-redacted version of the documents nor disclosed the identity of the witnesses. On that basis alone, the United States has failed to meet its burden of proof and thus, it has also failed to make a *prima facie* case of violation for each of its claims.

4. Notwithstanding that, and after intense efforts, Guatemala has been able to locate some (but not all) of the redacted documents submitted by the United States and other evidence that calls further into question the veracity and accuracy of the United States' evidence. Those documents and evidence reveal that the United States' account of the facts is inaccurate or misleading.

5. As shown in this submission, there is evidence that demonstrates, for example, that allegedly non-executed reinstatement orders were in fact appealed and thus there was no basis for the imposition of penalties as the United States is claiming. The documents obtained by Guatemala also show that, in many instances, contrary to the United States' unfounded assertions, the authorities did conduct investigations and/or did impose penalties as provided by the law. In some instances, the workers and the employers had reached mutually-agreed solutions and thus there was no basis to resort to enforcement procedures. The evidence also shows that some of the applications for union registration filed by the workers, for instance, did not meet the necessary legal requirements and this was the cause of the delays in registration, not the inaction of Guatemalan authorities. Similarly, some labor courts were unable to proceed with the constitution of the conciliation tribunals because of deficiencies in the petition filed by the employees.

6. The above examples not only undermine the United States' allegations, but also illustrate the perils of allowing the United States to base its case on anonymous statements and redacted documents. As in any rules-based system of adjudication, Guatemala cannot be held internationally responsible under the CAFTA-DR dispute settlement proceedings on the basis of anonymous statements, redacted documents and, in general, evidence that is not fully disclosed to it and to the Panel, without violating Guatemala's due process rights. If this were to occur, it would irreparably undermine the credibility of the CAFTA-DR dispute settlement mechanism.

7. In this submission, Guatemala demonstrates that the United States has failed to meet its burden of proof and therefore has failed to make a *prima facie* case with respect to each of its claims. Put simply, the United States' claims are either erroneous as a matter of law, unsubstantiated, based on evidence with no probative value or directly contradicted by the evidence submitted by Guatemala. In all instances identified by the United States in this case, Guatemala took action and acted in conformity with its domestic legislation and there is absolutely no basis to find that Guatemala failed to effectively enforce its labor laws.

8. The United States also failed to demonstrate that any alleged failure to effectively enforce labor laws occurred through a "sustained or recurring course of … inaction" as required under Article 16.2.1(a) of the CAFTA-DR. Among other deficiencies, the United States has failed to establish the existence of a series of related omissions, that are either continuous or occur repeatedly over a prolonged period of time, and that form part of a deliberate policy of the Government of Guatemala, so that they constitute a "sustained or recurring course of … inaction" within the meaning of Article 16.2.1(a).

9. Despite its repeated exaggerations and attempts to artificially magnify the extent of its claims, the United States' case rests on isolated and unrelated events that allegedly happened at 16 Guatemalan companies that were neither continuous nor occurred repeatedly. The United States, furthermore, has offered no evidence that such events form part of a deliberate policy of the Government of Guatemala. Thus, even if the United States had substantiated its claims, which it has failed to do, these isolated and unrelated incidents do not constitute a "sustained or recurring course of … inaction" within the meaning of Article 16.2.1(a) of the CAFTA-DR.

10. Additionally, the United States has failed to demonstrate that trade between the Parties is being affected, much less that any effect on trade is attributable to the alleged "sustained or recurring course of inaction". The United States' allegations on trade effects are factually and legally unsubstantiated. They reveal the desperate attempt of the United States to artificially create and magnify something that simply does not exist: only one of the 16 Guatemalan companies targeted in the United States' complaint has exported to the other CAFTA-DR Parties. The exports of this company were negligible, amounting to less than US$ 13,000 in 2014.[1]

11. This case evidently is not about the United States seeking to improve the enforcement of labor laws in Guatemala. Since the CAFTA-DR came into force, Guatemala has engaged in good faith negotiations with the United States and has addressed all of the recommendations made by the United States in the context of that bilateral process. Despite Guatemala's best efforts and active engagement in those bilateral negotiations, as well as the significant progress it made in implementing the United States' recommendations, the United States regrettably chose to abandon this process and decided to pursue litigation.

12. Guatemala stands ready to vigorously defend itself and to demonstrate its full compliance with its international obligations.

II. PROCEDURAL HISTORY

13. In June 2008, the U.S. Department of Labor accepted to review the petition submitted by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) along with six Guatemalan labor organizations regarding alleged violations of labor commitments by Guatemala, under Chapter 16 (Labor) of the CAFTA-DR. As a result, Guatemala and the United States held an intensive process of informal consultations between 2008 and 2010.

14. Throughout this process, Guatemala proactively sought to find a mutually agreed solution to the case. Between 2008 and 2009, Guatemalan authorities welcomed two U.S. Government delegations and shared with them extensive information about Guatemala's labor policies. In addition, Guatemalan authorities consistently sought ways to address U.S. Government concerns and diligently took steps to strengthen labor compliance supervision, such as reactivating the Inter-institutional Commission on Labor Relations. In 2009, Guatemala and the United States agreed on an Action Plan to address systemic labor issues that went beyond the scope of actions addressed in the original petition. This discussion was based on the findings and recommendations included in the U.S. Department of Labor Report of 2009.

[1] Exhibit GTM-35. Contains confidential information. Report by the *Superintendencia de Administración Tributaria – SAT-*. January 29, 2014.

15. In July 2010, the United States requested formal consultations under the cooperative labor consultations mechanism pursuant to Article 16.6.1 of the CAFTA-DR. Two rounds of consultations were held later that year, in September and December. As a follow-up to these discussions, Guatemalan authorities continued to move forward with the pending issues and submitted comprehensive follow-up reports in the first months of 2011.

16. In May 2011, the United States requested a meeting of the Free Trade Commission pursuant to Article 20.5.2 of the CAFTA-DR. Due to the lack of agreement at this stage, it subsequently requested, in August 2011, the establishment of a panel under Article 20.6.1 of the CAFTA-DR. The Panel was composed in November 2012. The Panel suspended its work on several occasions at the request of the disputing Parties.

17. In parallel to this process and until 2014, Guatemala remained determined to address the United States' concerns with a view to reaching a mutually agreed solution to the case. Accordingly, Guatemala worked intensively from 2009 to 2014 on the Labor Action Plan. Several versions of this document were exchanged with U.S. authorities during this period and, at all times, Guatemala remained open to discussing and implementing measures to address the United States' concerns, even if such measures went beyond the obligations of the CAFTA-DR, because the Guatemalan authorities firmly believe in continuously working to strengthen the rights and protections of workers.

18. In 2012, Guatemala's recently elected authorities sought to give a new impetus to the labor discussions with the United States and, proposed on their own initiative, a new Action Plan that would better address both parties' concerns and submitted updated progress reports to the U.S. Government.

19. Discussions eventually led to the signature of a mutually agreed plan, in April 2013. Again during this timeframe, Guatemalan authorities provided the agreed updates on time and complied with all measures included in the document that were within the reach of the Executive branch.

20. As a result of the commitment of Guatemalan authorities to improve labor conditions, a number of measures were implemented by Guatemalan authorities between 2008 and 2014, including the hiring of additional labor inspectors.

21. While implementation of the action plan was still ongoing and good progress was being made, and two weeks before the mid-term elections of the U.S. Congress, the United States surprisingly requested in August 2014 to reactivate the Panel that had been temporarily suspended.

III. PRELIMINARY PROCEDURAL RULING

22. On October 10, 2014, Guatemala requested a Preliminary Procedural Ruling and requested the Panel to find that it does not have the authority nor the jurisdiction to consider the complaint of the United States on the basis that its panel request was drafted in such extremely broad and vague terms that it failed to present the problem clearly. This failure greatly prejudiced the preparation of Guatemala's defense in this matter and violated Guatemala's due process rights. The plain reading of the United States' panel request makes it impossible to know what the terms of reference of the panel are and the case that Guatemala is required to answer.

23. Through different communications,[2] the Parties discussed how, as a matter of procedure, the Panel should address Guatemala's request for a preliminary ruling. On October 30, 2014, the Panel decided, by majority, to address Guatemala's preliminary ruling request without altering the procedures and timetable for proceedings established in the October 10, 2014 letter from the disputing Parties, unless Guatemala requested additional time to prepare its initial written submission. Guatemala requested additional time for several reasons, including an issue concerning the United States' exhibits

[2] Communication of the United States of October 15, 2014; communication of Guatemala of October 21, 2014; and communication of the United States of October 27, 2014.

that had direct bearing on the deadline for Guatemala to submit its initial submission: the United States redacted important information from 135 exhibits and submitted 33 exhibits with illegible pages.[3]

24. On November 20, 2014, the Panel issued to the disputing Parties its *Ruling on the Procedure for Addressing Guatemala's Request for a Preliminary Ruling* stating that it "will address due process arguments going to its authority and jurisdiction to consider the complaint by following the timetable and sequence of submissions and proceedings established in the disputing Parties' joint letter of October 10, 2014, subject to the adjustments set out in paragraph 4 of these reasons and any other adjustments that new circumstances may require".[4] Some of the adjustments on the timetable were communicated to the Parties by the Panel through the letter dated December 31, 2014. Accordingly, arguments raised by Guatemala in its Request for a Preliminary Procedural Ruling concerning the deficiencies in the United States' panel request are still pending of decision.

25. The United States' response to the arguments raised in Guatemala's request for a Preliminary Procedural Ruling is contained in its initial written submission. In its response, the United States ignores the central element of Guatemala's argument – i.e., that its panel request is overly vague and fails to set out the reasons for the request, including the identification of the measure or other matter at issue and an indication of the legal basis for the complaint, thus failing to meet the requirements of Article 20.6.1 of the CAFTA-DR necessary to invoke the Panel's jurisdiction. Rather than explaining how its panel request was precise and identified the measure or other matters at issue and the legal basis for the complaint, the United States argues that the requirements of Article 20.6.1 of the CAFTA-DR are met by merely paraphrasing Article 16.2.1(a). In summary, the United States makes six specific contentions:

a) The term "measure" encompasses a "range of governmental instruments and behavior".[5] Relying on WTO jurisprudence,[6] the United States asserts that 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".[7]

b) That it identified the "failure to enforce labor laws concerning three particular labor rights, which make up a limited realm of identifiable laws".[8]

c) That its panel request indicated the legal basis of the complaint because it identified the specific provision of the CAFTA-DR at issue (i.e. Article 16.2.1(a)).[9]

d) That there are "key" differences between the CAFTA-DR and the WTO requirements. The United States explains that "an 'indication' is not the same as a 'summary' for purposes of presenting the problem clearly.[10]

e) That "[n]othing 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 claim in subsequent submissions".[11]

[3] Communication of Guatemala of November 20, 2014.
[4] Ruling on the Procedure for Addressing Guatemala's Request for a Preliminary Ruling, November 10, 2014, para. 55.
[5] US initial written submission, para. 266.
[6] US initial written submission, para. 267.
[7] US initial written submission, para. 269.
[8] US initial written submission, para. 271.
[9] US initial written submission, para. 278.
[10] US initial written submission, para. 283.
[11] US initial written submission, para. 288.

> f) Finally, the United States claims that because Guatemala was informed of "the potential scope of the present dispute" during "previous negotiations" after "years of bilateral engagement in this case" it was excused from meeting the specificity requirements of Article 20.6.1 of CAFTA-DR.[12]

26. In addition to these contentions, which Guatemala replies to in the subsequent paragraphs, the United States, in its communication of October 15, 2014, stated that the "Panel would be in a better position to assess Guatemala's request after having the opportunity to read the United States' initial written submission".[13] With this statement, the United States tacitly acknowledged that its panel request failed to comply with the minimum procedural requirements required under Article 20.6.1.

27. On October 27, 2014, the United States tried to correct this mistake by misleadingly citing only a portion of an Appellate Body's reasoning. The complete paragraph referred to by the United States reads as follows:

> As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings.* Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced.* Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.* (* footnotes omitted).[14]

28. When read in its entirety it is clear the citation stand for the proposition that defects in the request for the establishment of a panel cannot be "cured" in subsequent submissions of the parties during the panel proceedings.[15] In this regard, as explained by the Appellate Body, the first written submission may be consulted to "*confirm the meaning of the words used* in the panel request" (emphasis added) and "as a part of the assessment of whether the ability of the respondent to defend itself was prejudiced".

A. THE PANEL REQUEST DID NOT MEET THE SPECIFICITY REQUIREMENTS OF ARTICLE 20.6.1 OF THE CAFTA-DR

29. Article 20.6.1 provides that:

> 1. If the consulting Parties fail to resolve a matter within:
>
> […]
>
> […] The requesting party shall deliver the request to the other Parties, and shall set out the reasons for the request, including identification of the measure or other matter at issue and an indication of the legal basis for the complaint.

30. The United States argues that the term "measure" encompasses a "range of governmental

[12] US initial written submission, para. 290.
[13] Communication of the United States, October 15, 2014.
[14] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, para. 127.
[15] Guatemala's request for a "Preliminary Ruling Request", paras. 44 – 47.

instruments and behavior".[16] Relying on WTO jurisprudence,[17] the United States asserts that 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".[18] The United States also submits that Article 20.6.1 cannot be interpreted in isolation and requires to be read in conjunction with Article 16.2.1(a) for purposes of labor disputes under Chapter 16 (Labor) of the CAFTA-DR.[19]

31. Guatemala agrees that "behavior" might be the subject matter of a dispute under Article 20.6.1 of the CAFTA-DR. In the WTO, challenging government conduct or practice is quiet common. The ordinary meaning of "measure" in the CAFTA-DR would support the challenge of government conduct and practices.

32. However, for purposes of labor disputes under Chapter 16 (Labor) of the CAFTA-DR, a "measure or other matter at issue" under Article 20.6.1 requires a different description when read in conjunction with Article 16.2.1(a). A complaining Party cannot simply identify "a failure to effectively enforce labor laws" as "a measure or other matter at issue". That identification would be incomplete. As a matter of fact, that would be the description of the prohibition contained in Article 16.2.1(a); not the measure at issue in a particular case. Accepting the interpretation of the United States would be equivalent to accepting that a panel request for issues under Chapter 16 (Labor) would merely require paraphrasing Article 16.2.1(a) to meet its procedural obligations under Article 20.6.1. Paraphrasing Article 16.2.1(a) does not inform the defending Party, at all, of the case to which it has to respond.

33. The United States also asserts that its panel request "clearly identifies the measure at issue as the failure to effectively enforce Guatemala labor laws in three specific areas corresponding with the definition of labor laws in Chapter 16".[20] This assertion not only contradicts the text of its own panel request, but conveniently ignores Guatemala's argument that the United States conflated the concept of the "matter at issue" and the "legal basis" for the complaint.[21]

34. The United States' panel request did not identify the "measure at issue". The word "measure" is not even mentioned in that panel request. Instead, the United States decided to identify a "matter at issue". The very first sentence of its panel request literally states: "The *matter at issue* and *legal basis* for this complaint is Guatemala's failure to conform to its obligation under Article 16.2.1(a) with respect to the effective enforcement of Guatemalan labor laws related to…" (emphasis added). As the "matter at issue" and the "legal basis" for the complaint are two different concepts, the way in which the United States drafted its panel request is confusing. Guatemala cannot even speculate the reasons why the United States decided to identify a "matter" and not a "measure" at issue.

35. The United States also submits that it identified the "failure to enforce labor laws concerning three particular labor rights, which make up a limited realm of identifiable laws". Again, this confirms that the United States did not identify the labor laws in its panel request. The Panel should have already noted that the United States is referring to three out of the five labor rights provided for in the definition of Article 16.8 of the CAFTA-DR. That is, the majority of the labor rights considered under such provision.

36. But the question is not whether the panel request refers to some, the majority, or all labor rights provided for in Article 16.8. The question here is that those laws were not identified in the panel request and the United States acknowledges it. According to the United States, the labor laws are "identifiable". That means that someone has to identify those laws. Put another way, someone has to undertake legal research and exercise judgment in order to establish the precise identity of the laws and regulations

[16] US initial written submission, para. 266.
[17] US initial written submission, para. 267.
[18] US initial written submission, para. 269.
[19] US initial written submission, para. 268.
[20] US initial written submission, para. 270.
[21] Guatemala's request for a Preliminary Procedural Ruling, para. 80.

implicated by the panel request.[22]

37. The breadth and vagueness of the United States' panel request is further exacerbated by the inclusion of an "open-ended" list of "alleged significant failures by Guatemala". The United States did not respond to Guatemala's arguments in this regard.[23]

38. The panel request did not identify with sufficient precision the legal basis of the complaint either. The United States makes a distinction between a "claim" and "argument" relying on WTO jurisprudence and concludes that its panel request identified the specific provision of the CAFTA-DR at issue: Article 16.2.1(a).[24]

39. It is obvious that Article 16.2.1(a) (the sole provision of Chapter 16 subject to dispute settlement) has to be part of the legal basis of the complaint. However, citing only such provision is simplistic and insufficient. The Appellate Body has warned that there may be situations in which listing provisions claimed to be violated may not be "sufficient to present the problem clearly". The Appellate Body has clarified that, in order "to present the problem clearly" a panel request must "plainly connect" the challenged measure(s) with the provision(s) claimed to have been infringed such that a respondent can "know what case it has to answer, and…begin preparing its defence".[25] The principles states by the Appellate Body are applicable to the present dispute under the CAFTA-DR rules, as both the WTO and the CAFTA-DR require that a panel request, as a matter of law and due process, provide *sufficient* notice of the case that is being filed by the complaining Party. In this case, there is no way to "plainly connect" the challenged measures (among other reasons, because they were not identified) with the provision claimed to have been infringed (among other reasons, because the United States' panel request simply paraphrases Article 16.2.1(a) and fails to properly identify the legal basis of the complaint).

40. For the reasons explained above, the United States did not set out clearly and with sufficient precision the reasons of the request for the establishment of the panel and failed to meet the requirements of Article 20.6.1 of the CAFTA-DR.

B. THE DISTINCTION BETWEEN "CLAIM" AND "ARGUMENT" IS IRRELEVANT FOR THE PRESENT DISPUTE

41. The United States contends that 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.[26] Then, the United States cites WTO jurisprudence explaining the difference between a "claim" and an "argument" when assessing the sufficiency of a panel request.[27]

42. The distinction between "claim" and "argument" that the United States seeks to draw is irrelevant for this dispute. Guatemala is not suggesting or requiring that the panel request should have included the arguments of the United States. Guatemala agrees with the United States that a panel request does not require the description of the "arguments" of the complaining Party. Guatemala recalls that it mentioned this issue in its request for a Preliminary Procedural Ruling.[28]

43. Guatemala's argument refers to the lack of clarity and sufficiency of the panel request. The benchmark to determine whether a panel request is sufficient and clear is whether the defending Party

[22] Guatemala's request for a Preliminary Procedural Ruling, para. 57, 58.
[23] Guatemala's request for a Preliminary Procedural Ruling, paras. 56-58, 98-102.
[24] US initial written submission, paras. 277, 278.
[25] Appellate Body Report, *US – Countervailing and Anti-dumping Measures (China)*, para. 4.8, citing Appellate Body Report, *US-Oil Country Tubular Goods Sunset Reviews*, para. 162 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 88).
[26] US initial written submission, para. 276.
[27] US initial written submission, para. 277.
[28] Guatemala's request for a Preliminary Procedural Ruling, paras. 75, 76.

received notice about the case it has to answer in order to begin preparing its defense.

44. While Guatemala agrees that "arguments" are not required to be included in a panel request, the United States did not explain why the alleged "claims" are sufficiently clear as to have allowed Guatemala to know the case it has to respond to and begin preparing its defense.

C. THE DISTINCTION BETWEEN "INDICATION" AND "SUMMARY" DOES NOT EXCUSE THE UNITED STATES FROM ITS OBLIGATION TO SET OUT THE REASONS OF THE PANEL REQUEST WITH SUFFICIENT PRECISION

45. The United States, based on a WTO panel report, seeks to draw a distinction between the legal standard of an "indication" and a "summary" when describing the legal basis for the complaint. The United States submits that "an indication is something less than a summary sufficient to present the problem clearly".[29]

46. The differences between the ordinary meaning of the terms "indication" and "summary", however, do not excuse the United States from its obligation to set out the reasons for the panel request with sufficient precision.

47. The ordinary meaning of "indication" is "[t]he action or an instance of indicating; something that indicates or suggests; a sign, a symptom, a hint…something indicated or suggested".[30] Thus, the term "indication" requires certain level of precision; at least something "indicated or suggested".

48. The fact that an indication is "something less than a summary" cannot be interpreted as a license to draft a panel request that is "not sufficient to present the problem clearly" as the United States appears to implicitly suggest.

49. In any event, the United States' panel request does not provide any indication of the legal basis for the complaint: the mere reference to Article 16.2.1(a), as explained earlier, is not sufficient or "something that indicates or suggests" the legal basis for the complaint.

D. PREJUDICE IS A NATURAL CONSEQUENCE OF THE VIOLATION OF DUE PROCESS RIGHTS

50. The United States submits that "[n]othing 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". This is consistent with Guatemala's position. As explained in Guatemala's request for a Preliminary Procedural Ruling, compliance with procedural requirements of Article 20.6.1 must be demonstrated on the face of the panel request and "regardless of whether the respondent is able to defend itself".[31]

51. The United States submits that the Appellate Body "declined to impose a prejudice test when examining the sufficiency of panel requests under Article 6.2 of the DSU".[32] The United States' argument in this regard is misplaced. In *China – Raw Materials* (the case referred to by the United States in support of its assertion), the Appellate Body stated that:

> …due process "is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction".* We find it troubling therefore that the Panel, having correctly recognized that a deficient panel request cannot be

[29] US initial written submission, para. 283.
[30] Shorter Oxford English Dictionary on Historical Principles, Oxford University Press, Sixth Edition, 2007, p. 1364
[31] Guatemala's request for a Preliminary Procedural Ruling, paras. 44-47, 118.
[32] US initial written submission, para. 289.

> cured by a complaining party's subsequent written submissions, nonetheless decided to "reserve its decision" on whether the panel requests complied with the requirements of Article 6.2 until after it had examined the parties' first written submissions and was "more able to take fully into account China's ability to defend itself".* The fact that China may have been able to defend itself does not mean that Section III of the complainants' panel requests in this dispute complied with Article 6.2 of the DSU. In any event, compliance with the due process objective of Article 6.2 cannot be inferred from a respondent's response to arguments and claims found in a complaining party's first written submission. Instead, it is reasonable to expect, in our view, that a rebuttal submission would address arguments contained in the complaining party's first written submission. (*Footnotes omitted)

52. In that case, the Appellate Body did not decline to impose a prejudice test when examining the sufficiency of the panel request under Article 6.2 of the DSU. Rather, the Appellate Body found it troubling that the panel, having correctly recognized that a deficient panel request cannot be cured by a complaining party's subsequent written submissions, nonetheless decided to "reserve its decision" on whether the panel request complied with the requirements of Article 6.2 until after it had examined the parties' first written submissions (including the first written submission of the defending party).

53. Contrary to what the United States is arguing, the Appellate Body concluded that the fact that the respondent may have been able to defend itself does not mean that a panel request *complied* with procedural requirements.

54. The above statement must also be read in light of the Appellate Body Report *in United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* where the Appellate Body explicitly recognized that there could be an "assessment of whether the ability of the respondent to defend itself was prejudiced":

> As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings.* Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced.* Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.* (* footnotes omitted).

55. In view of the above, it is clear that compliance with procedural requirements of Article 20.6.1 must be demonstrated on the face of the panel request and regardless of whether the respondent is able to defend itself. The Panel may consult the first written communication of the complaining Party to "confirm the meaning of the words used in the panel request" and not to "cure" such a panel request. Prejudice to the ability of the respondent to defend itself is the consequence of a faulty panel request. The Panel, if and when it decides to consult the first written submission of the complaining party to confirm the meaning of the words used in the panel request, must do so "as part of the assessment of whether the ability of the respondent to defend itself was prejudiced".

E. CONCLUSION

56. For the reasons explained above, Guatemala submits that the United States failed to demonstrate that its panel request set out the reasons for its complaint, including the identification of the measures or other matters at issues and the legal basis. In that regard, Guatemala reiterates its request

that the Panel find that this dispute is not properly before it, as the United States' panel request does not meet the minimum requirements of Article 20.6.1 of the CAFTA-DR. Therefore, the Panel must find that it does not have the authority nor the jurisdiction to consider the complaint of the United States.

IV. STANDARD OF REVIEW

A. TREATY INTERPRETATION AND THE VALUE OF JURISPRUDENTIAL PRECEDENT OF OTHER *FORA*

57. Article 1.2.2 of the CAFTA-DR provides:

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

58. Arbitral panels established under the CAFTA-DR shall interpret this Agreement in light of its objectives as set out in Article 1.2.1 and in accordance with applicable *rules of international law*. The reference to "rules of international law" corresponds to the sources of international law in Article 38(1) of the Statute of the International Court of Justice (ICJ) and thus includes customary rules of international law as well as general principles of law.[33] General principles of law include, among others, good faith,[34] *compétence de la compétence*[35] and due process.[36]

59. Customary rules of treaty interpretation are codified in Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties (Vienna Convention).[37]

60. Article 31.1 of the Vienna Convention provides that:

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

61. In accordance with Article 31.2 of the Vienna Convention, the context comprises the text of the agreement concerned, including its preamble and annexes.[38]

62. Article 32 of the Vienna Convention provides that recourse may be had to supplementary means

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[33] See M.E. Villiger, "*Commentary on the 1969 Vienna Convention on the Law of Treaties*" (Martinus Nijhoff, 2009), p. 433, cited in the Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures (China)*, para. 308.
[34] *Nuclear Tests (Australia v. France) (Merits)* [1974] ICJ Rep 253, 268.
[35] The principle that anybody with jurisdictional power has the authority to determine the extent of its jurisdiction. *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Advisory Opinion)* [1928] PCIJ (ser B) No 31, 5, 20.
[36] See, e.g., *Schweiker v. McClure*, 456US 188, 200 (1982): "due process is flexible and calls for such procedural protections as the particular situation demands".
[37] Appellate Body Report, *US – Gasoline*, pp. 16-18. See also, for example, Appellate Body Report, *India-Patents (US)*, paragraph 46.
[38] In accordance with Article 31.2(a), context may also include "a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." Article 31.3 additionally provides that "[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties."

of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. Article 33 of the Vienna Convention addresses treaties authenticated in more than one language.

63. The Panel may also seek guidance from the case law developed in other *fora*. This may be particularly helpful considering that this is only the second case to be decided under the CAFTA-DR State-to-State dispute settlement mechanism. The case law developed by adjudicatory bodies in other *fora*, although not binding, may be illustrative. Indeed, the Panel can find guidance in solutions offered in other legal proceedings without disregarding the relevant texts and more generally the applicable law.

64. Relying on prior case law for guidance is common in the majority of the rules-based system of adjudication and the "cross-fertilization" among international adjudicatory bodies is a growing phenomenon. The dispute settlement mechanism under the CAFTA-DR should not be the exception.

65. The International Court of Justice (ICJ) refers to its earlier decisions to ensure "consistency of jurisprudence".[39] Sometimes the ICJ does this by simply insisting on its "settled jurisprudence" (*jurisprudence constante*)[40] and, sometimes, by mentioning judgments previously rendered.[41]

66. ICSID arbitral panels, panels established pursuant to the UNCITRAL Rules, as well as panels established within the framework of free trade agreements, such as NAFTA and CAFTA-DR, also frequently refer to prior decisions. NAFTA and ICSID tribunals, for instance, have referred to WTO case law.

67. In *SD Myers v. Canada*, the NAFTA Tribunal relied on the reasoning of the Appellate Body of the WTO ("Appellate Body" or "AB") over "like products" in its report on *Japan – Alcoholic Beverages II*.[42] In the same vein, the Tribunal in *Pope & Talbot v. Canada*, relied in the reasoning of the Panel Reports in *EC – Bananas III*, *EC – Asbestos* and *US – Alcoholic and Malt Beverages*.[43] The Tribunal in *Canfor et al. v. USA* explained the role of the WTO/GATT jurisprudence by stating that it would not treat such jurisprudence as "binding precedent" but merely as "persuasive authority".[44]

68. A similar approach has been followed by ICSID tribunals. For example, in *Saipem S.p.A. v. The People Republic of Bangladesh*, the Tribunal stated that:

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

[39] See joint declaration of seven judges in the case of Kosovo. *Legality of Use of Force (Serbia and Montenegro v. Portugal) (Preliminary Objections, Judgment)* [2004] ICJ Rep 1160, 1208.
[40] *United States Diplomatic and Consular Staff in Tehran (Judgment)* [1980] ICJ Rep 3, 18, s33; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73, 87, s 33.
[41] *Case of the Readaptation of the Mavrommatis Jerusalem Concessions (Collection of Judgments)* [1927] PCIJ Rep Series A No 11, 18 (10 October 1927).
[42] *Pope & Talbot v. Canada (Award on Merits)*, 10 April 2011 (2002) 122 IRL 352, paras. 45-63 and 68-69.
[43] *SD Myers v. Government of Canada (First Partial Award)*, 12 November 2000 (2001) 40 ILM 1408, paras. 243-246.
[44] *Canfor et al. v. USA*, paras. 274-346.

> expectations of the community of States and investors towards certainty of the rule of law.[45]

69. In the WTO, the Appellate Body underscored the value of earlier case law in *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, where it stated:

> Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent *cogent reasons*, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.[46]

70. In the light of the above, Guatemala invites this Panel to consider the case law of other *fora* to the extent that it is relevant for legal questions that will arise in the present dispute. While that case law would not have a "binding" character, it may be illustrative and should have persuasive *authority*.

B. BURDEN OF PROOF AND THE ESTABLISHMENT OF A *PRIMA FACIE* CASE

71. The burden of proof to make a *prima facie* case of violation rests squarely on the complaining party. Rule 65 of the CAFTA-DR's Model Rules of Procedure (MRP) provides that:

> A complaining Party asserting that a measure of the Party complained against is inconsistent with its obligations under the Agreement, that the Party complained against has otherwise failed to carry out its obligations under the Agreement, or that a benefit that the complaining Party could reasonably have expected to accrue to it is being nullified or impaired in the sense of Article 20.2(c) (Scope of Application) shall have the burden of establishing such inconsistency, failure to carry out obligations, or nullification or impairment, as the case may be.

72. Consistent with Rule 65, the United States must provide arguments and evidence to establish a *prima facie* case that Guatemala has breached Article 16.2.1(a) of the CAFTA-DR. This burden includes establishing every element of the claim as well as the facts that substantiate those claims.[47]

73. A *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favor of the complaining party.[48] The nature and scope of arguments and evidence required to make a *prima facie* case "will necessarily vary from measure to measure, provision to provision, and case to case".[49]

74. It is not for a panel "to make the case for a complaining party"[50] and a "panel may not take

[45] ICSID, *Saipem S.p.A v. The People Republic of Bangladesh (Award)*, para. 67.
[46] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.
[47] Appellate Body Report, *Japan – Apples*, para. 157.
[48] Appellate Body Report, *EC – Hormones*, para. 104.
[49] Appellate Body Report, US – *Wool Shirts and Blouses*, p. 14; Appellate Body Report, *US – Carbon Steel*, para. 157.
[50] Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

upon itself to rebut the claim (or defence) where the responding party (or complaining party) itself has not done so".[51] It is for the parties to make their own case.

C. ADEQUATE OPPORTUNITY TO RESPOND TO EVIDENCE AND TESTIMONIES

75. The dispute settlement mechanism of the CAFTA-DR is a rules-based system of adjudication. As many other systems of adjudication, it does not contain rules dealing specifically with due process rights, including the possibility to have an adequate opportunity to respond to evidence and testimonies. Notwithstanding the lack of specific provisions, arbitral panels and international courts have dealt with this issue of due process rights in accordance with general principles of International Law.

76. For example, the WTO Appellate Body has stated that "the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU" and that "[d]ue process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute."[52] It has cautioned, in this regard, that "a panel must … be careful to observe due process, which entails providing the parties adequate opportunity to respond to the evidence submitted."[53] The Appellate Body subsequently clarified that "[a] party must not merely be given an opportunity to respond, but that opportunity must be meaningful in terms of that party's ability to defend itself adequately."[54]

77. Providing adequate opportunity to respond to the evidence includes evidence in the form of testimonies. The principle that a party must be guaranteed an adequate opportunity to respond to testimony being offered against it is firmly established in Guatemalan and United States law.

78. Article 332 (e) of the Labor Code of Guatemala requires a party to identify and individualize all pieces of evidence in a clear and concrete way "indicating the names and last names of the witnesses and their place of residence if known.[55] The judge, the General Labor Directorate (GLD) in those cases where it is considered to be part of the process[56] and the employers must be given access to all exhibits and know the identity of the employees that participate either as witnesses or complaining parties in labor disputes.[57]

79. Similar requirements apply under United States law. If the United States' Government chooses to introduce the allegations of an employee as evidence in the proceedings against an employer, the employer would have the due process right to learn the identity of the employee who made the statement and cross examine him on any prior statements.[58]

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[51] Appellate Body Report, *US – Gambling*, para. 282.
[52] Appellate Body Reports, *US / Canada – Continued Suspension*, para. 433.
[53] Appellate Body Report, *Australia – Salmon*, para. 272.
[54] Appellate Body Report, *US – Gambling*, para. 270.
[55] *Artículo 332 (e): enumeración de los medios de prueba con que acreditarán los hechos individualizándolos en forma clara y concreta según su naturaleza, expresando los nombres y apellidos de los testigos y su residencia si se supiere; lugar donde se encuentran los documentos que detallará; elementos sobre los que practicará inspección ocular o expertaje. Esta disposición no es aplicable a los trabajadores en los casos de despido, pero si ofrecieren prueba deben observarla.* Courtesy translation: Article 332(e): Enumeration of the means of evidence that will be used to support the facts, identifying them in a precise and concise way in accordance with their nature, including the first and last names of the witnesses as well as their addresses if known, the place where the listed documents are located; the elements on which visual inspections or expert reports will be conducted. This provision is not applicable to workers in case of dismissal, but it must be observed if evidence is provided.
[56] Article 280 of the Labor Code of Guatemala requires that the General Inspection Directorate be taken as a party in any individual or collective legal dispute involving underage workers or in cases where actions are pursued to protect maternity rights.
[57] See also articles 280, 321, 332, 344 – 351 of Labor Code of Guatemala.
[58] *N. L. R. B. v. Seine & Line Fishermen's Union of San Pedro*, 374 F.2d 974, 978 (9th Cir. 1967); see also Fed. R. Civ. P. 26.

80. The importance of due process has also been consistently emphasized in other *fora*. Rule 35 of the ICSID Rules of Procedure give parties a right to examine witnesses and experts. Such right is impossible to exercise if the identities of witnesses are not disclosed to the other party.

81. Relying on the European Convention on the Protection of Human Rights and Fundamental Freedoms and the Swiss Constitution, the Court of Arbitration for Sports (CAS) has held that "[a]dmitting anonymous witnesses potentially infringes upon both the right to be heard and the right to a fair trial of a party, since the personal data and record of a witness are important elements of information to have in hand when testing his/her credibility".[59] Article 6.3 of the ECHR recognizes the right for a person to examine or have examined witnesses testifying against him or her and, as provided under Article 6.1 of the ECHR, this principle applies both to criminal procedures and civil procedures.

82. Due process also extends to those cases where the relevant witness's testimony is rebutted by other evidence. In those cases, that witness must be given a fair opportunity to explain the divergence in evidence.

D. INTERPRETATION OF MUNICIPAL LAW

83. This case is about enforcement of Guatemalan law. The United States is not claiming that any of Guatemala's labor laws are in breach of the CAFTA-DR.[60] Rather, the only question before this Panel is whether under Article 16.2.1(a) Guatemala has failed to effectively enforce its labor laws in accordance with the conditions set out in that provision. Accordingly, this Panel is not called upon to *interpret* Guatemalan law or second-guess Guatemalan authorities' interpretation of Guatemalan law.

V. BACKGROUND: GUATEMALA'S LABOR REGIME

A. GENERAL LEGAL FRAMEWORK

84. Guatemala has comprehensive labor legislation that ensures the right of association; the right to organize and bargain collectively; the prohibition on the use of any form of forced or compulsory labor; the establishment of a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and the establishment of acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

85. Guatemalan labor law also provides efficient and effective mechanisms that guarantee the enforcement of labor obligations in a fair, equitable and transparent manner.

86. Guatemala's commitment to protect and enhance labor rights is also reflected in its active participation as a Member of the International Labor Organization (ILO). To date, Guatemala has ratified 73 International Labor Conventions, including all 8 Fundamental Conventions.[61] The United States, by contrast, has ratified only 14 ILO Conventions, and only 2 of the 8 Fundamental Conventions.[62]

87. An overview of the legal instruments that form part of Guatemala's labor regime is provided below.

88. Therefore, redacted exhibits and anonymous witnesses' statements do not have any probative value and the Panel cannot rely on them without violating due process rights.

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[59] CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC and CAS 2011/A/2386 WADA v. Alberto Contador Velasco & RFEC, http://www.tas-cas.org/d2wfiles/document/5648/5048/0/FINAL20AWARD202012.02.06.pdf)
[60] US initial written submission, para. 275.
[61] See: http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102667
[62] See: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102871.

1. Political Constitution of the Republic of Guatemala

89. The Constitution is the highest authority within the Guatemalan legal structure and establishes the basic principles of the Guatemalan legal system. The priority given to the protection of labor rights in Guatemala is reflected in the fact that the Constitution contains an important number of provisions on the subject. Under the Constitution, the right to work is considered a human right and a social obligation. The Constitution provides that all labor regulation must be organized according to social principles of justice.[63]

90. The minimum labor rights recognized in the Constitution include: freedom of labor, equality in remuneration, minimum wages, the protection of women workers, prohibition of child labor, the right to organize collectively, maximum working days, maximum working hours, vacations, weekly rest days, holidays, annual vacations, among others.

2. ILO International Labor Conventions ratified by Guatemala

91. Guatemala is a Member of the International Labor Organization (ILO) and has ratified the Constitution of the Organization as well as its amendments. Guatemala has also ratified 73 ILO Conventions: the 8 Fundamental Conventions, the 4 Governance Conventions and 61 Technical Conventions.[64] Upon ratification, these Conventions are incorporated into domestic law and "are deemed to be part of the minimum rights enjoyed by workers in the Republic of Guatemala".[65]

3. Labor Code and other laws

92. The Labor Code provides for general labor rights and obligations and establishes the minimum level of protection for workers. The Labor Code also establishes procedures and institutions for resolving labor conflicts and enforcing labor rights.

93. Other laws supplement and enhance the minimum standards of protection provided for in the Labor Code. Examples of such laws include: (a) the Fourteenth Salary Law for Private Sector Workers (*Ley Reguladora de la Prestación del Aguinaldo para los Trabajadores del Sector Privado*); (b) the Annual Bonus Law for Private and Public Sector Workers (*Ley de Bonificación Anual para los Trabajadores del Sector Privado y Público*); (c) the Incentive Bonus Law (*Ley de Bonificación Incentivo*); and the (d) the Social Security Institute Law (*Ley del Instituto Guatemalteco de Seguridad Social*).

4. Regulations

94. At a lower level of hierarchy, immediately below the Labor Code and other laws mentioned above, are the regulations issued by the Executive Branch. Regulations may also be issued by the Ministry of Labor in the form of Ministerial decrees.

95. Examples of such labor regulations include:

a. Regulation for the Authorization of Foreign Workers in the Private Sector;[66]

[63] Political Constitution, Article 101.
[64] http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102667
[65] Political Constitution, Article 102(u).
[66] *Reglamento de autorización del trabajo de personas extranjeras a empleadores del sector privado.*

b. Regulation for the Negotiation, Homologation and Requests of Termination of Collective Pacts of Working Conditions of a Company or Specific Production Center.[67]

c. Regulation of Legal Personality Recognition, Statutes Approval and Registration of Labor Unions.[68]

d. Protocol on Best Practices for Work Inspections.[69]

5. General Principles of Labor Law

96. General Principles of Labor Law provide guidance for the interpretation of labor law. These principles are specifically set out in the preamble of the Labor Code and consist of the following:

a. **Protective nature of the Labor Law**: This principle ensures that all labor laws are protective of the workers and that they take into account all relevant social and economic circumstances. The Labor Code goes even further and establishes that the protective nature of the labor law is a way to compensate the economic inequality between employers and workers, granting workers a preferential legal protection.

b. **Evolutionary Principle**: means that Labor Law evolves constantly since it always seeks the improvement of working conditions for workers.

c. **Realism Principle**: means that Labor Law is always and should always be based on the specific economic and social conditions of workers and employers. Any dispute emerging from a labor relationship should always consider the specificities of the case.

d. **Compulsory Principle**: means that Labor Law is compulsory in nature and it should be enforced independently from the will of the parties.

e. **Conciliation Principle:** Labor Law always seeks to avoid conflict and its purpose is for the parties to reach an agreement. In view of this principle, the Labor Code provides for several conciliation proceedings and seeks to provide the parties with numerous opportunities to reach mutually agreed solutions.

f. **Procedural Labor Principles**: Labor Procedures contained in the Labor Code are oral, automatic and conciliatory.

6. Custom or local uses

97. Within Guatemalan legal system, custom is applicable in absence of applicable law or when the law specifically allows it.[70] The Labor Code also stipulates that, in absence of regulation, labor cases should be resolved according to the Labor Law Principles and according to equity, customs or local

[67] *Reglamento para el Trámite de Negociación, Homologación y denuncia de los Pactos Colectivos de Condiciones de Trabajo de Empresa o Centro de Producción Determinado*
[68] *Reglamento para el Reconocimiento de la Personalidad Jurídica, Aprobación de Estatutos e Inscripción de las Organizaciones Sindicales*.
[69] *Protocolos de Inspección de Trabajo, Buenas Prácticas, Verificación e Investigación, para fortalecer el sistema de inspección de trabajo en los establecimientos industriales, comerciales y agrícolas entre otros.* Exhibit USA-93.
[70] Article 12 of the Judicial Organism Law.

uses.[71] In certain instances, the Labor Code considers customs as mandatory.[72]

7. Other sources of law

98. Given the specific and protective nature of Labor Law, other laws are applicable to the extent that they do not contradict it and fill any gaps in accordance with the labor law principles cited above.

99. Additionally, other sources of labor law may include:

a. Individual Labor Contracts

b. Internal Labor Regulations (*Reglamentos Internos de Trabajo*)

c. Collective Pacts on Working Conditions (*Pactos Colectivos de Condiciones de Trabajo*)

d. Collective Agreements on Working Conditions (*Los Convenios Colectivos de Condiciones de Trabajo*

B. ENFORCEMENT OF LABOR LAW IN GUATEMALA

100. The Government of Guatemala is organized and divided into three branches: Legislative, Executive and Judicial. These branches are completely independent of each other.[73]

101. The Executive is responsible for enforcing Guatemala's Constitution and labor laws. Such function is exercised by the President of the Republic through his Ministers, particularly the Minister of Labor and Social Security.

1. Ministry of Labor and Social Security

102. The Ministry of Labor and Social Security ("Ministry of Labor") is in charge of the development, improvement and enforcement of Guatemala's labor laws[74], particularly those whose direct purpose is to establish and promote harmonious relations between employers and workers.[75]

103. The main functions of the Ministry of Labor are: to formulate labor, salary and health and hygiene policies for the country; to promote harmonious labor relations, always seeking the agreement through conciliation among the parties; and to study, discuss and recommend ratification of international labor conventions.[76]

2. Auxiliary entities of the Ministry of Labor and Social Security

104. The Ministry of Labor relies on several subordinate entities to fulfill its functions. The subordinate entities most relevant to the present case are:

a) General Labor Inspectorate ("*Inspección General de Trabajo*" or "GLI")

[71] Article 15 of the Labor Code.
[72] Article 116 of the Labor Code: regarding working schedules, custom prevails in case it is usual to work less than the legal maximum of 44 hours per week.
[73] Article 141 of the Political Constitution.
[74] Article 203 of the Political Constitution establishes the principle of independence of the Judicial Organism and its mandate to adjudicate.
[75] Article 274 of the Labor Code.
[76] Article 40 of the Executive Organism Law.

105. It is the entity in charge of ensuring that employers, workers and unions comply with labor laws, collective agreements and regulations.[77] In order to fulfill its mandate, the GLI is included as a party in any individual or collective conflict of a legal nature involving minors or in proceedings intended to protect the maternity rights, except when the Guatemalan Institute of Social Security becomes a party in the process. The GLI has the authority to bring proceedings for the imposition of penalties to domestic courts in cases of labor law violations.[78]

106. One of the main functions of the GLI is to conduct work site inspection to ensure compliance with minimum labor standards. The Labor Visits Unit directly exercises this function. Inspections are conducted by inspectors and social workers that belong to the Labor Visits Unit.

107. An inspection may be initiated by the GLI on its own initiative or at the request of a worker or group of workers. When conducting an inspection, an inspector visits the premises of the employer and personally verifies that the employer is in compliance with the relevant labor laws. In case a breach of the labor law is observed or is suspected, the inspector will issue a warning and grants the employer a short period of time to bring itself into compliance. After this period of time expires, the inspector returns to the premises to verify compliance with the warning. If the employer has complied, the inspector withdraws the warning. In case the employer does not comply, the inspector initiates a Labor Law Breach Procedure (*Incidente por falta laboral*) before a Labor Court that may result in the imposition of a penalty.[79] The penalty is a sanction for non-compliance with the warning and is independent of any other proceeding initiated with a view to enforcing the labor laws breached by the employer.

b) The General Labor Directorate (GLD)

108. The GLD is responsible for the registration of unions and union members, union statutes, and union dissolutions. Union registration is governed by the Labor Code and the Regulation on the Recognition of Unions Legal Personality, Approval of their Statutes and Registration.[80]

3. Judicial enforcement of a labor union

109. The Labor Code establishes special courts to deal with labor matters[81], namely:

a. Labor and Social Security Courts;

b. Conciliation and Arbitration Tribunals; and

c. Labor and Social Security Courts of Appeal.

4. Public Ministry

110. Criminal prosecutions in Guatemala are conducted by the Public Ministry. This is an entity that is functionally independent of the Executive, Legislative and Judicial branches of government.[82] It is headed by the Attorney General.

[77] Article 278 of the Labor Code
[78] Article 280 of the Labor Code
[79] Article 415 of the Labor Code.
[80] *Acuerdo Gubernativo 143-96* "*Reglamento para el Reconocimiento de la Personalidad Jurídica, Aprobación de Estatutos e Inscripción de las Organizaciones Sindicales*".
[81] Article 284 of the Labor Code
[82] Political Constitution, Article 251.

VI. LEGAL INTERPRETATION OF ARTICLE 16.2.1(A) OF THE CAFTA-DR

111. Guatemala turns next to the interpretation of Article 16.2.1(a) of the CAFTA-DR, the provision that the United States claims Guatemala is breaching.

112. At the outset, Guatemala agrees with the United States that, in its interpretation of the CAFTA-DR, the Panel should be guided by the customary rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties ("Vienna Convention). The general rule of interpretation is set out in Article 31 of the Vienna Convention, which was quoted earlier.

113. Interpretation is a "holistic exercise"[83] and there is no "hierarchical order"[84] between the various elements set out in Article 31.

114. The English and Spanish versions of the CAFTA-DR's text are equally authentic.[85] According to the principle codified in Article 33(3) of the Vienna Convention, "[t]he terms of the treaty are presumed to have the same meaning in each authentic text."

115. Having set out the general principles that should guide the interpretation, Guatemala turns now to the text of Article 16.2.1(a) of the CAFTA-DR. Guatemala will subsequently examine the context and object and purpose.

116. Article 16.2.1(a) reads:

> 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 the entry into force of this Agreement.[86]

117. There are express linkages between the various clauses of Article 16.2.1(a) that connect each clause to the preceding one. While the first clause of Article 16.2.1(a) sets out a general enforcement obligation, the scope of this obligation is narrowed considerably by the subsequent clauses and by the scope of laws and regulations that the Parties chose to include in the definition provided in Article 16.8.

118. As explained below, the text of Article 16.2.1(a) does not make actionable each instance in which a Party fails to enforce its labor laws, nor does it cover all aspects of labor enforcement. Rather, the provision addresses a much narrow set of circumstances, lays down a series of elements that are cumulative in nature, and imposes a high threshold that must be met by a Party invoking the provision. Based on the ordinary meaning of its terms, a Party invoking Article 16.2.1(a) must establish: (i) a consistent and repeated series of related acts or omissions; (ii) with respect to the observance or compliance of laws that protect certain labor rights; (iii) by entities belonging to the Executive branch of government; (iv) over a prolonged period of time; (v) taken pursuant to a deliberate policy of neglect of the Party concerned; (vi) that has the intended consequence of having an effect on the exchange of goods or services among all of the States that are part of the CAFTA-DR. The conduct that is actionable under Article 16.2.1(a) is of a composite nature, and concerns some aggregate of conduct and not individual acts as such. In other words, the focus of Article 16.2.1(a) is on a consistent series of acts defined in aggregate as wrongful. Only after a series of acts take place consistently, will the aggregate of conduct defined as wrongful be *revealed*, not merely as a succession of isolated acts, but as a

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[83] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 176.
[84] Panel Report, *US – Section 301 Trade Act*, para. 7.22.
[85] Article 22.9 of the CAFTA-DR.
[86] The Spanish text of Article 16.2.1(a) reads as follows: "*Una Parte no dejará de aplicar efectivamente su legislación laboral, por medio de un curso de acción o inacción sostenido o recurrente, de una manera que afecte el comercio entre las Partes, después de la fecha de entrada en vigor de este Tratado"*.

composite act, i.e. an act defined in aggregate as wrongful.[87]

119. We examine each element of the text of Article 16.2.1(a) below.

a) "A Party"

120. A "Party" is defined in Article 2.1 of the CAFTA-DR as "any State for which this Agreement is in force". It is uncontested that the CAFTA-DR is in force for both Guatemala and the United States.

b) "shall not fail to effectively enforce"

121. The first clause of Article 16.2.1(a) is framed as a negative obligation ("shall not"). In fact, there is a double negative in the clause because the ordinary meaning of "fail" is "to neglect to do something".[88] In the context of Article 16.2.1(a), what a Party may not "neglect to do" is "to effectively enforce its labor laws". The failure must be attributable to the Party that is mentioned at the beginning of the clause.[89]

122. The ordinary meaning of "enforce" is to "[c]ompel observance of or compliance with".[90] It is also to [c]ompel the occurrence or performance of; impose (a course of action) on a person" and "[c]ompel the observance of (a law, rule, practice, etc.); support (a demand, claim, etc.) by force".[91] "Effectively" is the adverb of "effective". The ordinary meaning of "effective" is "[c]oncerned with or having the function of accomplishing or executing".[92]

123. Based on the ordinary meaning of the terms in the first clause of Article 16.2.1(a), a Party may not to neglect to compel observance of or compliance with its labor laws in a manner that accomplishes or executes.

c) "labor laws"

124. Article 16.8 of the CAFTA-DR defines "labor laws" as:

> … a Party's statutes or regulations, or provisions thereof, that are directly related
>
> to the following 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

[87] Relevant guidance can be found in Article 15 of the Draft Articles on State Responsibility, as described *infra* in paras. 155 to 165.
[88] Oxford Online Dictionary.
[89] Useful guidance on "attribution" can be found in Article 2 of the Articles on State Responsibility. There is an internationally wrongful act of a State when conduct consisting of an action or omission: a) is attributable to the State under international law; and b) constitutes a breach of an international obligation of the State.
[90] Oxford Online Dictionary.
[91] Shorter Oxford English Dictionary on Historical Principles, Oxford University Press, Sixth Edition, 2007, p. 833.
[92] Shorter Oxford English Dictionary on Historical Principles, Oxford University Press, Sixth Edition, 2007, p. 799.

> (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.
>
> For greater certainty, the setting of standards and levels in respect of minimum wages by each Party shall not be subject to obligations under this Chapter. Each Party's obligations under this Chapter pertain to enforcing the level of the general minimum wage established by that Party.

125. A definition of "statutes and regulations" is also provided in Article 16.8. In the case of Guatemala, the term "statutes and regulations" is defined as "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".

126. The definition of "statutes and regulations" quoted above refers to two types of legal instruments. The first type of instrument is "laws" enacted by Guatemala's legislative body. Under Guatemala's Constitution, legislative powers belong to Congress.[93] The term "laws" therefore refers to binding legal instruments enacted by the Guatemalan Congress. The second type of instrument is "regulations promulgated pursuant to an act of its legislative body". Thus, regulations are legal instruments adopted by a body other than the Congress, but such regulations must have been authorized by an act of Congress.

127. According to the definition provided in Article 16.8, these laws and regulations must be "enforceable by action of the executive body". Hence, the definition specifically identifies the "executive body" as the entity responsible for enforcing such "laws and regulations". The Spanish version of the definition states: "*leyes de su órgano legislativo o regulaciones promulgadas conforme a un acto de su órgano legislativo que se ejecutan mediante acción del órgano ejecutivo*". As in the English version, the lack of commas or separators indicates that the phrase "*que se ejecutan mediante acción del órgano ejecutivo*" refers back to both "*leyes de su órgano legislativo*" and "*regulaciones*".

128. Therefore, when read together with the definitions provided in Article 16.8, Article 16.2.1(a) must be understood as referring to enforcement of labor laws by the Executive Body. According to Guatemala's Constitution, the Executive is headed by the President and also includes the Vice-President, Ministers, Vice-Ministers and other dependent officials.[94] Consequently, in the particular case of Guatemala, Article 16.2.1(a) covers enforcement of labor laws by the President, Vice-President, Ministers, Vice-Minister and other dependent officials.

d) "through a sustained or recurring course of action or inaction"

129. Guatemala turns to the second clause of Article 16.2.1(a), which reads "through a sustained or recurring course of action or inaction". This clause is connected to the first clause by the term "through", which means "[b]y means of".[95] The term "through" indicates that the second clause is qualifying or clarifying the meaning of the preceding clause.

130. The ordinary meaning of "sustained" is "[c]ontinuing for an extended period or without interruption"[96]; or "[t]hat has been sustained; esp. maintained continuously or without flagging over a long period".[97] The term "recur" means "[o]ccur or appear again, periodically, or repeatedly".[98]

131. Thus, "sustained" and "recurring" describe conduct is continuous or repeats itself. The

[93] Guatemala's Political Constitution, Article 157.
[94] Guatemala's Political Constitution, Articles 182 and 193.
[95] Oxford Online Dictionary.
[96] Oxford Online Dictionary.
[97] Shorter Oxford English Dictionary on Historical Principles, Oxford University Press, Sixth Edition, 2007, p. 3126.
[98] Shorter Oxford English Dictionary on Historical Principles, Oxford University Press, Sixth Edition, 2007, p. 2495.

particular conduct must be observable over a prolonged period of time; otherwise, it would not be possible to detect the continuity, periodicity, or repetition. Logically, the conduct that repeats itself must be the same. If the conduct occurring is distinct it could not qualify as continuous, periodic or repetitive. Isolated events thus would not fall within the meaning of "sustained" or "recurring". The terms "sustained" and "recurring" also denote that there is observable consistency.

132. Accordingly, Article 16.2.1(a) provides for a composite obligation that concerns some aggregate of conduct and not individual acts as such. In other words, the focus of Article 16.2.1(a) is on a consistent series of acts defined in aggregate as wrongful. Only after a series of acts take place consistently, will the aggregate of conduct defined as wrongful be *revealed*, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.[99]

133. The second clause refers to "action" or "inaction". Guatemala understands that "action" refers to acts whereas "inaction" refers to omissions. Linking back to first clause, the acts or omissions are those of the Party. More specifically, these are acts or omissions by Executive Body entities concerning the observance of or compliance with its labor laws.

134. Guatemala notes that the second clause of Article 16.2.1(a) does not simply refer to "action or inaction", but rather refers to "a course of action or inaction". The terms "a course of" must also be given effect. Relevant dictionary definitions of the term "course" include "[h]abitual or regular manner of procedure; custom, practice…[a] line of conduct, a person's method of proceeding"[100] and "[a] procedure adopted to deal with a situation", "[t]he route or direction followed by a ship, aircraft, road, or river" and "[t]he way in which something progresses or develops".[101] The insertion of the words "course of" before "action or inaction" reinforces the notions of repetition and consistency that are conveyed by the terms "sustained" and "recurring". Yet, the terms "course of" must be given their own meaning independent of the meaning of "sustained" and "recurring."[102]

135. In Guatemala's view, the terms "course of" are intended to convey that the sustained or recurring action or inaction reflects a procedure or direction adopted by the relevant Party. In other words, Article 16.2.1(a) is intended to capture a deliberate policy of action or inaction adopted by the relevant Party.

e) "in a manner affecting trade between the Parties"

136. The third clause of Article 16.2.1(a) reads: "in a manner affecting trade between the Parties". Like the second clause, it is linked back to the preceding clauses of Article 16.2.1(a), in this case through the terms "in a manner". The term "manner" means "[t]he way in which something is done or happens; a method of action; a mode of procedure".[103] The third clause of Article 16.2.1(a) sets out an additional condition that must be met in order to make out a claim under that provision. This additional condition concerns the intended consequence of the Party's "course of action or inaction". The intended

[99] Relevant guidance can be found in Article 15 of the Draft Articles on State Responsibility, as described *infra* in paras. 155 to 165.
[100] Shorter Oxford English Dictionary on Historical Principles, Oxford University Press, Sixth Edition, 2007, p. 542.
[101] Oxford Online Dictionary.
[102] This principle is known as the principle of effectiveness ("*ut res magis valeat quam pereat*"). The WTO Appellate Body has explained, in this regard, that "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty." (Appellate Body Report, *US – Gasoline*, p. 21 (citing to *Corfu Channel Case (1949)* I.C.J. Reports, p.24 (International Court of Justice); Territorial Dispute Case (*Libyan Arab Jamahiriya v. Chad*) (1994) I.C.J. Reports, p. 23 (International Court of Justice); 1966 Yearbook of the International Law Commission, Vol. II at 219; Oppenheim's International Law (9th ed., Jennings and Watts eds., 1992), Volume 1, 1280-1281; P. Dallier and A. Pellet, Droit International Public, 5è ed. (1994) para. 17.2); D. Carreau, Droit International, (1994) para. 369).
[103] Shorter Oxford English Dictionary on Historical Principles, Oxford University Press, Sixth Edition, 2007, p. 1698.

consequence is to "affect [] trade between the Parties". The term "affect" means to "influence, make a material impression on"[104] and to "[h]ave an effect on".[105] This, in turn, means that there must be a relation of cause and effect between the "course of action or inaction" and the trade effect.

137. The ordinary meaning of "trade" is "[t]he action of buying and selling goods and services".[106] Based on its ordinary meaning, the term "trade" does not include investment. Indeed, other provisions of the CAFTA-DR refer separately to "trade" and to "investment". For example, Article 16.2.2 provides that "[t]he Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws". This provision clearly indicates that the drafters understood "trade" and "investment" to have different meanings and confirms that the term "trade" does not encompass investment. Similarly, in the Preamble of the CAFTA-DR, the Parties resolve to "PROMOTE transparency and eliminate bribery and corruption in international trade and investment". If the term "trade" were to include investment as well, the use of the term "investment" in Article 16.2.2 and the Preamble to the CAFTA-DR would become redundant. Such an outcome is contrary to the principle of effective treaty interpretation reflected in Article 31(1) of the Vienna Convention.[107]

138. Article 16.2.1(a) refers to trade "between the Parties", which indicates that the provision is addressing cross-border exchange of goods and services. The exchange of goods or services within each Party—that is, internal trade—does not constitute "trade between the Parties". Moreover, Guatemala notes that the clause refers to "Parties" in the plural. This must be understood as referring to all of the States that are Parties to the CAFTA-DR. Thus, the "course of action or inaction" must have an effect on FTA trade a whole and not simply on bilateral trade flows. If the drafters had intended Article 16.2.1(a) to address effects on bilateral trade, they would have referred instead to "trade with another Party" or "trade with the Party invoking Article 16.2.1(a)".

f) "after the date of the entry into force of this Agreement"

139. The last clause of Article 16.2.1(a) states: "after the date of the entry into force of this Agreement". The CAFTA-DR entered into force, in the case of Guatemala, on July 1, 2006. Hence, any act or omission that underlies a claim under Article 16.2.1(a) must have occurred after this date.

g) Conclusion on the interpretation of Article 16.2.1(a)

140. For the reasons explained above, the text of Article 16.2.1(a) does not make actionable each instance in which a Party fails to enforce its labor laws, nor does it cover all aspects of labor enforcement. Rather, the provision addresses a much narrow set of circumstances, lays down a series of elements that are cumulative in nature, and imposes a high threshold that must be met by a Party invoking the provision. Based on the ordinary meaning of its terms, a Party invoking Article 16.2.1(a) must establish: (i) a consistent and repeated series of related acts or omissions; (ii) with respect to the observance or compliance of laws that protect certain labor rights; (iii) by entities belonging to the Executive Branch of government; (iv) over a prolonged period of time; (v) taken pursuant to a deliberate policy of neglect of the Party concerned; (vi) that has the intended consequence of having an effect on the exchange of goods or services among all of the States that are part of CAFTA-DR. The obligation in Article 16.2.1(a) is of a composite nature that concerns some aggregate of conduct and not individual acts as such. In other words, the focus of Article 16.2.1(a) is on a consistent series of acts defined in aggregate as wrongful. Only after a series of acts take place consistently, will the aggregate of conduct defined as wrongful be *revealed*, not merely as a succession of isolated acts, but as a composite act, i.e.

[104] Shorter Oxford English Dictionary on Historical Principles, Oxford University Press, Sixth Edition, 2007, p.36.
[105] Oxford Online Dictionary.
[106] Oxford Online Dictionary.
[107] See footnote 102 *supra*.

an act defined in aggregate as wrongful.[108]

h) Context

141. The interpretation above is supported by the immediate context of Article 16.2.1(a). Guatemala turns first to Article 16.2.1(b), which provides:

> Each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.

142. Article 16.2.1(b) further limits the obligation set out in Article 16.2.1(a) by recognizing that each CAFTA-DR Party retains broad discretion with respect to the enforcement of labor laws. This discretion extends to a wide range of matters, namely, investigatory, prosecutorial, regulatory, and compliance matters, as well as to the allocation of resources. Article 16.2.2(b) also recognizes that each Party retains discretion in terms of setting priorities and that the enforcement of labor matters does not necessarily take precedence over other matter to which a Party in its discretion assigns higher priority.

143. An express cross-reference to paragraph 1(a) is included in Article 16.2.1(b). This cross-reference clarifies and limits the scope of the obligation in Article 16.2.1(a). According to Article 16.2.1(b), where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources, it will be deemed to be in compliance with Article 16.2.1(a). Therefore, a panel examining a claim under Article 16.2.1(a) must examine the challenged conduct against Article 16.2.1(b) before arriving at a definitive conclusion as to whether a Party is in violation of the former. This is because a Party exercising its discretion in accordance with the second sentence of Article 16.2.1(b) cannot be found to be acting inconsistently with Article 16.2.1(a). Thus, the conduct described in the second sentence of Article 16.2.1(b) falls outside the scope of Article 16.2.1(a). A consequence of this is that, consistent with the rules on burden of proof established in Rule 65 of the Model Rules of Procedure, the complaining party must establish that the exercise of discretion has been unreasonable or that a decision regarding the allocation of resources is improper.

144. Article 16.2.1(b) provides additional contextual guidance. The provision generally reinforces the understanding that the threshold for there to be a violation of Article 16.2.1(a) is high. Read together with Article 16.2.1(b), a violation of Article 16.2.1(a) requires a showing of abuse of discretion. Article 16.2.1(b) also confirms that the actions of judicial bodies are excluded from the scope of Article 16.2.1(a). It provides a closed list of matters falling with the concept of enforcement as it is used in Article 16.2. The matters that are explicitly listed are investigatory, prosecutorial, regulatory, and compliance matters. While this is a wide-ranging list, it is striking that the list does not include judicial matters. All of the matters that are listed are administrative in nature. Article 16.2.1(b) also refers to "a course of action or inaction" further reinforcing the conclusion that Article 16.2.1(a) is intended to capture situations in which the acts or omissions are pursuant to a deliberate policy of the Party concerned.

145. Article 16.2.2 also provides relevant guidance. It reads:

> The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise

[108] Relevant context can be found in Article 15 of the Draft Articles on State Responsibility, as described *infra* in paras. 155 to 165.

> derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in Article 16.8 as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

146. Article 16.2.2 reinforces the conclusion that Article 16.2.1(a) requires the showing of a *deliberate policy* by the challenged government. This policy must deliberately seek to encourage trade[109] through weaker or lower protections of labor rights.

147. Article 16.3 sets out a number of disciplines that seek to guarantee access to judicial proceedings, due process and the transparency of those proceedings. This provision indicates that Chapter 16 set outs a separate set of disciplines for judicial proceedings and confirms that the drafters did not intend to include actions or inactions by judicial entities within the scope of Article 16.2.1(a).

148. Additionally, Article 16.2.3 clearly establishes that "[n]othing in [Chapter 16] shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another territory".

149. Furthermore, and for greater certainty, Article 16.3.8 indicates that "decisions or pending decisions by each Party's administrative, quasi-judicial, judicial, or labor tribunals, as well as related proceedings, shall not be subject to revision or be reopened under the provisions of [Chapter 16]". Article 16.3.8 thus provides additional confirmation that judicial actions or inactions are not intended to be reviewed under Article 16.2.1(a).

150. Aside from the specific contextual guidance discussed above, these provisions indicate more generally that a panel may not conclude that there is a violation of Article 16.2.1(a) unless the complaining Party has demonstrated that there is a failure to effectively enforce labor laws in accordance with the *domestic legislation* of the defending Party. In other words, the standard is not the law and procedures as the complaining Party would like to see them or would like to have them interpreted.

i) Object and Purpose

151. Article 31(1) of the Vienna Convention also calls for consideration of the treaty's object and purpose. The CAFTA-DR is a Free Trade Agreement that establishes a free trade area. Article 1.1 of the CAFTA-DR provides that:

> The Parties to this Agreement, consistent with Article XXIV of the General Agreement on Tariffs and Trade 1994 and Article V of the General Agreement on Trade in Services, hereby establish a free trade area.

152. The CAFTA-DR's objectives are set out in Article 1.2.1. The objectives include to:

> (a) encourage expansion and diversification of trade between the Parties;
>
> …
>
> (c) promote conditions of fair competition in the free trade area;
>
> (d) substantially increase investment opportunities in the territories of the Parties;

153. None of the objectives set out in Article 1.2.1 of the CAFTA-DR makes any reference to labor matters. Although Chapter 16 (Labor) contains limited and qualified labor obligations, the CAFTA-DR

[109] As noted earlier, investment is expressly excluded from Article 16.2.1(a).

is not a labor agreement, nor was it intended to be one. The object and purpose of Chapter 16 is to prevent Parties from deliberately reducing or weakening the protections afforded in domestic labor laws to encourage expansion and diversification of trade and promote conditions of unfair competition. The CAFTA-DR's object and purpose therefore reinforces the conclusion that a violation of Article 16.2.1(a) may only be found when the failure to enforce labor law arises from a deliberate policy adopted by the respondent Party to give its firms an unfair advantage by weakening the protection of labor rights.

j) Articles on State Responsibility

154. Finally, Guatemala notes that, in order to find a breach of Article 16.2.1(a), that breach must be "attributable" to a Party in the sense of the definition under Article 2.1. Article 2 of the Articles on State Responsibility describes the elements of an internationally wrongful act of a State as follows:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> a) is attributable to the State under international law; and
>
> b) constitutes a breach of an international obligation of the State.

155. The Permanent Court of International Justice, in the *Phosphates in Morocco* case, explicitly linked the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State". In the *Diplomatic and Consular Staff* case, the Court pointed out that, in order to establish the responsibility of Iran:

> [f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations or Iran under treaties in force or under any other rules of international law that may be applicable.

156. Thus, only acts imputable to a State may be regarded to establish a breach of an obligation. A State cannot act of itself. An "act of a State" must involve some action or omission by a human being or group: "States can act only by and though their agents and representatives". This is particularly important under Article 16.2.1(a) of the CAFTA-DR. This provision contains composite and qualified obligations for the Parties to the CAFTA-DR. The failures to effectively enforce labor laws, through a sustained or recurring course of action or inaction must be attributed to a Party. Therefore, acts or omissions by private actors cannot be regarded as acts or omissions by any Party.

157. The Articles on State Responsibility are also helpful in further understanding the composite nature of the conduct that is actionable under Article 16.2.1(a). Composite acts are addressed in Article 15 of the Articles on State Responsibility, which provides:

> Article 15
>
> Breach consisting of a composite act
>
> 1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
>
> 2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or

> omissions are repeated and remain not in conformity with the international obligation.

158. As explained in the Commentaries of the International Law Commission's Articles on State Responsibility by the Special Rapporteur, paragraph 1 of Article 15 defines the time at which a composite act "occurs" as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without necessarily having to be the last of the series. The element of "sufficiency" is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation is also determined by the formulation and purpose of the primary rule.

159. Paragraph 2 of Article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The word "remain" in paragraph 2 was inserted to deal with the principle that a State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence.

160. Examples of this kind of composite obligations include the obligations concerning genocide, *apartheid* or crimes against humanity and systemic acts of racial discrimination. In each of these examples, there is a distinction between the character of the "composite obligation" and simple obligations breached by a "composite act".

161. To illustrate that distinction, one could refer to the special features of the prohibition of genocide, formulated in the 1948 Convention and in later instruments, like Article 4 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; or Article 6 of the Rome Statute of the International Criminal Court, to mention some examples.

162. In these instruments, genocide was defined as "killing members of [a national, ethnical, racial or religious group]" with the intent to destroy that group as such, in whole or in part. It implies that the responsible entity (including a State) will have adopted a *systematic policy or practice*. Genocide is not committed until there has been an *accumulation* of acts of killing, causing harm, etc., committed with the *relevant intent*, so as to satisfy the definition. Once the *threshold is crossed*, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.[110]

163. Thus, genocide is different in kind from individual acts even of ethnically or racially motivated killing. In the same vein, *apartheid* is different in kind from individual acts of racial discrimination. In the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed. In *Ireland v. United Kingdom*, the Court explained very clearly this distinction as follows:

> A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system; *a practice does not of itself constitute a violation separate from such breaches*…The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in article 26 of the Convention, applies to State applications … in the same way as it does to "individual" applications … On the other hand and in principle, the rule does not apply where the applicant State complains of a

[110] *Application of the Convention of the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, I.C.J. Reports 1996, p. 595, at p.617, para. 34.

> practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.[111]

164. Only after a series of actions or inactions takes place will the composite act be *revealed*, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful. Accordingly, for a complaining Party to succeed in any claim under Article 16.2.1(a) of the CAFTA-DR, it must be established that the defending Party engaged in a series of deliberate actions or inactions with a demonstrable intent: in this case, the intent of affecting trade between the Parties.

VII. THE MERITS OF THE UNITED STATES' ALLEGATIONS

A. ANONYMOUS STATEMENTS AND EXHIBITS WITH REDACTED OR ILLEGIBLE INFORMATION LACK PROBATIVE VALUE

165. Before addressing each of the United States' claims, Guatemala wishes to reiterate its objections to the use of anonymous statements and redacted/illegible exhibits by the United States.

166. The United States submitted 135 exhibits (out of 160) in the form of anonymous statements or documents with key information redacted. At least 33 exhibits contain illegible pages.[112]

167. The anonymity of the statements, the redaction of the key identifying information and the documents' illegibility make it extremely difficult for Guatemala to verify the authenticity of the documents or the accuracy of their contents.

168. For instance, there is absolutely no way to determine whether the witnesses making the statements are real, whether their testimony was spontaneous, or whether they have been employees of the companies targeted by the United States' claims.

169. The anonymous statements are not even sworn declarations, guaranteeing in this way that there will be no legal consequences in case of perjury.

170. The credibility of anonymous statements is further undermined when considering that they represent the view of one of the parties in a domestic dispute. As parties to a domestic dispute, they have their own views, interests and expectations about the outcome of such dispute and thus, have an incentive to make self-serving comments and statements.

171. Because Guatemala is unable to verify the authenticity and accuracy of the documents or the credibility of the anonymous statements, and because Guatemala does not have the opportunity to respond to them, the Panel cannot rely on those documents and statements without violating Guatemala's due process rights.

172. As such, these exhibits cannot be given any probative value or weight by the panel.

173. The burden of proof to make a prima facie case of violation rests squarely on the United States. It has the onus of providing evidence to substantiate its claims. This onus is not satisfied where, like here, the evidence submitted is defective and has no probative value or weight.

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[111] E.C.H.R., Series A, No. 25 (1978), at p. 64, para. 159 (emphasis added); see also *ibid*. at p. 63, para. 157. See also the United States counterclaim in *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim*, I.C.J. Reports 1998, p. 190, which likewise focuses on a general situation rather than specific instances.

[112] Exhibit GTM-3. List of exhibits with anonymous statements and/or redacted information and/or illegible pages.

174. Furthermore, the uncooperative approach taken by the United States in this dispute does not find any support in the MRP. The MRP do govern the presentation of redacted documents. The MRP *only allow* the redaction of information when it refers to non-confidential versions of documents to be disclosed to the broader public and not to the other Party or to the Panel. Under the MRP, a Party cannot withhold information from the other Party and the Panel.

175. It is even more striking that the United States suggests that some of the documents in its possession are "already redacted" and that it does not have copies of non-redacted versions of the documents.[113] If that assertion were true, it would be even more absurd to give probative value to evidence that is unknown to the Panel, the defendant *and* the complaining Party.

176. The Panel has the authority and the duty to preserve the due process rights of the parties. Due process is an essential element of any system of dispute settlement, domestic or international.

177. Withholding from the respondent party information in exhibits submitted by the complaining party as evidence is contrary to basic due process obligations recognized in international and municipal law. It is a fundamental tenet of due process that a party has a right to adequately prepare its defense and to see and respond to evidence put forward against it by the other party. A Panel cannot make an objective assessment of the facts if it does not have access to the evidence either.

178. Moreover, the Panel may draw adverse inferences in the absence of collaboration from the United States in providing an un-redacted version of the documents. These adverse inferences would be based upon the presumption that the United States, who is in control of the evidence, would have cooperated and disclosed information to Guatemala and the Panel if that evidence would had been supportive of its position.

179. In light of the above, the Panel cannot attribute any weight or probative value to the exhibits containing anonymous statements, redacted information or illegible pages.

B. THE UNITED STATES FAILED TO MAKE A PRIMA FACIE CASE OF VIOLATION WITH RESPECT TO EFFECTIVE ENFORCEMENT OF 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

[113] United States' communication of November 25, 2014.

1. The United States claim fails because it is premised on inaction by Guatemala's Public Ministry and Guatemala's labor courts and such inaction falls outside the scope of Article 16.2.1.(a) of CAFTA-DR

180. The United States' first claim is that Guatemala has failed to effectively enforce Labor Code Articles 10, 62(c), 209, 223, 379 and 380. The United States' claim is based exclusively on the following two allegations of inaction: (i) the allegation that Guatemala's Public Ministry did not pursue a criminal penalty against companies that allegedly failed to reinstate employees or pay benefits owed to them; and (ii) the allegation that Guatemala's labor courts did not increase penalties against companies that failed to reinstate employees or pay benefits owed to them or refer the matter to the Public Ministry.[114]

181. Before proceeding to the factual basis of the United States' allegation, Guatemala considers that the United States' claim must be rejected by the Panel as a matter of law. Guatemala explained in Section VI that Article 16.2.1(a) of the CAFTA-DR covers action or inaction by the Executive branch of government only. Action or inaction of entities that do not belong to the Executive branch fall outside of the scope of Article 16.2.1(a). As explained below, the Guatemalan labor courts and the Public Ministry do not belong to the Executive branch and therefore their alleged inaction cannot provide a basis for a violation of Article 16.2.1(a).

182. In accordance with Guatemala's Constitution, the Executive Body is comprised of the President, Vice-President, Ministers, Vice-Ministers and other dependent officials. Although it is referred to as a "Ministry", the Public Ministry is functionally independent of the Executive branch. Article 251 of Guatemala's Constitution establishes the Public Ministry as an institution with "autonomous functions". The Public Ministry is headed by the Attorney General ("Fiscal General") who is not a Minister for purposes of Article 182 of Guatemala's Constitution.

183. The independence of the Public Ministry is confirmed in the Public Ministry's Organic Statute. Article 1 of the Organic Statute describes the Public Ministry as "an institution with autonomous functions". This autonomy is reiterated in Article 3 of the Organic Statute, which states that the "Public Ministry shall act independently, on its own initiative and in furtherance of the functions attributed to it by law without subordination to any of the Organs of the State[115] nor any authority, except as provided in this Law."

184. Article 3 of the Organic Statute makes clear that neither the Guatemalan Executive nor the Judiciary can order the Public Ministry to take action. Neither has authority over the Public Ministry. The Public Ministry takes action "on its own initiative". Article 3 additionally states that the Public Ministry has its own budget line and autonomy over the administration of its budgetary resources. The fact that the Public Ministry is regulated under its own Organic Statute, as are the Executive, Legislative and Judicial branches of government, further confirms its independence.

185. The Public Ministry's independence from the Executive has been confirmed by Guatemala Constitutional Court. In a 1996 ruling, the Court declared unconstitutional two paragraphs of Article 4 of the Public Ministry's Organic Statute that provided for the President to give "general instructions" to the Head of the Public Ministry and required the Head of the Public Ministry to issue an explanation in case it decided not to follow the President's instructions. The Court struck down these provisions because they violated Article 251 of Guatemala's Constitution. The Court found as follows:

> 1) *el artículo 4, en los párrafos objetados (primero y segundo), se refiere a que el Presidente de la República podrá impartir instrucciones generales al Jefe*

[114] US initial written submission, paras. 55, 57, 60, 63, 65, 66, 70, 73, 76, 79, and 83.
[115] By "Organs of the State", the Organic Statute is referring to the Executive, Judicial and Legislative branches of the Government.

> *del Ministerio Público para que oriente sus funciones. Asimismo, indica que si el Fiscal General la acepta, emitirá las instrucciones pertinentes, si la rechaza, comunicará públicamente su decisión al Presidente, explicando los fundamentos de su rechazo. En este último caso el Presidente podrá recurrir al Organismo Legislativo para que resuelva dentro de los quince días siguientes, mediante acuerdo legislativo, sobre la procedencia de la petición, en cuyo caso la resolución será obligatoria para el Ministerio Público. Confrontado el artículo en cuestión con el 251 de la Constitución de la República, resulta patente que son violatorios de este último los dos primeros párrafos del artículo confrontado, pues el Ministerio Público tiene constitucionalmente funciones autónomas, y ello no le permite estar subordinado a las instrucciones del Presidente de la República; por consiguiente, resulta notoria su inconstitucionalidad*.[116]

186. In conclusion, the Public Ministry is not part of Guatemala's Executive Body and thus, criminal prosecution by the Public Ministry cannot constitute "enforceable … action of the executive body" for purposes of Article 16.8. For this reason, the Public Ministry's alleged failure to pursue a criminal penalty cannot constitute action or inaction to enforce Guatemala's labor laws within the meaning of Article 16.2.1(a).

187. For their part, the Guatemalan labor courts are part of the Judicial Branch, an independent branch of government under Article 141 of Guatemala's Political Constitution.

188. The independence of the Judicial Branch is enshrined in Guatemala's Constitution. Article 203 of the Constitution gives the courts of law the exclusive authority to adjudicate and enforce their judgments. The Article further provides that "the judges of the higher courts and other judges are independent in the exercise of their functions and are solely subject to the Constitution and the law". It goes on to state that anyone who interferes with the independence of the Judicial Branch is not only subject to criminal penalties under the Criminal Code, but will also be barred from holding public office. Article 203 additionally establishes that the judicial function is to be exercised exclusively by the Supreme Court and the other courts established by law and that "no other authority may intervene in the administration of justice".

189. The independence of the judiciary is reinforced in Article 204 of the Constitution, which establishes certain guarantees of the judiciary. These guarantees include: its functional independence, its financial independence, a prohibition on removal of judges of the higher courts and judges of the lower courts except in the circumstances established by law, and the right to select its staff.

190. Furthermore, the independence of the judiciary is also reflected in the fact that it is regulated under its own Organic Statute, like the Executive, Legislature and Public Ministry. Conflicts relative to labor and social security issues are subject to the exclusive jurisdiction of Labor and Social Security Courts which have competence to adjudicate disputes and execute their verdicts.[117] This exclusive jurisdiction is to be read in light of the functions and competences of the Ministry of Labor. The Ministry of Labor and Social Security is in charge of the development, improvement and enforcement of all legal

[116] Constitutional Court of Guatemala, File 662-94. Courtesy translation: Article 4, within the contested paragraphs (first and second), states that the President of the Republic may issue general instructions to the Head of the Public Ministry in order to guide his functions. Furthermore, it indicates that in case the Attorney General accepts them, he will issue the pertinent instructions; if he rejects them, he has to publicly communicate his decision to the President explaining the basis of his rejection. In this case, the President may recur to the Legislative Body to issue a resolution within the fifteen following days, by means of a legislative decree, regarding the merits of the request, and such resolution will be mandatory for the Public Ministry. Comparing the contested article with article 251 of the Constitution of the Republic, it is clear that the two paragraphs of the contested article are in breach of the article of the Constitution, since the Public Ministry has autonomous functions according to the Constitution, and this does not allow it to be subordinated to the instructions of the President of the Republic; in conclusion, the unconstitutionality is evident.

[117] Article 283 of the Labor Code.

provisions related to labor, *which are not competence of the courts*.[118] Put differently, each branch of the Government (Executive and Judicial) is independent of each other has its own scope of competence in labor matters.

191. The labor courts therefore are not part of Guatemala's Executive Body. Rather, they are a separate and independent branch of government according to Guatemala's Constitution. Accordingly, the actions or inaction of Guatemala's labor courts cannot constitute "enforceable … action of the executive body" for purposes of Article 16.8. It follows from this that any inaction of the Guatemalan labor courts, even if demonstrated, does not fall within the purview of Article 16.2.1(a) of the CAFTA-DR.

192. Consequently, as a matter of law, the United States' claim that Guatemala has failed to effectively enforce Labor Code Articles 10, 62(c), 209, 223, 379 and 380 must be rejected by the Panel.

2. The United States failed to demonstrate inaction by the Public Ministry and/or Labor Courts

193. Even assuming arguendo that Article 16.2.1(a) were to cover inactions by Guatemala's labor courts and Public Ministry, the United States has failed to establish the factual basis of its claim.

194. The United States claims that Guatemala has failed to enforce 10, 62(c), 209, 223, 379 and 380 of the Labor Code. In support of this assertion, the United States refers to alleged inaction by the Public Ministry or Guatemala's labor courts with respect to nine companies: ITM, NEPORSA, ODIVESA, Fribo, RTM, Mackditex, Alianza, Avandia, and Solesa.[119]

195. Claims of failure to enforce Articles 10, 62(c), 209, 223, 379 and 380 of the Labor Code require as a pre-condition the *existence of violations* of those provisions. Notwithstanding that, the United States appears to mistakenly believe that the demonstration of inaction by the Public Ministry or Guatemala's labor courts would be sufficient to conclude that there was a failure to enforce Articles 10, 62(c), 209, 223, 379 and 380 of the Labor Code. That is incorrect.

196. The alleged inactions by the Public Ministry or Guatemala's labor courts do not necessarily imply the existence of labor laws violations. Indeed, the purpose of proceedings before the labor courts is to determine whether the alleged violation exists.

197. Consequently, the United States has to demonstrate two elements to prove its claim: a) that there was a violation of Articles 10, 62(c), 209, 223, 379 and 380 of the Labor Code; and b) that there was inaction by the Public Ministry and/or labor courts. Each of these elements needs to establish separately and the United States has the burden of proof with respect to both.

198. The United States' argument makes the violation the consequence of the failure to enforce. However, there is only a basis for enforcement, and therefore for a claim of failure to enforce, if a violation has been previously established. Therefore, the United States has not sustained its burden on a necessary element of its claim.

199. Further, a careful review of the documents submitted by the United States reveals that the United States' claim does not rest on a sound evidentiary basis. Guatemala reviews the allegations made with respect to each company in turn.

a) ITM

200. In the case of ITM, the United States alleges that the Public Ministry failed to pursue criminal penalties with respect to the dismissal of 14 stevedores for engaging in the formation of a union. The United States additionally alleges that the labor court has failed to increase penalties against the

[118] Article 274 of the Labor Code.
[119] US initial written submission, paras. 55, 57, 60, 62, 63, 65, 70, 73, 76, 79, and 83.

company.[120]

201. The United States seeks to support its allegations exclusively on the basis of several exhibits that either contain anonymous statements and/or documents for which key identifying information has been redacted or is illegible. The anonymity of the statements, the redaction of the key identifying information and illegibility of the documents make it impossible for Guatemala to verify the authenticity of the documents and the veracity and accuracy of their contents. On their face, those exhibits cannot be given any probative value or weight by the Panel. Furthermore, because Guatemala is unable to respond to these documents, the Panel cannot rely on them without violating Guatemala's due process rights.

202. In light of the above, the United States' claim does not rest on any evidentiary basis and that the United States has failed to present a *prima facie* case of violation with respect to ITM. Guatemala identifies below some of the many contradictions that confirm the lack of credibility and accuracy of the evidence submitted by the United States. In some cases, Guatemala will show how the United States is misinterpreting the facts relating to the administrative record.

203. The United States seeks to support its allegation concerning the dismissal of the 14 stevedores on the basis of Exhibit USA-55. Even if the documents contained in Exhibit USA-55 had any probative value, which they do not, they would not show any failure to enforce Guatemalan labor law. The United States is offering the documents as evidence that the 14 stevedores were wrongly dismissed. Rather than showing inaction by the Guatemalan government, Exhibit USA-55 shows the Guatemalan labor court taking action to protect the rights of the stevedores.

204. The United States also relies on Exhibit USA-56 to support the assertion that the labor court certified each of the 14 stevedores' cases to the Public Ministry for possible criminal sanction. Exhibit USA-56 would appear to contain a letter from the Guatemalan Ministry of Labor to a union.[121] Several factors call into question the credibility and probative value of Exhibit USA-56. For instance, no reference is made in the letter to the attachments that have been included as part of that exhibit. As a result, there is no basis to confirm that the tables included in pages 3-6 of such exhibit (the numbering includes the cover page) were attached or were otherwise part of the letter. There are no dates in pages 3-6 and thus there is no basis to confirm until what day the information was current. Nor is it possible to confirm who is the author of those pages.

205. In addition, Exhibit USA-56 includes two different tables for "*Industria de Transporte Marítimo, Sociedad Anónima*". Each table seems to list 17 names (all of which have been redacted). No explanation is provided as to why two tables are included and what, if any, is the difference between the two. Furthermore, there is no correspondence between the number of names listed in each table (17) and the United States' allegation which concerns 14 stevedores.

206. Even leaving aside these serious flaws, Exhibit USA-56 actually demonstrates action by the government of Guatemala rather than inaction. Assuming Exhibit USA-56 in its entirety is authentic—which Guatemala has been unable to verify—it shows the Labor Court referring the cases to the Public Ministry. Consequently, Exhibit USA-55 does not provide any evidence of inaction by the Guatemalan Labor Court.

207. The United States also refers to so-called "statements of A, B, C, D, E, F" (Exhibits USA-1 to USA-6) and an email communication from NNN (Exhibit USA-58). All of these are anonymous witness statements. Guatemala has not been provided with an opportunity to question these witnesses or otherwise confirm their credibility. Guatemala is not even able to verify whether the witnesses making the statements worked or are working for ITM. Anonymous statements cannot be given any probative value. Because Guatemala has not been afforded an opportunity to question the witnesses, relying on the statements would violate Guatemala's due process rights.

[120] US initial written submission, paras. 55, 56.
[121] [Confidential information: the name of the Union is ----------]

208. For the reasons explained above, there is no factual basis for the United States' claim that there has been inaction of the Public Ministry and the labor court in the case of ITM.

b) NEPORSA

209. As regards NEPORSA, the United States asserts that the Public Ministry has failed to pursue a criminal penalty in case of the dismissal of 40 stevedores in retaliation for participating in the formation of a union and the Guatemalan labor court has failed to increase the penalties against the company for continued non-compliance.[122]

210. In support of its assertion, the United States claims to have provided, in Exhibit USA-57, the reinstatement orders for the 40 stevedores that were allegedly wrongfully dismissed by NEPORSA. Key identifying information has been redacted from the documents included in Exhibit USA-57. In addition, some of the pages in Exhibit USA-57 are illegible. For the reasons explained earlier, such exhibit does not have any probative value and may not be relied upon without violating Guatemala's due process rights.

211. However, even if the documents contained in Exhibit USA-57 had any probative value, which they do not, what they would show is action by the Guatemalan labor courts to protect the rights of the 40 stevedores. Indeed, as described by the United States, the documents show that the stevedores had access to the Guatemalan labor courts and that the Guatemalan labor courts responded favorably to the allegations of these workers by ordering their reinstatement. Therefore, rather than demonstrating inaction, the documents would demonstrate that the Guatemalan labor courts have taken action to protect the rights of NEPORSA employees.

212. The United States again relies on Exhibit USA-56, in this case to support the assertion that the labor court certified each of the 40 stevedores' cases to the Public Ministry for possible criminal sanction. Key information, such as the letter's recipients and the name of the employees, has been redacted. Thus, Exhibit USA-56 cannot have any probative value.

213. Nevertheless, Guatemala has also identified other factors that call into question the credibility and probative value of Exhibit USA-56. No reference is made in the letter to the attachments that have been included as part of Exhibit USA-56. As a result, there is no basis to confirm that the tables include in pages 3-6 of the Exhibit (the numbering includes the cover page) were attached or were otherwise part of the letter. There are no dates in pages 3-6 and thus there is no basis to confirm until what day the information was current. Nor is it possible to confirm who is the author of those pages.

214. Exhibit USA-56 includes two different tables for "*Negocios Portuarios, Sociedad Anonima*". The first table would appear to include 45 names (all of which have been redacted), while the second would appear to include 43 names (also redacted). Neither number matches the number of stevedores that the United States alleges were wrongfully dismissed. Thus, there is again a lack of correspondence between the assertions made by the United States and the evidence that it is putting forward to support the assertion. This lack of correspondence further undermines the credibility and probative value of the document.

215. The differences between the two tables go beyond the number of names listed. No explanation is provided as to why two tables are included or of the difference between the two. While the note below the first table would seem to indicate that NEPORSA had refused to implement the orders, the note below the second table provides a different explanation. The note is not clearly legible, but would seem to indicate that the reinstatement orders had been appealed by the company. This note would contradict the assertion that NEPORSA had failed to comply with the court orders and rather indicates that the company was availing itself of its rights under Guatemalan law by seeking review of the order. If that was indeed the case, there would be no basis under Guatemalan law for the labor court to impose a fine on the company or for the Public Ministry to pursue criminal sanctions. Accordingly, Exhibit USA-56

[122] US initial written submission, para. 56.

not only fails to show inaction by the Guatemalan labor courts or the Public Ministry, it also contradicts the United States' assertion that fines or criminal sanctions were warranted against NEPORSA.

216. Moreover, the United States has submitted so-called "statements" of four alleged employees of NEPORSA who assert that they have not been reinstated (Exhibits USA-2, USA-4, USA-7 and USA-8), as well as an email from NNN (Exhibit USA-58). These exhibits contain anonymous witnesses' statements that lack probative value and may not be relied on without violating Guatemala's due process rights.

217. There are other flaws in the evidence put forward by the United States. First, as the United States itself recognizes in footnote 55, it only offers statements of 4 out of the 40 stevedores that were allegedly wrongfully dismissed by NEPORSA. The United States only offers indirect testimony with respect to the other 36 stevedores in the form of an email from NNN. Aside from being anonymous and the fact that Guatemala is unable to question the person writing the email or even evaluate his/her credibility, the email does not mention NEPORSA. It makes a broad unsubstantiated statement about companies operating in Puerto Quetzal. Thus, the United States has submitted evidence with no probative value in support of the case of the 4 stevedores and no evidence at all for the other 36 stevedores.

218. Another example that illustrates the perils of relying on the anonymous statements is Exhibit USA-2. This exhibit indicates that it contains the statement of "B". In fact, Exhibit USA-2 contains three anonymous statements. Those statements do not appear to be from the same person as one of them indicates that the person started working as a crane operator in 1989, the other says he/she started in 1990 and the third one states that he/she started in 1993. The three statements also provide contradictory information as to the number of stevedores who allegedly were wrongfully dismissed. One of the statements indicates that 70 stevedores had been wrongfully dismissed, while another statement says 68 stevedores had been wrongfully dismissed. Neither number matches the 40 stevedores that the United States claims were wrongfully dismissed and which the labor court had ordered reinstated.

219. For the reasons explained above, there is no factual basis for the United States' claim that there has been inaction of the Public Ministry and the labor court in the case of ITM.

c) ODIVESA

220. The United States asserts that 11 stevedores wrongfully dismissed by ODIVESA were ordered to be reinstated by the labor court with back pay and benefits.[123]

221. In support of its allegation, the United States submitted Exhibit USA-59, which the United States claims contains 11 reinstatement orders issued by Guatemala's labor courts. Exhibit USA-59 only contains 9 reinstatement orders and all of documents have key information redacted from them. Some of the documents contained in Exhibit USA-59 are also illegible. As a result, these documents cannot be given any probative value and may not be used without violating Guatemala's due process rights.

222. The United States also submits so-called "statements" of three supposed employees of ODIVESA who allegedly have not been reinstated. The statements are anonymous and consequently Guatemala is unable to confirm that the persons providing the statements were in fact employees of ODIVESA, much less verify other information provided in their statements. Anonymous statements cannot be given any probative value and may not be used without violating Guatemala's due process rights.

223. Furthermore, the United States recognizes that at least five stevedores were reinstated. The United States claims that these five stevedores "agreed to settle with ODIVESA for lesser amounts that

[123] US initial written submission, para. 58.

what they were owed".[124] The United States, however, provides no support for its assertion that the settlement was for an amount lower than what the employees were owed.

224. The United States alleges that the labor court failed to refer the matter for possible criminal sanction or increase the penalties on ODIVESA. Exhibit USA-56 includes a table titled "*Operaciones Diversas, Sociedad Anónima* – ODIVESA" that appears to contain a list of 14 names (all of which have been redacted). The entry "*2da. Instancia*" on the third column to the right is the same for all 14 names and indicates that the labor court's ruling is being reviewed on appeal. Because the rulings were subject to appellate review, there would not have been a basis for the labor courts to increase penalties or refer the matter for possible criminal sanction. Therefore, there is no basis for the United States' allegation of inaction with respect to ODIVESA.

225. In light of the above, the United States has failed to provide evidence to support its claim and thus has failed to make a *prima facie* case of violation with respect to ODIVESA. Consequently, Guatemala would not need to submit any evidence to refute the United States' claims. Nonetheless, Guatemala has found four resolutions of an appellate labor court in favor of ODIVESA that declare with no legal effect the reinstatement orders in the case of four employees.[125] This evidence directly contradicts the United States' assertions.

226. Therefore, the United States has failed to demonstrate that there has been inaction of the Public Ministry and the labor court in the case of ODIVESA.

d) Fribo

227. As with the other three companies discussed above, the United States complains that, in the case of Fribo, the labor court failed to increase the penalties or refer the matter to the Public Ministry for criminal sanctions.[126]

228. Rather than inaction, the factual description provided by the United States shows the labor court actively protecting the workers' rights. As the United States recognizes, the labor court ordered the reinstatement of the employees with back pay and fined the company. The United States also accepts that 15 employees were reinstated and that the company paid the employees back pay and benefits.[127]

229. In support of its allegations, the United States relies on Exhibit USA-60. The names of the employees wrongfully dismissed have been redacted from Exhibit USA-60 and therefore it is not possible to determine, on the basis of Exhibit USA-60, whether the number of employees wrongfully dismissed was 24 as the United States is asserting. After intensive research, Guatemala could obtain an un-redacted version of the inspector's report contained in Exhibit USA-60. The un-redacted report indicates that the number of employees wrongfully dismissed was 15 and not 24 as the United States had incorrectly asserted.[128] Therefore, all of the employees were reinstated and there is no basis for the United States' allegation of inaction with respect to Fribo.

230. Furthermore, the payment of back pay and benefits was based on a settlement reached voluntarily between the workers and the company.[129] In the light of the settlement between employees and employer, there was no basis for the labor court to refer the matter to the Public Ministry or increase the fines either.

231. The United States also alleges that the workers agreed to settle their differences "at the urging

[124] US initial written submission, footnote 61 to para. 59.
[125] Exhibit GTM-4. Contains confidential information. Inspector's report describing resolutions by the appellate labor court in favor of ODIVESA.
[126] US initial written submission, para. 63.
[127] US initial written submission, para. 62.
[128] Guatemala will not disclose the name of the workers until de United States discloses the names of the persons providing anonymous statements in support of its claims against Fribo.
[129] Exhibit USA-11.

of Guatemala" and suggests that that this is contrary to worker's rights and Article 12 of Guatemala's Labor Code. The United States allegation is problematic in several respects. First, Guatemala recalls that the United States based its case exclusively on claims of inaction by Guatemala. In this particular instance, the United States is attempting to improperly raise a claim against an alleged action by the Guatemalan government. In any event, United States does not identify the entity or person who "urged" the employees. It characterizes the "urging" as having come from "Guatemala". Such a vague statement is clearly insufficient to sustain the United States' claim. Moreover, the only support provided by the United States is the anonymous statement contained in Exhibit USA-11. Guatemala reiterates that such anonymous statements cannot be given any probative value and reliance on such statements would violate Guatemala's due process rights.

232. Finally, with respect to the allegation that the workers were posted to positions with less pay, the United States has failed to demonstrate that those workers filed a complaint against the employer before the GLI or the labor court. Therefore, such allegation cannot be characterized as inaction by Guatemalan authorities.

233. For the reasons explained above, there is no factual basis for the United States' claim that there has been inaction of the labor court in the case of Fribo.

e) RTM

234. The United States asserts that RTM failed to reinstate six stevedores or pay them back wages and that RTM failed to pay the court-imposed fine. The United States further asserts that the Guatemalan labor court failed to refer the violation for criminal sanctions or increase the fines for non-compliance with its orders.[130]

235. As with the other allegations made by the United States, the record actually shows the Guatemalan labor court taking action to protect the rights of workers. Indeed, as the United States itself recognizes, the labor court ordered the reinstatement of the workers and imposed a fine on RTM.[131]

236. The United States alleges that six of the stevedores dismissed from RTM had not been reinstated or paid back wages or benefits as of May 2014. The United States' supports this allegation on the basis of anonymous statements that it claims to have been given by the six employees. However, because the names of the persons providing the statements and other identifying information are redacted, it has been impossible for Guatemala to confirm that the individuals providing the statements were, in fact, employees of RTM, nor has it been able to assess the credibility of the persons providing the statements. As such, these statements cannot be given any probative value or weight by the Panel. Furthermore, because the Guatemala is unable to respond to these documents, the Panel cannot rely on them without violating Guatemala's due process rights.

237. The United States also provides a report by Alejandro Argueta who claims to have reviewed the court files of four of the six stevedores.[132] The names of the complainants and the file numbers of the four cases allegedly examined by Mr. Argueta have been redacted. Therefore, Guatemala has been unable to verify the accuracy of the information provided by Mr. Argueta's report. As a result, the report by Mr. Argueta cannot be given any probative value or weight by the panel. Furthermore, because Guatemala is unable to respond to the information contained in the report, the Panel cannot rely on it without violating Guatemala's due process rights. Guatemala, moreover, notes that the United States has provided no foundation for the alleged legal expertise of Mr. Argueta, thus further undermining the credibility of the report.

238. In any event, if Mr. Argueta's report were to have probative value, it would undermine the United States' position. Mr. Argueta's report indicates that RTM's noncompliance had not been

[130] US initial written submission, para. 69.
[131] US initial written submission, para. 68.
[132] Guatemala notes that the United States offers no further evidence with respect to the other two stevedores.

established in any of the four proceedings and thus there was no legal basis for the labor courts to refer the matter for criminal prosecution or to increase the fines for non-compliance.

239. Consequently, there is no factual basis for the United States' claim that there has been inaction of the Guatemalan labor court in the case of RTM.

f) Mackditex

240. The United States asserts that the Guatemalan labor court has failed to refer Mackditex for criminal sanctions or increase the fines for non-compliance with the court's order to reinstate 17 workers.[133]

241. In this case, as in the other cases, the facts asserted by the United States show action by the Guatemalan Ministry of Labor and labor courts to protect the rights of workers. The United States acknowledges that the Ministry issued a report finding that the workers had been wrongfully dismissed and that the labor court ordered the employees' reinstatement with back pay and benefits.[134]

242. The United States' assertion that the employees have not been reinstated is based on statements provided by four persons (Y, W, Z and AA) claiming to have been employed by Mackditex. The statements of Y, W, Z and AA are anonymous. Their names and other identifying information have been redacted. These statements cannot have any probative value. The United States offers no evidence for the other 13 employees that it alleges were wrongfully dismissed.

243. There are other reasons to call into question the credibility of the statements of Y, W, Z and AA. Exhibit USA-18 is a joint statement of W and Z, while Exhibit USA-19 is a joint statement of Y, Z and AA. Both statements are dated 25 June 2014. It would thus appear that the person identified as "Z" provided two different statements on the same day.

244. Furthermore, even if the statements of Y, W, Z and AA had any probative value, they undermine the United States' assertions. In paragraph 2 of Exhibit USA-18, W and Z testify that they were still employed by Mackditex in 2012. This declaration directly contradicts the United States' allegation that both had been dismissed by Mackditex in 2011.[135] In addition, in both exhibits, Y, W, Z, and AA declare that they reached a settlement with respect to their complaint.

245. The terms of the settlement are not disclosed. On its face, it would appear that, as part of the settlement, Y, W, Z and AA voluntarily waived their right to be reinstated. In such circumstances, there would be no basis for the labor court to refer the matter for criminal sanctions or increase the fines.

246. Accordingly, there is no factual basis for the United States' claim that there has been inaction of the Guatemalan labor courts in the case of Mackditex.

g) Alianza

247. The United States asserts that "the experience of Alianza workers again demonstrates the labor court's failure to take the necessary action to ensure compliance with their orders".[136]

248. However, the United States does not specify which concrete actions the labor court failed to take. Notably, the United States does not allege in the case of Alianza that the labor courts were required to increase the fines or refer the matter for criminal prosecution.

249. Furthermore, the United States accepts that 30 employees reached a voluntary settlement with their employer. The United States asserts that the employees settled for less pay and that their decision to settle "was contrary to what the court had ordered". The only support provided by the United States

[133] US initial written submission, para. 73.
[134] US initial written submission, para. 72.
[135] US initial written submission, para. 72.
[136] US initial written submission, para. 76.

consists of anonymous statements, which have no probative value and may not be relied upon by the Panel without violating Guatemala's due process rights.

250. In any event, the statements confirm that the settlements were voluntarily entered into by the employees.[137] The statements also confirm that the employees voluntarily terminated the suit that gave rise to the reinstatement order.[138] The employees' decision to accept a settlement cannot be attributed to the Guatemalan labor court. There is no evidence that the employees filed complaints for the alleged differences between the settlement and the amount that they considered may have been due under the court's ruling.

251. Given that the suit was voluntarily terminated by the employees, there was no basis for the labor court to increase the fine or refer the matter for criminal prosecution. Accordingly, the United States' assertion of inaction by Guatemala's labor court with respect to Alianza does not have a factual basis.

h) Avandia

252. As with the case of Alianza, the United States does not identify any specific action that the Guatemalan labor court failed to take with respect to Avandia. The United States' assertion also lacks an adequate factual and evidentiary foundation as explained below.

253. First, Guatemala notes that the United States refers in footnote 93 to Exhibit USA-191. This Exhibit was not included in the United States' first written submission and has not been received by Guatemala. Consequently, the assertion that is allegedly supported by Exhibit USA-191 does not have any evidentiary foundation.

254. Secondly, even if the United States' description of the facts were taken at face value, they would show that the Guatemalan labor court admitted the list of grievances and recognized the collective conflict on the same day that it received the petition.[139] This again demonstrates action by the Guatemalan labor courts, rather than inaction.

255. Thirdly, Guatemala observes that the United States submits Exhibit USA-74 in support of its assertion that the Guatemalan labor court found, in 2006, that Avandia had wrongfully dismissed nine workers and ordered their reinstatement. Exhibit USA-74 appears to include two orders of the Guatemalan labor court. The case numbers and identity of the employees have been redacted. This makes it impossible to determine whether the Exhibit contains two court orders or duplicate copies of the same court order. Guatemala draws attention to the fact that in footnote 95 the United States refers to the "Reinstatement Order" in the singular, suggesting Exhibit USA-74 contains a single document. Aside from this, the redactions make it impossible to determine how many employees are covered by the court order(s) and for Guatemala more generally to confirm the authenticity of the document(s). In the light of these serious defects, the document(s) in Exhibit USA-74 cannot be given any probative value or weight by the panel. Furthermore, because Guatemala is unable to verify the authenticity of the documents or respond to them, the Panel cannot rely on them without violating Guatemala's due process rights.

256. The United States next asserts that two workers were reinstated, at lesser paying positions, and that the other seven workers were not reinstated. Because the United States has not provided any evidentiary foundation for its assertion that the reinstatement order covered nine workers, there is no basis for the Panel to assess whether there was a failure to reinstate seven workers. This is not the only defect in the evidentiary foundation of the United States' assertion. The United States submits Exhibit USA-75 in support of its allegation that the two reinstated workers were assigned to lesser paying positions. Exhibit USA-75 appears to include copies of an employee complaint and a court order. The

[137] Exhibit USA-22, p. 2 (excluding cover).
[138] Exhibit USA-23, p. 2 (excluding cover).
[139] US initial written submission, para. 77.

case numbers, name of the employees and names of the employers have been redacted. Guatemala also observes that there are inconsistencies between Exhibits USA-74 and USA-75. The employee complaint included in Exhibit USA-75 refers to the alleged failure by the employer to comply with the judicial resolution of 3 July 2007. This judicial resolution presumably is the court's reinstatement order. Yet, the reinstatement order that the United States claims to have included in Exhibit USA-74 is dated 22 November 2006. The inconsistencies between Exhibit USA-74 and USA-75 further undermine their credibility and probative value.

257. In any event, even if the documents were given probative value, they demonstrate the opposite of what the United States seeks to establish. Exhibit USA-75 would show the labor court taking action against the employer as a result of the latter's failure to reinstate the employees. Thus, rather than inactivity, Exhibit US-75 would show the Guatemalan labor court taking action to protect worker's rights.

258. Finally, Guatemala notes that the United States has offered no evidence for its allegation that seven workers were never reinstated. Guatemala recalls that the United States bears the burden of proving its claim and of any facts that it asserts in support of its claim. Failure to reinstate the workers is a necessary condition of the United States' claim. Until this fact is established, the United States does not have a basis to argue that the Guatemalan labor court was required to take action and that it failed to do so. Guatemala further reiterates that the United States' submission fails to specify which actions the Guatemalan labor court failed to take in the case of Avandia.

259. Accordingly, there is no factual basis for the United States' claim that there has been inaction of the Guatemalan labor courts in the case of Avandia.

i) Solesa

260. The United States asserts that Solesa has failed to reinstate 21 workers that were found to have been wrongfully dismissed and that the Guatemalan labor court has failed to increase the penalties or refer the matter to the Public Ministry for criminal sanction.[140]

261. The United States alleges that, on 8 November 2010, the Guatemalan labor court ordered the reinstatement of 49 workers. In support of its allegation, the United States submits Exhibit USA-80, which it describes as the "Decision in the case of Mr. OOO". The United States does not provide any evidence with respect to the other 48 alleged employees of Solesa. Exhibit USA-80, which the United States would have the Panel believe has a reinstatement order for OOO, does not say anything about the reinstatement of OOO. In Exhibit USA-80 the court notes that the case has been appealed by the union. Consequently, the United States has not provided any evidentiary foundation for its assertion that the Guatemalan labor court ordered the reinstatement of 49 employees that allegedly had been wrongfully dismissed by Solesa.

262. The United States further asserts that Solesa appealed the reinstatement order of OOO on 24 November 2010 and seeks to supports its assertion with Exhibit USA-81. The name of the person filing the appeal and the name of the entity he/she represents have been redacted from Exhibit USA-81. Consequently, it is not possible to verify that the appeal was in fact filed by Solesa nor the case with respect to which the appeal was filed. Also, as noted above, Exhibit USA-80 indicates that the appeal was filed by the union and not by Solesa. Therefore, there is contradictory information on the record about which party initiated the appeal.

263. The United States additionally asserts that the appellate court upheld the reinstatement orders with respect to 31 workers. The United States seeks to supports this assertion with Exhibit USA-83, which it describes as "Decision in the case of Mr. OOO". Exhibit USA-83 is completely illegible. As a result, it is impossible to confirm that the document actually consists of an appellate court decision ordering the reinstatement of an employee of Solesa. The United States does not even claim to provide

[140] US initial written submission, para. 82.

the court decisions of the other 30 employees. The United States' claim that the labor court has failed to increase the penalty on Solesa or refer the matter to the Public Ministry is premised on the existence of a reinstatement order for the 31 workers. Because the United States has not provided evidence to establish that the labor court had ordered the reinstatement of the 31 workers, the premise of the United States' claim has not been met and its claim must necessarily fail.

264. The other evidence provided by the United States to support its contention that 21 employees had not been reinstated is also deficient and has no probative value. The United States provides an email in Exhibit USA-84 to the Department of Labor from an anonymous source. Because the author of the email is not identified, it cannot be given any probative value. Furthermore, relying on it would violate Guatemala's due process rights. In any event, the email does not mention Solesa and therefore could not provide an evidentiary basis for any findings with respect to Solesa.

265. The United States also refers to Exhibit USA-20, which it describes as a statement of GGG. The statement is anonymous because the identity of GGG has been redacted. As Guatemala has explained, anonymous statements do not have any probative value and the Panel cannot rely on them without violating Guatemala's due process rights. In his/her statement, GGG does not indicate how it came to know the information that he/she is declaring and does not provide any support for this testimony. It is entirely unsubstantiated. There is no basis in the redacted Exhibit to verify that the employees to whom GGG refers correspond to the 21 employees that the United States alleges were not reinstated. Moreover, the statement refers to "Finca la Soledad". The United States does not provide any evidence to establish that Solesa and "Finca la Soledad" are the same entity.

266. The United States asserts that the court failed to take action when the workers sought further assistance in obtaining relief. In support of this assertion, the United States submits Exhibit USA-85 which appears to be a complaint filed before the Public Ministry. Like the other documents, Exhibit USA-85 is heavily redacted. Guatemala further notes that the United States has failed to submit the evidence that allegedly supported the allegations made in Exhibit USA-85. The allegations are thus unsubstantiated and consequently for this reason too they do not have any probative value.

267. Finally, the United States alleges that the court failed to take action when the workers asked the court to proceed with partial liquidation of the company's assets. The United States submitted Exhibits USA-86 and USA-87 in relation to this allegation. Because the documents are redacted, it is not possible to confirm that the judicial decision that is submitted in Exhibit USA-87 is a response to the request submitted in Exhibit USA-86. Nor is it possible to confirm the authenticity of the documents or conduct the inquiries necessary to evaluate the credibility of the information provided therein.

268. In any event, assuming Exhibit USA-87 is a judicial decision that responds to the requests in Exhibit USA-86 as the United States claims, it would not support the United States' allegation of inaction. While the United States may disagree with the merits of the judge's decision, the decision constitutes action by the labor court. Hence, Exhibits USA-86 and Exhibit USA-87 do not support the allegation of the United States that the labor court has failed to take action. Guatemala additionally notes that Article 16.2.1(a) of the CAFTA-DR may not be used to second-guess the decisions of the labor courts. Article 16.3.8 emphatically states that "[f]or greater certainty, decisions or pending decisions by each Party's administrative, quasi-judicial, judicial, or labor tribunals, as well as related proceedings, shall not be subject to revision or be reopened under the provisions of this Chapter." Accordingly, the Panel must deem the judicial decision in Exhibit USA-87 to be in accordance with Guatemalan law.

269. In light of the above, the United States has failed to prove that there has been inaction of the Guatemalan labor court in the case of Solesa. Consequently, there is no factual basis for the United States' claim that there has been inaction of the Guatemalan labor court in the case of Solesa.

j) Conclusion

270. Guatemala recalls that the United States' claim that Guatemala has failed to effectively enforce

Labor Code Articles 10, 62(c), 209, 223, 379 and 380 is based exclusively on the following two allegations of inaction: (i) the allegation that Guatemala's Public Ministry did not pursue a criminal penalty against companies that allegedly failed to reinstate employees or pay benefits; and (ii) the allegation that Guatemala's labor court did not increase penalties against companies that failed to reinstate employees or pay benefits or refer the matter to the Public Ministry. Guatemala further recalls that, under Rule 65 of the MRP, the United States has the burden of proof and therefore must present arguments and evidence to establish a *prima facie* case.

271. In the previous subsections, Guatemala has provided a detailed review of the arguments and evidence submitted by the United States and has demonstrated that the United States has failed to make a *prima facie* case. First, in most instances, the United States has sought to support its case on anonymous statements or other documents that have been heavily redacted and that cannot be evaluated for authenticity or credibility. As a result of these deficiencies, these Exhibits have no probative value and relying on them would violate Guatemala's due process rights. Secondly, even if the documents were considered, Guatemala has shown above that the Exhibits do not support the United States' allegation. Thus, the United States has failed to establish that there have been violations of Labor Code Articles 10, 62(c), 209, 223, 379 and 380. Moreover, for each of the nine companies addressed by the United States, Guatemala has shown that the United States' claim that there has been inaction of the Guatemalan labor courts or by the Public Ministry lacks an evidentiary foundation.

272. In sum, the United States has failed to provide a factual basis for its claim and thereby has failed to make a *prima facie* case. As a consequence, the Panel must reject the United States' claim that Guatemala has breached Article 16.2.1(a) of the CAFTA-DR by failing to effectively enforce labor law related to the right of association and the right to organize and bargain collectively by not securing compliance with court orders.

3. Even if the United States had substantiated the factual basis of its assertions, it would have failed to establish that the failure to effectively enforce the relevant labor law has been "through a sustained or recurring course of inaction"

273. Article 16.2.1(a) requires the complaining party to demonstrate that the respondent party's failure to effectively enforce its labor laws is "though a sustained or recurring course of action or inaction". Guatemala explained, in section VI that this requires that the complaining party establish a consistent and repeated series of acts or omissions, over a prolonged period of time, by entities belonging to the Executive branch of government of another Party. These acts or omissions must have formed part a deliberate policy of neglect with respect to the observance or compliance of laws that protect certain labor rights with the intended consequence of having an effect on the exchange of goods or services among all of the States that are part of CAFTA-DR.

274. The United States acknowledges that "isolated instances" are insufficient to establish a violation of Article 16.2.1(a).[141] The United States also accepts that the threshold under Article 16.2.1(a) is higher and describes it as requiring a "pattern of inaction" , "a consistent and ongoing course of inaction" , or a "consistent[] and repeated[]" failure to enforce a Party's labor laws. Yet, the United States provides no evidence that the alleged omissions it describes constitute a "pattern" or "consistent", "ongoing" and "repeated" conduct. Rather, the United States' case is based on an improper presumption that the alleged omissions it describes are sufficiently connected to establish the existence of a composite act.

275. The fact is that the alleged omissions described by the United States do not constitute a consistent and repeated series of omissions over a prolonged period of time. In the case of the alleged failure to enforce Articles 10, 209, and 223 of the Labor Code, the United States refers to alleged

[141] US initial written submission, para. 94.

omissions with respect to employees in four companies —ITM, NEPORSA, ODIVESA and Fribo. The United States provides no evidence that the alleged omissions with respect to these four companies are connected such that they reflect "consistent" or "repeated" conduct, or a "pattern". Nor can the number of employees involved provide a basis to show "consistent" or "repeated" conduct, or a "pattern". Guatemala notes, in this regard, that the United States has artificially inflated the number of workers affected by double-counting individuals involved. The documents submitted by the United States suggest that some of the individuals simultaneously worked at more than one of the companies targeted by the United States' allegations.[142] In the absence of any evidence provided by the United States as to linkages between them, the Panel must treat the omissions as isolated events. Furthermore, the alleged omissions occurred in 2006 (Avandia), 2008 (ITM, NEPORSA, and ODIVESA) and 2009 (Fribo). In other words, the alleged events giving rise to the United States claims occurred at each company during a single year and there is no recurrence. This can hardly qualify as a "consistent" conduct over a "prolonged period", which the United States acknowledges is required to constitute "a sustained or recurring course of action".

276. The United States' case with respect to the alleged failure to enforce Articles 10, 223, 379 and 380 of the Labor Code is equally weak. In this case, the United States has referred to alleged omissions occurring with respect to Mackditex, Alianza, Avandia, RTM, and Solesa. According to the United States, the alleged omissions occurred in 2010 (RTM, Alianza and Solesa) and 2011 (Mackditex). On its face, the description provided by the United States is of isolated events. The fact that the omissions occurred in four companies is not by itself sufficient to establish consistency, repetition or a pattern. Even as the United States describes them, the omissions took place during a single year at each company and there is no recurrence. The United States provides no evidence of any linkages between the alleged omissions.

277. Guatemala further notes that, in order to constitute a "sustained or recurrent course of … inaction", the omissions would have to form part of a deliberate policy of neglect with respect to the observance or compliance of laws that protect certain labor rights with the intended consequence of having an effect on the exchange of goods or services among all of the States that are part of CAFTA-DR. The United States has failed to provide any evidence that the alleged omissions form part of a deliberate government policy of neglect with respect to the observance of or compliance with Articles 10, 223, 209, 379 and 380 of the Labor Code. Nor has the United States provided any evidence of the existence of such policy. The United States, furthermore, has failed to provide evidence that the policy was intended to have an effect on trade.

278. For the reasons explained above, even if the United States allegations were to rest on a sufficient factual foundation, they would be insufficient to establish a "sustained or recurring course of action or inaction" within the meaning of Article 16.2.1(a) of the CAFTA-DR. Accordingly, the Panel must reject the United States' claim that Guatemala has breached Article 16.2.1(a) of the CAFTA-DR by failing to effectively enforce labor law related to the right of association and the right to organize and bargain collectively by not securing compliance with court orders.

C. THE UNITED STATES FAILED TO MAKE A PRIMA FACIE CASE OF VIOLATION WITH RESPECT TO EFFECTIVE ENFORCEMENT OF LABOR LAWS DIRECTLY RELATED TO ACCEPTABLE CONDITIONS OF WORK OR BY NOT CONDUCTING INSPECTIONS AS REQUIRED BY NOT IMPOSING OBLIGATORY PENALTIES

[142] For example, B and D claim to have worked for ITM and NEPORSA. Exhibit USA-2 and USA-4.

1. The United States failed to demonstrate that Guatemala did not conduct investigations or imposed penalties as required by law

279. The United States claims that Guatemala has failed to effectively enforce Labor Code articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197[143] *because* Guatemala *did not conduct investigations* and *did not impose penalties*.[144] In the own words of the United States:

> Guatemala has failed to effectively enforce its labor laws directly related to acceptable conditions of work *by not investigating* as required by law (emphasis added).[145]
>
> Guatemala has failed to effectively enforce its labor laws directly related to acceptable conditions of work *by not imposing penalties* as required by law (emphasis added).[146]

280. As formulated by the United States, its claims are essentially about the *lack of investigation* and *the lack of imposition of penalties*. The United States appears to believe that the demonstration of the lack of investigation or the lack of imposition of penalties automatically leads to the conclusion that there were violations of labor laws directly related to acceptable conditions of work.[147] The logic of the United States' argument, however, is flawed. The alleged lack of investigation or imposition of penalties does not necessarily imply the existence of violations of labor laws directly related to acceptable conditions of work.

281. Not all complaints filed by workers about working conditions are necessarily justified or true. The investigation by the GLI is, precisely, one of the mechanisms used to determine whether or not there is a violation of labor laws, including those related to acceptable working conditions.

282. There is no basis to draw a legal presumption that there was an alleged violation of labor laws on working conditions where an investigation was not conducted. Put another way, it cannot be automatically concluded that there was a violation of such labor laws if allegedly the GLI did not conduct an investigation to determine the existence (or not) of that violation.

283. Consequently, if the United States is claiming that there was a violation of labor laws directly related to acceptable conditions of work, it has the burden of demonstrating the existence of that violation as well.

284. The United States has to demonstrate two elements to prove its claim: a) that there was a violation of labor laws directly related to acceptable conditions of work); and b) that the GLI did not conduct an investigation.

285. Similarly, the lack of imposition of penalties cannot be determinative of the existence of labor laws violations. Penalties are imposed as consequence of labor and social security offenses. There may be many reasons why the authorities do not impose penalties, such as the fact that there has not been a violation. Therefore, the lack of imposition of penalties cannot lead to the conclusion that there has been a violation of labor laws directly related to acceptable conditions of work, as the United States is proposing.

286. Guatemala further notes that the United States relies heavily on anonymous statements made by alleged workers or documents from which key information has been redacted or that are illegible. Guatemala is simply unable to verify the authenticity and veracity of the information contained in the documents or the credibility of the statements. The documents and statements may not be given any probative value or weight. Moreover, because Guatemala is unable to verify the authenticity and

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[143] US initial written submission, page 27.
[144] US initial written submission, pages 29, 32.
[145] US initial written submission, page 29.
[146] US initial written submission, page 32.
[147] US initial written submission, paras. 135, 137, 139.

veracity of the documents or the credibility of the individuals providing the statements, and because Guatemala does not have the opportunity to respond to them, the Panel cannot rely on those documents and statements without violating Guatemala's due process rights.

287. Therefore, for the reasons explained above, the evidence submitted by the United States in the form of anonymous statements or redacted or illegible documents cannot be given any weight or probative value.

288. Guatemala demonstrates below that the United States has failed to make a *prima facie* case of violation of Article 16.2.1(a) with respect to labor laws directly related to acceptable conditions of work.

a) Seventy Coffee Farms:

289. The United States claims that workers from 70 coffee farms jointly filed more than 80 complaints with the Ministry of Labor regarding minimum wage, mistreatment or health and safety conditions. The United States adds that despite these many complaints alleging violations of Guatemala's labor laws, Guatemala failed to inspect to worksites in such a way as to determine whether the employer had violated the relevant laws.[148]

290. In support of its claim, the United States submits only one (1) complaint[149] and not 70 as claimed in its initial submission. Additionally, the United States relies on an anonymous joint declaration of five individuals that allegedly are part of the union of Las Delicias farm. This joint declaration makes reference to alleged facts concerning Las Delicias farm only.

291. For the reasons explained earlier, the anonymous joint declaration lacks probative value and the Panel cannot rely on it without violating Guatemala's due process rights. Furthermore, there is no evidence at all for the United States' claims concerning the other 69 coffee farms.

292. Exhibit USA-95 could only demonstrate that the union MSICG filed a complaint. On its own, Exhibit USA-95 does not prove that there was no investigation, much less that there was a failure to effectively enforce labor laws. Therefore, the evidence submitted by the United States fails to establish a prima facie case with respect to Las Delicias and the other 69 coffee farms (for which the United States did not even submitted evidence).

293. Although Guatemala legally does not need to submit any evidence given the lack of evidence submitted by the United States, it feels compelled to undermine any remaining notion that Guatemalan authorities do not take worker complaints seriously. Contrary to the United States' assertion that the Ministry of Labor "never responded to MSICG's complaint directly" and that "no further actions were taken",[150] the table submitted as Exhibit GTM-5[151] provides examples of investigations that the GLI conducted in San Marcos, Suchitepéquez and Chimaltenango as a result of the union's complaint. In Exhibit GTM-6,[152] Guatemala also attaches inspectors' reports that confirm the information provided in the table.

294. As reflected in the table, the GLI did conduct investigations and determined that working conditions on the majority of farms complied with Guatemalan labor laws. A few farms were required to make adjustments, which they did. Contrary to the United States' allegations, these examples demonstrate that the GLI conducted investigations and that labor laws are strictly enforced.

295. Coming back to *Las Delicias*, the evidence submitted by the United States inherently lacks any

[148] US initial written submission, para. 132.
[149] Exhibit USA-95.
[150] US initial written submission, para. 142.
[151] Exhibit GTM-5. General Labor Inspection's report on an operating plan of inspections performed in San Marcos, Suchitepéquez and Chimaltenango.
[152] Exhibit GTM-6. Contains confidential information. Examples of inspectors' reports linked to the information provided in Exhibit GTM-5.

probative value. Notwithstanding that, Guatemala notes that such evidence also contains information that is not supported by the facts.

296. For example, the United States, based on the anonymous statements, claims that inspectors "have regularly refused to inspect unless workers paid for the inspector's transportation". This is an unfounded allegation.

297. First, besides the anonymous statements, there is no evidence that the inspectors required or received money to buy gasoline.

298. Secondly, GLI inspectors are provided with gasoline and transportation to perform their duties. Exhibit GTM-7[153] shows the date and amount of money provided to the inspectors to perform the inspections concerned. Guatemala has found no evidence that the workers made a complaint about the inspectors' alleged actions. Had the workers filed a complaint against the inspectors, the Ministry of Labor would have taken legal action to sanction those inspectors. The inspectors that conducted the inspections have an impeccable record. This Panel should not tolerate the United States' attempt to tarnish their record with unsubstantiated, self-serving, allegations.

299. The evidence that Guatemala could obtain after intensive research shows that inspectors efficiently carried out investigations every time that the workers requested. The inspectors visited the farm and the administrative offices of *Las Delicias* on February 6, February 13, March 11 and March 25, 2012, and on April 11, April 24, May 16, May 30 and June 19, 2013, to address two separate complaints filed by a union.[154]

300. As a result of the conciliation hearings and their investigations, the inspectors identified certain deficiencies at Las Delicias. In Exhibit USA-26, RR, SS, TT, UU, VV assert that they requested the GLI to continue with de conciliation proceedings because they wanted to reach an agreement with the employer and they did not have money to resort to judicial procedures.[155] However, the administrative file shows it was the workers who requested the termination of those procedures.[156] This contradiction highlights the concerns about the credibility of anonymous statements, which Guatemala has raised in this dispute.

301. Article 321 Guatemalan Labor Code provides that the intervention of an advisor is not necessary in labor trials. Nevertheless, if the parties decide to seek counsel, the ones who may act as such are lawyers, union executives and law students. The advice of both union executives and law students is free. This is basic information that is known to all unions. The inspectors and Court officers provide this information to the workers as well. However, the statements of RR, SS, TT, UU, VV (Exhibit USA-26) seek to depict a completely different picture that, again, is not supported by the facts and further undermine its own credibility.

302. The United States also asserted that the representative of *Las Delicias* admitted that "the company was not paying the workers the minimum wage" and that the "Ministry warned the employer that it needed to raise wages in the next 30 business days to avoid further action taken against it".[157] In the view of the United States, 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".[158] The United States misreads the inspector's report submitted as Exhibit USA-100. The Ministry did not warn the employer that it needed to raise wages in the next 30 business days to avoid further action taken against

[153] Exhibit GTM-7. Report by the Transportation Department and Fuels Coordination of the Ministry of Labor.
[154] Exhibits GTM-36. Certificate by the GLI. January 29, 2014. [Confidential information: the Union is --------].
[155] Exhibit USA-26, pag. 3: "*Al verificar que el patrono no ha cumplido con el acta del Ministerio, entonces dan por agotada la vía administrativa, aunque les pedimos que no den por agotada la vía. Queremos conciliación con el patrono, porque tenemos muchos problemas en el trabajo y no tenemos el dinero para presentar una denuncia en el Juzgado"*.
[156] Exhibits USA-100, page 2.
[157] US initial written submission, para. 144.
[158] Ibid.

it. Because the workers decided to exhaust the administrative proceedings of conciliation, the inspectors warned the workers (not the employer) that they had 30 business days to go to court to exercise their rights.[159]

303. Therefore, in light of the above, the United States has not demonstrated that Guatemala failed to effectively enforce its labor laws with respect to 70 coffee farms, including *Las Delicias*. To the contrary, Guatemala has demonstrated full compliance with its labor laws.

b) Koa Modas

304. The United States claims that the GLI did not conduct investigations or impose penalties with respect to Koa Modas. In support of its claim, the United States relies heavily on anonymous statements.

305. For the reasons already explained in this submission, anonymous statements and documents with redacted information inherently do not have any probative value. Notwithstanding that, Guatemala will point out some of the many contradictions that confirm the lack of credibility of the anonymous statements submitted by the United States. As regards the administrative records, Guatemala will show how the United States misinterprets the facts. The evidence submitted by Guatemala will correct the misleading picture that the United States presented in its initial written submission with respect to this company.

306. First, Guatemala notes that the workers had legal counsel assisting them during the inspection of Koa Modas.[160] Contrary to the allegations of the United States[161], there is no evidence, in any of the minutes of the many inspections that were conducted at Koa Modas' premises, that either the workers' legal counsel or the workers themselves expressed dissatisfaction with the inspectors' attitude or the way they conducted inspections. The worker's representatives and their lawyer were present in all inspections and signed the minutes of every inspection.[162]

307. If the workers or their legal counsel disagreed with the content of the minutes, they could have refused to sign the minutes and the inspector would have had to place such disagreement on the record. Additionally, the United States has not submitted any proof to substantiate the allegation that a complaint was raised before the Labor General Inspector.[163]

308. Because the United States refuses to cooperate by providing the name of the persons making the statements submitted as evidence, Guatemala is unable to confirm whether the persons making those statements are the same persons that were present during the inspections. However, Guatemala can confirm that the *complainants* and their lawyer signed the minutes of every inspection.

309. Guatemala also notes that the allegation that an inspector was sleeping during the inspection

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[159] Exhibit USA-100, page 2: "…*deciden los actores AGOTAR LA VÍA ADMINISTRATIVA CONCILIATORIA en contra de COMPAÑÍA AGRÍCOLA LAS DELICIAS SOCIEDAD ANÓNIMA. SEGUNDO: En virtud de la manifestado por ambas partes el suscrito inspector de trabajo deja constancia de la misma haciéndoles saber a los actores el derecho que les asiste de acudir a El Juzgado de Trabajo y previsión social que ellos elijan contando con treinta días hábiles para presentar su demanda y no prescriba la misma*…".

[160] Exhibit USA-37, Statement of GG.

[161] US initial written submission, paras. 136, 137. Allegations that one of the inspectors was sleeping; inspectors received gifts; inspectors only met with representatives of Koa Modas management; and inspectors spoke with employees chose by the employer and not to the complainants.

[162] Exhibits USA-117, USA-118, USA-119, USA-120, USA-121, USA-122, USA-123 and USA-125. Guatemala could locate, after intensive research, the inspectors' reports contained in the exhibits just mentioned. Guatemala verified that the workers' representatives and the lawyer signed of conformity such reports. Because the United States has the burden of production, Guatemala will not submit a non-redacted version of these exhibits. Guatemala may provide a non-redacted version of such exhibits if the United States provides a non-redacted version of the anonymous statements that make reference to the exhibits identified above.

[163] Exhibit USA-37, page 2: "*Por eso el sindicato bajo mi asesoría presentamos una queja ante el Inspector General de Trabajo, en forma verbal y levantaron un acta, porque consideramos que los inspectores habían faltado a sus responsabilidades*".

comes from the statement of the worker's legal counsel who states that "someone" told him that an inspector was sleeping. Put another way, an anonymous individual (the lawyer) is saying that someone else (an unnamed worker), with vested interests, told him something that the United States is now trying to make the Panel believe is true.

310. Once again, this is a clear example that the evidence submitted by the United States lacks any probative value. As a matter of fact, all inspections are conducted in the *presence* of the workers and the employer. Inspectors take note of the discussions and address every issue raised in the complaints, as well as other issues that they decide to inspect on their own, to benefit of the workers. Due to the number of companies they have to inspect daily, inspectors have busy schedules and hardly have time for naps. It is also hard to believe that an inspector would take a nap in the presence of so many persons (the workers, the worker's legal counsel, the employer's representatives and colleagues from the GLI).

311. The United States also claims that Koa Modas did not appear at seven conciliatory meetings to which it was summoned by the Ministry between March and December 2013.[164] The United States then asserts that "[a]t 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".[165] As support for its assertions, the United States refers to Exhibits USA-117 to 123, which contain several inspectors' reports and Exhibit USA-20, which contains the anonymous statement of GG. The United States' assertions are unfounded and completely incorrect.

312. First, the inspectors' reports are not the instrument by which the GLI take steps with the labor court pursuant to Article 281(m) of the Labor Code to impose sanctions. Inspectors draft a separate complaint to initiate proceedings before the court in the case of labor offenses. Therefore, with exhibits USA-117 to 123 the United States is not proving anything.

313. The only evidence left that is arguably pertinent to the United States' claim is an anonymous statement with no probative value. Thus, the United States has failed to demonstrate that the Ministry of Labor did not take steps with the labor court pursuant to Article 281(m) of the Labor Code to impose sanctions on the employer.

314. In sum, the United States has failed to demonstrate that Guatemalan authorities did not conduct inspections or did not take actions for the imposition of penalties. The United States did not submit any evidence of violation of labor laws directly related to acceptable conditions of work. Therefore, the United States also failed to establish a *prima facie* case of violation regarding Koa Modas.

c) Mackditex

315. For Mackditex (as it was the case for Koa Modas and the seventy coffee farms), the United States relies on anonymous statements without any probative value and, on that basis, formulates unfounded allegations.

316. In this particular case, the United States is arguing that the inspections conducted in Mackditex were insufficient because: a) inspectors allegedly met only with employees chosen by the employer;[166] and b) the inspectors did not follow-up on known violations to ensure compliance.[167]

317. As regards the first allegation, the United States asserts that "[w]orkers 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".[168] The workers referred to by the United States are X and Z, whose statements are contained in Exhibit USA-18. For the reasons explained below, not only do those

[164] US initial written submission, para. 167.
[165] US initial written submission, paras. 167, 168.
[166] US initial written submission, para. 138.
[167] US initial written submission, para. 165.
[168] US initial written submission, para. 138.

statements lack probative value and credibility, they are also contradicted by other evidence.

318. Guatemala is unable to know for certain the identity of X and Z because their names have been redacted. However, in documents obtained by Guatemala after much research, Guatemala can confirm that the two employees that filed the complaints on behalf of the workers of Mackditex, are the same employees that were representing the workers in all proceedings, including the inspections.[169] Therefore, the assertion that during inspections inspectors only met with employees selected by the employer is plainly inaccurate.

319. Additionally, contrary to the United States' allegation, the inspector in charge of this case conducted the inspections rigorously. For example, on October 7, 2011, one day after the GLI received a complaint filed by the workers of Mackditex, the inspector appeared at the worksite of Mackditex to conduct an investigation and the employer was summoned to a conciliation meeting on October 11, 2011.[170] The inspector conducted the conciliation meeting on October 11, 2011, and found the existence of labor law violations.[171] However, the employees requested termination of the administrative conciliation proceedings.[172] The same inspector then initiated a proceeding before a labor court with the view of imposing penalties to the employer.[173]

320. In view of the above, Guatemala again has demonstrated that the United States' allegations are unfounded. The evidence submitted by Guatemala shows instead that GLI took actions to protect the workers' rights.

321. The United States therefore has failed to demonstrate that Guatemala did not conduct sufficient inspections and that Guatemala did not follow-up on known violations. On the contrary, Guatemala has demonstrated that inspectors acted in conformity with the law, performed sufficient inspections in a timely manner and did follow-up on known violations.

d) African Palm Oil Plantations

322. The United States refers to four companies (Tiki Industries, NAISA, REPSA and Ixcan Palms) that allegedly violated Guatemala's labor laws. The United States attempts to improperly extend its allegations with respect to these four companies to the entire palm oil sector.[174]

323. The United States also claims that Guatemala failed to effectively enforce its labor laws directly related to acceptable working conditions because it did not *imposed penalties* as required by law.[175]

324. In the view of the United States, simply asserting that there were labor law violations, without any evidence, and that no penalties were imposed suffices to conclude that Guatemala failed to effectively enforce labor laws related to acceptable working conditions of work. The claims of the United States as formulated cannot succeed.

325. The United States again chose to present anonymous statements as evidence to support its allegations. The United States also relies on a statement of an association with vested interests that contains redacted information.

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[169] Exhibit GTM-8. Contains confidential information. Examples of administrative and judicial documents that demonstrate that the two employees that filed the complaints on behalf of the workers of Mackditex, are the same employees that were representing the workers in all proceedings, including the inspections. Guatemala will not reveal the complete name of the employees, unless the United States submits an un-redacted version of the documents in support of its allegations against Mackditex.
[170] Exhibit GTM-9. Contains confidential information. Inspector's report. October 7, 2011.
[171] Exhibit GTM-10. Contains confidential information. Inspector's report. October 11, 2011.
[172] Ibid.
[173] Exhibit GTM-11. Contains confidential information. Inspector's request for the imposition of penalties against Mackditex.
[174] US initial written submission para. 188.
[175] US initial written submission paras. 140, 146.

326. As it happens, the four companies chosen by the United States as basis for the alleged failures of effective enforcement meet the highest labor standards. Three of the companies have received international certifications that require, among many other issues, strict compliance with labor laws. The other company is in the process of obtaining that certification as well.

327. Further, as demonstrated below, the four companies are in full compliance with their obligations under Guatemalan labor law. Guatemala will also demonstrate that the GLI conducted inspections both at the request of the workers and at its own initiative. For three of these companies, no labor offenses were found and, therefore, there was no basis for the imposition of penalties. In the sole case where one labor offense was found, the inspector initiated proceedings before a labor court. Subsequently, the company complied with the requirements of the GLI and is in full conformity with its obligations under Guatemalan labor laws.

e) Tiki Industries

328. The United States alleges that Tiki Industries refused to provide the documentation requested by the inspector and, despite the warning given to the company and its lack of compliance, the Ministry took no further enforcement action such as to refer the matter to the court as required by the Labor Code.[176] This assertion is incorrect.

329. On March 14, 2012, the inspector in charge of Tiki Industries' case initiated proceeding before a labor court for labor offenses.[177] Therefore, the statement that Guatemala failed to take further enforcement action such as to refer the matter to the court as required by the Code is incorrect.

330. The United States also claims that by not referring the matter to the court as required by the Labor Code, Guatemala automatically failed to effectively enforce Articles 61(f), 103, 126, 197 and Article I of the Protocol of Best Practices for Workplace Inspections. Guatemala notes that the United States has not submitted any evidence that Tiki Industries failed to comply with these provisions. Therefore, the United States has failed to make a *prima facie* case of violation of labor laws directly related to acceptable working conditions.

331. Guatemala draws the Panel's attention to the fact that Exhibit USA-105, which the United States uses in support of the assertion that the "Ministry's own records show that Tiki Industries has not complied with the warning issued to it in February 2012"[178] also demonstrates, two rows below, that Tiki Industries "complies with the law". The document states three times, including the last row of the table in Exhibit USA-105, that Tiki Industries is in compliance with Guatemalan labor law.

332. Tiki Industries' compliance with Guatemalan labor law is confirmed by other evidence that Guatemala has been able to obtain. On June 1, 2012, inspectors visited Tiki Industries and verified that the company was in full compliance with labor laws. Among other findings, the inspectors determined that the company was paying all benefits in accordance with the law including minimum wages and that working conditions were adequate. [179]

333. On November 14, 2012, on its own initiative,[180] the GLI conducted another inspection of Tiki Industries. Tiki Industries provided all of the information required by the inspector. The inspector determined that Tiki Industries was in full compliance with Guatemalan labor laws directly related to

[176] US initial written submission, para. 149, 150.
[177] Exhibit GTM-12. Contains confidential information. Inspector's request for the imposition of penalties against Tiki Industries.
[178] US initial written submission, para. 150.
[179] Exhibit GTM-13. Contains confidential information. Inspector's report. June 1, 2012.
[180] With respect to the allegation that the inspectors required the payment of gas in order to conduct the inspection, Guatemala has explained that the Ministry of Labor has a budget to pay these expenses (see paras. 297-299 *supra*). The fact that the GLI conducts inspections at its own initiative confirms that inspectors do not require nor need money to pay for the gas as a condition to visit work sites.

acceptable working conditions.[181]

334. On January 1, 2013, the GLI again conducted an inspection on its own initiative of Tiki Industries. Among other findings, the inspector determined that Tiki Industries provided the necessary health and safety equipment, that there were extinguishers, showers, restrooms in good conditions, dormitories, potable water, first-aid kits, health clinic, a doctor and a nurse, dining room, and equipment for chemical handling.[182]

335. On March 6, 2014, the GLI conducted yet another inspection on its own initiative of Tiki Industries. Among other findings, the GLI determined that the workers were paid their salaries in accordance with the law, that all had social security, and that there was no child labor.[183]

336. The employer, the workers' representatives and the inspectors conducting the inspections signed all of the inspection reports described above.

337. Therefore, for the reasons explained above, it is clear that Guatemala did conduct inspections, that Tiki Industries is in full compliance with labor laws directly related to acceptable conditions of work; and that Guatemala has not failed to effectively enforce its labor laws.

f) REPSA:

338. The United States makes a number of unfounded allegations with respect to REPSA, namely, that: a) inspectors met only in private with the employers; b) the workers did not receive minimum wages; c) women and children were paid less that minimum wages; d) workers often worked two or three hours beyond the scheduled work time without additional pay; and e) workers fumigate the fields without protection including gloves, overalls, or hats and suffered burns to their skin.[184]

339. The United States also claims that the Ministry suspended visits to the region where REPSA is located citing lack of funding, and that the Ministry took no further action to inspect, sanction or remediate violations of Article 103, 121 and 197 against REPSA.[185]

340. The United States does not provide any evidence of violation of labor laws directly related to acceptable working conditions at REPSA other than statements made anonymously and with redacted information. Those statements do not have any probative value, lack veracity and are contradicted by other evidence obtained by Guatemala.

341. First, Guatemala draws the Panel's attention to the fact that the United States develops its claim based only on events that allegedly happened on February 29, 2012. Such a narrow focus on events occurring on a single day provides an incomplete and distorted picture.

342. The GLI conducted several inspections, some of them on its own initiative, after February 29, 2012. In those inspections, the inspectors interviewed the workers and verified that REPSA was in full compliance with Guatemalan labor laws.

343. GLI inspectors visited REPSA on March 8, 2012, interviewed the workers and confirmed with them that there was no violation of their labor rights. The workers signed the inspector's report. The inspectors then asked the company to provide more information to assess its compliance with labor laws and set a deadline of 12 working days to that effect. [186]

344. On March 26, 2012, REPSA provided the information that had been requested and the GLI

[181] Exhibit GTM-14. Contains confidential information. Inspector's report. November 14, 2012.
[182] Exhibit GTM-15. Contains confidential information. Inspector's report. January 31, 2013.
[183] Exhibit GTM-16. Contains confidential information. Inspector's report. March 6, 2014.
[184] US initial written submission, para. 151.
[185] US initial written submission, para. 152, 153.
[186] Exhibit GTM-17. Contains confidential information. Inspector's report. March 8, 2012.

determined that REPSA complied with that requirement.[187]

345. On November 14, 2012, the GLI inspected the work site of REPSA again. GLI inspectors determined that REPSA was in full compliance with labor laws. Among other findings, the inspectors determined that there were no children working at REPSA, that workers were being paid in accordance with domestic labor laws, and that workers had available all necessary equipment to guarantee their health and safety.[188]

346. On February 1, 2013, on its own initiative, the GLI conducted another inspection of REPSA. Again, the inspectors found that the company was in full compliance with Guatemala's labor laws.[189]

347. On October 23, 2013, also on its own initiative, the GLI conducted yet another inspection of REPSA. The inspectors interviewed the workers and upon completing the inspection, confirmed that the company continues to be in full compliance with Guatemala's labor laws.[190]

348. As shown above, the GLI conducted inspections regularly on its own initiative or at the request of the workers without delay. The United States thus also has failed to demonstrate that inspections were suspended in the region. The evidence submitted by Guatemala clearly demonstrates that inspections were conducted and directly contradicts the United States' claim. The United States has also failed to show that there were violations to labor laws directly related to acceptable working conditions at REPSA or that the Ministry of Labor took no action. The evidence submitted by Guatemala demonstrates the contrary.

g) NAISA:

349. The United States' claims with respect to NAISA are similar to those made with respect to REPSA. As was the case with respect to REPSA, the evidence submitted by the United States in support of its allegations involving NAISA do not have any probative value.

350. Like with REPSA, the United States also develops its claim involving NAISA based only events that allegedly happened on February 29, 2012. This narrow focus provides an incomplete and distorted picture of the facts.

351. The GLI conducted several inspections, some of them on its own initiative, subsequent to February 29, 2012. In those inspections, the inspectors interviewed the workers and verified that NAISA was in full compliance with Guatemalan labor laws.

352. For example, on November 16, 2012, inspectors visited NAISA's premises and determined that there were no children working for the company. Workers confirmed that they received their wages in accordance with the law. The inspectors, however, found that the company did not have an Internal Labor Regulation (*Reglamento Interior de Trabajo*) in place and gave the company a deadline to comply with this obligation.

353. On January 30, 2013, inspectors visited the company to verify compliance with the requirement of November 16, 2012. The company provided a copy of its Internal Labor Regulation thereby complying with the GLI's requirement.

354. On October 23, 2013, on its own initiative, the GLI visited NAISA and interviewed the workers. The workers indicated that there were no violations of labor laws to report. The inspectors were not able to examine certain documents because they were not available and requested the company to provide such documents.

355. On November 4, 2013, the inspectors conducted an inspection to verify compliance with the

[187] Exhibit GTM-18. Contains confidential information. Inspector's report. March 26, 2012.
[188] Exhibit GTM-19. Contains confidential information. Inspector's report. November 14, 2012.
[189] Exhibit GTM-20. Contains confidential information. Inspector's report. February 1, 2013.
[190] Exhibit GTM-21. Contains confidential information. Inspector's report. October 23, 2013.

request of October 23, 2013. The company complied with the request, and the inspectors were able to verify that the company complied with the minimum wage and payment of social security.

356. As demonstrated above, the assertions that NAISA violated labor laws directly related to acceptable working conditions and that Guatemala failed to take action to enforce those laws have no factual basis.

357. Accordingly, the United States also has failed to make a *prima facie* case of violation with respect to NAISA.

h) Fribo:

358. The United States claims that the Ministry of Labor took no further action against Fribo despite the commitment in the inspectors' report to take action because they were turned away in their attempt to conduct inspections.[191]

359. The United States also asserts that, during an inspection conducted on July 10, 2009, the GLI noted at least seven occupational safety and health-related violations at the worksite and gave the company 10 days to pay wages owed to the reinstated workers and 30 days to fix the remaining violations.[192] The United States claims that the GLI conducted follow-up inspections, but did not verify compliance with all warnings.

360. The United States seeks to support its claim on the basis of anonymous statements that have no probative value and may not be relied upon without violating Guatemala's due process rights. The United States also mischaracterizes the content of certain administrative records.

361. GLI inspectors visited Fribo in 2007 at the workers' request.[193] On four occasions, the inspectors were not allowed entry to the premises of Fribo, and in two inspectors' reports the GLI informed the company that they would refer the case to the labor courts for sanctions.[194] The inspectors' reports are not the legal instruments by which the GLI takes action before the labor court. Therefore, the inspectors' reports cannot serve the purpose of demonstrating the lack of any action for the imposition of sanctions.

362. The United States' allegation that the GLI did not conduct an inspection to ensure compliance with warnings issued on July 10, 2009, regarding health and safety violations and outstanding payments of workers is also incorrect.

363. The warnings in the inspectors' report of July 10, 2009 (Exhibit USA-61) gave the company 10 *working* days to pay wages owed to the reinstated workers (i.e., the company had until July 24, 2009 to comply), and 30 *working* days to fix the occupational safety and health-related violations[195] (i.e., the company had until August 21, 2009 to comply).

364. On July 22, 2009, during a follow-up inspection (Exhibit USA-113), the inspector did not verify compliance with the warnings *because the deadline to comply had not expired*. Here, again, the United States misrepresents the facts and the GLI's obligations.

365. On July 27, 2009, during another inspection (Exhibit USA-114), the inspector held private interviews with the reinstated workers and inquired about their salaries and working conditions. In this interview, the workers requested:

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[191] US initial written submission, para. 157-159.
[192] US initial written submission, para. 160.
[193] US initial written submission, para. 157
[194] U.S. initial written submission, paras. 157 and 158.
[195] U.S. initial written submission, para. 160.

> "that the warnings be verified in their entirety on the last date to comply with them, with the goal and spirit of thus finding a solution to the present conflict and seeking for the company to comply with these measures."[196]

366. In other words, it was the workers themselves who expressly requested (and not the inspectors who decided) that all warnings be verified only upon the expiration of the time period granted to the company to comply (i.e., August 21, 2009).

367. Moreover, the inspectors' reports presented by the United States as exhibits do not provide any evidence that the inspectors failed to properly verify the company's fulfillment of its labor obligations. To the contrary, those reports show that the inspectors conducted themselves with professionalism and complied with their duties rigorously. The Panel should note that the inspectors visited the premises of Fribo S.A. on several occasions, some of them within very short period of time in between (e.g., three consecutive visits during the month of July 2009). The inspectors also met directly with the affected workers.

368. Therefore, for the reasons explained above, the United States has failed to demonstrate that Guatemala did not follow-up with respect to warnings given to Fribo. To the contrary, Guatemala has demonstrated that inspectors acted in conformity with the law, respected the periods of time given to the company to comply, performed sufficient inspections in a timely manner to check that no reprisals were being taken against the reinstated workers, and took action before a labor court for the imposition of penalties.

i) Alianza:

369. The United States claims that the Ministry of Labor never took enforcement action following a conciliation meeting that was held on March 19, 2013, and that was not attended by Alianza representatives. The United States concludes from this that Guatemala failed to effectively enforce Articles 103 and 121 of the Labor Code.[197] The only evidence submitted in support of this allegation is Exhibit USA-131, which contains the inspectors' report of the meeting held on March 19, 2013.

370. As explained earlier, inspection reports are not the legal instrument by which the GLI takes action for the imposition of penalties. Therefore, Exhibit USA-131 does not prove that the Ministry of Labor did take impose penalties on Alianza. Exhibit USA-131 only proves what the inspectors reported about the inspection held on March 19, 2013, including the non-attendance of Alianza representatives to the conciliation meeting.

371. The United States did not submit any evidence demonstrating that Guatemala failed to effectively enforce Articles 103 and 121 of the Labor Code. Instead, the United States misrepresents the facts of this case and draws conclusions based on incomplete information.

372. The GLI did take actions in the case of Alianza (later substituted by Industria D&B).[198] These actions included, among others: requesting the imposition of penalties for labor offenses,[199] the seizure of the company's assets and the detention of the company's representatives.[200]

373. These are just a few examples of the numerous actions taken by the Ministry of Labor and how the Ministry acted in conformity with the law and to benefit of the workers. Hence, in this case, the United States has not established that Guatemala failed to effectively enforce its labor laws directly

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[196] Exhibit USA-114, page 2.
[197] US initial written submission, paras. 162, 163.
[198] Exhibit GTM-22. Contains confidential information. Inspector's report November 29, 2012.
[199] Exhibit GTM-23. Contains confidential information. Inspector's request for the imposition of penalties against Industria D&B.
[200] Exhibit GTM-24. Contains confidential information. Court's resolution for the seizure of Industrias D&B's assets and the detention of the company's representatives.

related to acceptable working conditions by not imposing penalties as required by the law.

j) Santa Elena:

374. The United States makes a number of allegations in relation to the Santa Elena coffee plantation and its "sister" plantation, El Ferrol, all of which are unfounded.

375. The United States indicates that workers of Santa Elena coffee plantation filed a complaint, on June 5, 2014, with the Ministry of Labor about the treatment and welfare of the workers at the farm. The workers' complaint concerned changes to the method for the application of herbicides to the crops of the farm.[201]

376. The United States further asserts that labor inspectors visited the farm on June 6, 2014 (i.e. the day after receipt of the complaint) and met with the workers and the employer, but did not examine the fumigation process or the part of the farm where it was being applied.[202]

377. Guatemala notes that, in support of this allegation, the United States submits an inspectors' report dated June 16, 2014 (and not the report of the visit of June 6, 2014). The report of June 6, 2014 shows that the inspectors did not examine the fumigation process *because the workers requested the intervention of a health and safety officer*.[203]

378. On June 16, 2014, following the workers' request of June 6th, a health and safety officer conducted an inspection and made certain recommendations. Thus, contrary to the United States' suggestion, the inspection in response to the workers' complaint and specific requests did take place. As a result of that inspection, the inspectors planned another visit to be held on July 8, 2014 to verify whether the employer had "complied or made progress" with the recommendations of the health and safety officer.[204]

379. The United States asserts that, on "the health and safety officer was not permitted to verify the employer's compliance when she returned on July 7, 2014".[205] The United States does not support its statement with any evidence. Guatemala further notes that no inspection was planned for July 7, 2014, as the United States mistakenly asserts.

380. The inspection of July 8, 2014 had to be rescheduled because the employer excused himself and submitted a medical certificate.[206] Contrary to the United States' allegations, the follow-up inspection by the health and safety officer did take place on July 22, 2014.[207] Other inspections and conciliation meetings took place thereafter, including one on September 30, 2014, that included the participation of the highest authorities of the Ministry of Labor. The Minister and a Vice-Minister, with the assistance of several inspectors, participated in a mediation meeting between workers and employer. The parties reached an agreement, including with respect to the application of the herbicides.[208]

381. Additionally, the employer also implemented the other recommendations made by the health and safety officer. Inspections continued to be conducted to verify full compliance with those recommendations. The most recent inspection was scheduled to take place on January 20, 2015.[209]

382. The events described above and the supporting documents demonstrate that the Guatemalan authorities are firmly committed to effectively enforcing Guatemala's labor laws. The GLI has acted

[201] US initial written submission, para. 173.
[202] US initial written submission, para. 174.
[203] Exhibit GTM-25. Contains confidential information. Inspector's report. June 6, 2014.
[204] Exhibit USA-127, page 4.
[205] US initial written submission, para. 174.
[206] Exhibit GTM-26. Contains confidential information. Resolution of the GLI accepting medical certificate.
[207] Exhibit GTM-27. Contains confidential information. Inspector's report. July 22, 2014.
[208] Exhibit GTM-28. Contains confidential information. Inspector's report. September 30, 2014.
[209] Exhibit GTM-29. Subpoena. December 10, 2014.

expeditiously, at the request of the workers or on its own initiative, to conduct inspections and compel compliance. The case of Santa Elena coffee plantation is another good example on the effectiveness of Guatemalan authorities' interventions.

383. Therefore, for the reasons explained above, the United States has failed to demonstrate that Guatemala did not take further action, in respect of Santa Elena and El Ferrol coffee plantations, to secure the employer's compliance with labor laws directly related to acceptable conditions of work.

k) Serigrafía:

384. In the case of Serigrafia, the United States alleges that, despite the filing of several complaints by the workers, the Ministry of Labor "did not investigate accordingly when it conducted an inspection at the worksite on January 29, 2013".[210] The United States also asserts that the Ministry of Labor convened approximately 15 meetings between the workers and the company to resolve the issues raised by the workers and that the "employer failed to appear at seven" of these meetings.[211]

385. The United States' claim is essentially that the Ministry of Labor did not take any action to compel or penalize the employer for failing to attend the meetings to resolve the alleged violations.[212] However, the United States does not submit any probative evidence to substantiate its allegation that the employer failed to attend the meetings.

386. The United States relies exclusively on anonymous statements. Such anonymous statements have no probative value and lack credibility, and they cannot be relied on by the Panel without violating Guatemala's due process rights. Moreover, the statements cannot be reconciled with the content of the numerous inspectors' reports that provide a completely different picture to the one depicted by the United States.

387. The United States has simply failed to meet its burden of proof. Guatemala is not legally obliged to submit any evidence to refute the United States' allegations. Notwithstanding that, Guatemala will show that, during the numerous conciliation meetings, the good faith and willingness of the workers and the employer to find mutually agreed solutions prevailed.[213] Some of these meetings were chaired by the Minister of Labor who was accompanied by the Vice-Minister.[214]

388. Furthermore, the Ministry has not taken any action to penalize the employer is because there is no reason to do so. The employer was present or represented in all meetings and both employer and workers were engaged in good faith negotiations to find mutually agreed solutions.[215]

389. Therefore, the United States' claim is unfounded and misplaced. In this case, the United States also failed to demonstrate that there was a cause for imposing sanctions and did not prove that Guatemala failed to effectively enforce labor laws directly related to acceptable conditions of work.

2. There is no sustained or recurring course of inaction by Guatemala

390. Article 16.2.1(a) requires the complaining party to demonstrate that the respondent party's failure to effectively enforce its labor laws is "though a sustained or recurring course of action or inaction". Guatemala explained, in Section VI that this requires that the complaining party establish a consistent and repeated series of acts or omissions, over a prolonged period of time, by entities belonging to the Executive branch of government of another Party. These acts or omissions must have

[210] US initial written submission, para. 175.
[211] US initial written submission, para. 176.
[212] US initial written submission, para. 177.
[213] Exhibit GTM-30. Inspector's report. February 11, 2013.
[214] Ibid.
[215] The United States submitted no evidence of failure of the employer to appear at the 7 meetings.

formed part a deliberate policy of neglect with respect to the observance or compliance of laws that protect certain labor rights with the intended consequence of having an effect on the exchange of goods or services among all of the States that are part of CAFTA-DR.

391. As Guatemala has noted, the United States acknowledges that "isolated instances"[216] are insufficient to establish a violation of Article 16.2.1(a). The United States also accepts that the threshold under Article 16.2.1(a) is higher and describes it as requiring a "pattern of inaction"[217], "a consistent and ongoing course of inaction"[218], or a "consistent[] and repeated[]"[219] failure to enforce a Party's labor laws. Yet the United States provides no evidence that the alleged omissions it describes constitute a "pattern" or "consistent", "ongoing" and "repeated" conduct. Rather, the United States' case is based on an improper presumption that the alleged omissions it describes are sufficiently connected to establish the existence of a compound act.

392. The alleged omissions described by the United States do not constitute a consistent and repeated series of omissions over a prolonged period of time. As explained above, the United States failed to make a *prima facie* case of violation in all instances cited in support of its claim. In particular, the United States did not demonstrate that the GLI failed to conduct inspections or that it did not take actions for the imposition of penalties.

393. On the contrary, the evidence on record demonstrates that Guatemala consistently acted in accordance with its law, in favor of the workers concerned. In particular, the evidence submitted by Guatemala shows that the GLI conducted inspections and took actions for the imposition of penalties, when applicable, in all instances cited by the United States.

394. In other words, the United States has not succeeded in showing a single instance in which Guatemala has failed to effectively enforce labor laws directly related to acceptable conditions of work. Therefore, there is no basis to meet the threshold of "sustained or recurring course of inaction" either.

395. However, even if the United States had substantiated its allegations, it would have failed to establish a consistent and repeated series of omissions over a prolonged period of time.

396. Although the United States exaggerates and double-counts the alleged cases of omission, its claim concern only 9 companies.[220] The alleged omissions, according to the United States, occurred between 2006 and 2014.[221] Generally speaking, that alone means that the United States provided only less than one example of alleged omissions per year. If one considers that some of the alleged omissions occurred during a single year, there is simply no possibility to find a pattern, repetition or consistency of "inaction".

397. Guatemala further notes that, in order to constitute a "sustained or recurrent course of … inaction", the omissions would have to form part of a deliberate policy of neglect with respect to the observance or compliance of laws that protect certain labor rights with the intended consequence of having an effect on the exchange of goods or services among all of the States that are part of CAFTA-DR. The United States has failed to provide any evidence that the alleged omissions form part of a deliberate government policy of neglect with respect to the observance of or compliance with labor laws directly related to acceptable conditions of work. Nor has the United States provided any evidence of the existence of such policy. The United States, furthermore, has failed to provide evidence that the policy was intended to have an effect on trade. Rather, as demonstrated above, Guatemala's Ministry

[216] US initial written submission, para. 94.
[217] US initial written submission, para. 95.
[218] US initial written submission, para. 92.
[219] US initial written submission, para. 92.
[220] Guatemala notes that inspections are performed by company; not by the number of workers. If there is an alleged failure to conduct an investigation in a particular company, for instance, that omission would be counted as only one; not as the number of workers complaining or allegedly affected by the potential violation of labor laws.
[221] US initial written submission, para. 179.

of Labor has a firm policy of protecting workers' rights and its highest authorities have been personally involved in efforts to secure those rights.

398. For the reasons explained above, even if the United States allegations were to rest on a sufficient factual foundation, they would be insufficient to establish a "sustained or recurring course of action or inaction" within the meaning of Article 16.2.1(a) of the CAFTA-DR. Accordingly, the Panel must reject the United States' claim that Guatemala has breached Article 16.2.1(a) of the CAFTA-DR by failing to effectively enforce labor law directly related to acceptable conditions of work by not conducting inspections or by not imposing penalties.

D. THE UNITED STATES FAILED TO MAKE A PRIMA FACIE CASE OF VIOLATION WITH RESPECT TO EFFECTIVE ENFORCEMENT OF 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

1. Any alleged inaction by Guatemala's labor courts in establishing conciliation tribunals is excluded from the scope of Article 16.2.1(a) of the CAFTA-DR

399. Guatemala recalls that Article 16.2.1(a) of the CAFTA-DR covers action or inaction by the Executive branch of government only. Action or inaction of entities that do not belong to the Executive branch falls outside of the scope of Article 16.2.1(a). As Guatemala explained in section VII.B, the Guatemalan labor courts do not belong to the Executive branch and therefore their alleged inaction cannot provide a basis for a violation of Article 16.2.1(a).

400. The United States' claim, in Section III.C.2 of its first written submission, is premised entirely on the alleged inaction of the labor courts. Even assuming that the United States had substantiated its allegations—which, as Guatemala demonstrates below, it has not—they could not sustain a violation of Article 16.2.1(a). Accordingly, the Panel must reject, as a matter of law, the United States' claim that Guatemala is in breach of Article 16.2.1(a) because its labor courts allegedly failed to institute conciliation tribunals.

2. The United States has failed to demonstrate a violation of Articles 61, 103, 116-118, 121-122, 126-130, 197, 211, 217-219 and 377-396 of the labor code

401. In the case of the conciliation tribunals, the United States' claim is premised on the proposition that a delay in the constitution of a conciliation tribunal necessarily results in a violation of Labor Code Articles 61, 103, 116-118, 121-122, 126-130, and 377-396.

402. However, a delay in the constitution of a conciliation tribunal does not leave workers unprotected nor does it prevent workers from pursuing their grievances collectively. In each of the cases cited by the United States, the labor court recognized the existence of a collective labor conflict and extended to the workers the protections afforded to them under Guatemalan law. This meant that the workers could pursue their grievances collectively while being assured that the companies could not take retaliatory action against them.

403. Therefore, it is insufficient for the United States to allege failure to constitute the conciliation tribunals to sustain a violation of Article 16.2.1(a). As part of its burden of proof, the United States must provide evidence demonstrating that, in each instance, the failure to constitute a conciliation tribunal

resulted in the violation of each of the provisions of the Labor Code to which it refers in its submission, something it has failed to do.

404. The United States' claim relating to union registration is similarly flawed. In all of the cases cited by the United States the union was, in fact, registered. The United States' claim is premised entirely on alleged delays in the registration process.

405. Reasonable delays in the registration process cannot amount to a failure to secure enforcement of Guatemala's labor laws. This is particularly so because in Guatemala workers engaged in the formation of a union obtain certain collective rights before the registration process is completed. In other words, the exercise of workers' collective rights is not necessarily subject to the union having been registered.

406. Consequently, any delay in the registration of the union does not necessarily result in the denial of workers' rights, as the United States erroneously claims.[222]

407. In sum, even if the United States had succeeded in demonstrating that there have been delays in the constitution of conciliation tribunals or in the registration of unions—which it has not, as Guatemala demonstrates in the next subsection—such delays do not *ipso facto* establish a violation of Articles 61, 103, 116-118, 121-122, 126-130, 197, 211, 217-219 and 377-396 of the Labor Code. Since the United States has failed to provide any other arguments or evidence to sustain its allegation, the Panel must reject the United States' claim under Article 16.2.1(a) relating to the alleged delay in the constitution of conciliation tribunals and in the registration of unions.

3. The United States has not demonstrated that Guatemala has failed to enforce labor laws related to union formation and acceptable working conditions

408. The United States' claim that Guatemala has failed to enforce its labor laws related to union formation and acceptable working conditions is based entirely on the following two factual premises: (i) the alleged failure to register unions formed at 3 companies; and (ii) the alleged failure to institute conciliation proceedings. Neither allegation is supported by the facts as Guatemala explains below.

Alleged failure to register the unions at 3 Guatemalan companies

409. The United States alleges that the General Labor Directorate (GLD) of Guatemala's Ministry of Labor failed to register the unions at 3 Guatemalan companies in a timely manner. The three companies are Mackditex, Koa Modas and Serigrafia. As United States itself acknowledges, in all three cases the unions were registered by the GLD in accordance with the Guatemalan Labor Code. Having failed to identify cases in which union registration was denied, the United States tries to identify instances in which the registration process was allegedly delayed. The United States, however, improperly tries to portray as delay instances in which the GLD properly applied the requirements of the Guatemalan Labor Code.

410. Guatemala reviews the facts alleged by the United States with respect to each union below.

a) Mackditex

411. In the case of Mackditex, the request to register the union was submitted on 22 July 2011, that is, more than six months after the date claimed by the United States.[223] On 25 July, the Ministry of

[222] US initial written submission, para. 215.
[223]Exhibit GTM-37. Contains confidential information. *Application*. July 22, 2011. The document also states that the union was constituted on June 3, 2011, suggesting that it was not possible for the union to have submitted an application for registration on November 18, 2010, as the United States claims.

Labor issued *Providencia* No. 391-2011 indicating several deficiencies in the application for registration.[224] The application was resubmitted more than three months later, on 4 November 2011. This delay is entirely attributable to the employees and cannot be attributed to the Ministry of Labor.

412. On 10 November 2011, the Ministry of Labor issued *Providencia* No. 425-2011 indicating that the deficiencies identified earlier had not been fully corrected.[225] The employees submitted a corrected application on 29 March 2012. The delay of almost 5 months between *Providencia* No. 425-2011 and the resubmission of the application is entirely attributable to the employees and cannot be attributed to the Ministry of Labor.

413. In sum, the United States improperly attempts to attribute to the Ministry of Labor delays that are attributable to inaction of the employees. The United States recognizes that a union application may be denied where the application does not meet the requirements established under Guatemalan law. In this case, the application was found to be defective on two occasions. The United States alleges that the Ministry of Labor "delayed the registration process by requesting documents apparently not required by the Code".[226] However, the United States offers no evidence to sustain its assertion that the requested documents are not required by the Labor Code. In the absence of any evidence to the contrary, this Panel must assume that the Ministry of Labor's decisions were consistent with Guatemalan law. Furthermore, the facts demonstrate that the union took considerable time (3 and 5 months, respectively) to resubmit its application. Therefore, the delay in the registration of the union in the case of Mackditex is attributable mainly to inaction by the employees.

b) Koa Modas

414. The union registration application in the case of Koa Modas was submitted on 20 December 2011. On 22 December, the Ministry of Labor issued *Providencia* number 485-2011[227] indicating that the application failed to meet the requirements established under Guatemalan law. The application for registration was not properly resubmitted by the union until 14 February 2012. This delay of over 2 months is attributable to the actions or inactions of the union and cannot be attributed to the Ministry of Labor.

415. A person claiming to be the Secretary General of the union had sought to resubmit the application on 20 January 2012. However, as the Ministry of Labor explained in *Providencia* number 057-2012[228], this individual was not authorized to act on behalf of the union under Guatemalan law, in particular Article 223(e) of the Labor Code. The Labor Ministry therefore requested that the members of the union's Provisional Executive Committee resubmit the application as foreseen by Guatemalan law.

416. Unfortunately, the union representatives failed to ensure that the application submitted on 14 February met the requirements of Guatemalan law. As a consequence, the Guatemalan Ministry of Labor issued *Providencia* number 083-2012 indicating certain corrections that were required in the application in accordance with Article 218 of the Guatemalan Labor Code.[229] The union registration application was resubmitted on 20 March 2012. This additional delay of over a month is attributable to the actions or inactions of the employees and cannot be attributed to the Ministry of Labor.

417. The union was recognized on 12 April 2012. The United States complains that the union's registration was published in the official gazette on 12 June 2012.[230] However, under Guatemalan law, the union's registration became effective upon the registration of the union in the official register of

[224] Exhibit GTM-38 Contains confidential information. *Providencia*. November 10, 2011
[225] Exhibit GTM-38 Contains confidential information. *Providencia*. November 10, 2011.
[226] US initial written submission, para. 205.
[227] Exhibit GTM-31. Contains confidential information. *Providencia*. December 22, 2011.
[228] Exhibit GTM-32. Contains confidential information. *Providencia*. February 2, 2012.
[229] Exhibit GTM-43 Contains confidential information. *Providencia*. March 7, 2012.
[230] US initial written submission, para. 210.

unions. This registration occurred on 18 May 2012.[231] The fact that the union's registration was not published until 12 June did not affect the rights of the union or its members.

418. The United States additionally complains that the union's executive committee was registered on 7 February 2013, "seven months after the registration of the union".[232] Yet, the United States has failed to provide the application for the registration of the union's executive committee. Until the United States provides the application (and the date it was filed with the GLD), the Panel cannot assume that the GLD did not process the registration expeditiously.

419. Therefore, the delay of over six months between the date when the union obtained legal recognition and the request to register the membership of the union's executive committee is attributable exclusively to the union and its members and cannot be attributed to the Ministry of Labor.

c) Serigrafía

420. The United States alleges that the Ministry of Labor failed to register the union of Serigrafía for more than six weeks.[233] This assertion is inaccurate and is not supported by the evidence.

421. The union registration application was submitted on 8 August 2012. However, the United States failed to mention that, on 17 August 2012, members of the union's Executive Committee withdrew the registration application and filed a new application.[234] Therefore, part of the delay is attributable to actions of the employees and not to the Ministry of Labor.

422. The United States also refers to the delay in publishing the summary resolution approving the bylaws of the union in the official gazette.[235] Under Guatemalan law, the union obtains legal personality at the moment of registration and the right to collective bargaining is protected as of this moment.[236] Therefore, any delay in publication in the official gazette did not limit or affect the rights of the union or its members.

d) Summary

423. In concluding, it is important to underscore that unions were recognized and registered by the GLD within a reasonable time frame for each of the three companies mentioned by the United States. Furthermore, the evidence demonstrates that many of the delays alleged by the United States were not attributable to the GLD, but rather to actions or inactions of the employees. As discussed further below, the United States has failed to establish that any delays in the registration procedures resulted in a denial of workers' access to the rights afforded to them under Guatemalan law.

Alleged failure to establish conciliation tribunals with respect to 4 Guatemalan companies

424. The United States alleges that the Guatemalan labor court has failed to set up and advance the conciliation process within the mandated time frames.[237] The United States makes this allegation with respect to four companies. We review the allegations with respect to each company below.

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[231] Exhibit USA-150.
[232] US initial written submission, para. 210. The United States is trying to improperly extend the scope of its claim beyond the registration of the union.
[233] US initial written submission, para. 213.
[234] Exhibit GTM-39 Contains confidential information. *Providencia*. August 31, 2012.
[235] US initial written submission, para. 213.
[236] See Articles 34 and 35 of the Guatemalan Constitution, Articles 206-234 of the Labor Code, Articles 1-17 of *Acuerdo Gubernativo* 143-96, and ILO Conventions 87and 98.
[237] US initial written submission, para. 224.

a) Las Delicias

425. Although the United States alleges that the Guatemalan labor court failed to establish a conciliation tribunal in the case of Las Delicias, it does not provide any probative evidence in support of its assertion.

426. The United States has failed to submit a copy of the complaint and has not provided evidence that the complaint was actually filed with the Guatemalan labor court. The United States seeks to base its allegation on an anonymous statement of RR, SS, TT, UU, and VV contained in Exhibit US-26. Because the names of the persons have been redacted, Guatemala is unable to confirm the veracity of their statement or the credibility of the persons providing the statement. Guatemala is unable to even confirm that the persons providing the statement were, in fact, employees of Las Delicias. There are a number of other aspects of the statement that give rise to serious concerns. For example, the statement was provided on June 30, 2014, and yet describes events occurring in 2001, that is, over 10 years earlier. The statement provides no documentary support for the allegations made in it. In view of these concerns, the statement may not be given any probative value. Moreover, relying on the statement would violate Guatemala's due process rights. In any event, even if the statement could be considered, Guatemala notes that the statement does not indicate that the workers requested the establishment of a conciliation tribunal.

427. The United States allegation that the labor court failed to establish a conciliation tribunal is premised on the employees having submitted such a request to the labor court. As the United States has not demonstrated that the workers filed a complaint before the labor court and requested the establishment of conciliation tribunal, the United States allegation that the labor court did not establish a conciliation tribunal in a timely manner must fail.

428. Guatemala further notes that the United States allegation refers to events allegedly taking place in 2001. Any allegations that pre-date the entry into force of the CAFTA-DR—that is, July 1, 2006, in the case of Guatemala—are excluded from the scope of Article 16.2.1(a). This is yet another reason why the United States' allegations must be rejected.

b) Avandia

429. In the case of Avandia, the United States alleges that the labor court failed to establish conciliation tribunals in response to lists of grievances filed on November 13, 2006, August 29, 2007 and September 4, 2009.[238]

430. The United States submits Exhibit USA-72 in support of its allegation relating to the list of grievances of November 13, 2006. Guatemala notes that, among many other deficiencies, Exhibit USA-72 contains only the first page (barely legible) of the labor court's order of the same date. In the absence of the full text of the order, it is not possible to confirm the United States' allegation that the labor court did not establish the conciliation tribunal or determine whether there were legal reasons that precluded the labor court from taking this step. Guatemala recalls that the United States has the burden of proving its allegation.[239] By submitting the incomplete text of the November 13th court order, the United States has failed to substantiate its allegation that the labor court failed to establish a conciliation tribunal.

431. The United States also refers to a list of grievances allegedly files on August 29, 2007 and claims the court failed to establish a conciliation tribunal.[240] The labor court did take the actions required by law to constitute the conciliation tribunal.[241]

432. The United States also asserts that, "on September 4, 2009, workers filed another list of

[238] US initial written submission, paras. 228-234.
[239] MRP Rule 65.
[240] US initial written submission, paras. 230, 231.
[241] Exhibit GTM-44. Contains confidential information. Summary of Avandia 2007 proceedings.

grievances with a labor court"[242] and that the labor court failed to acknowledge receipt of the list within one day.[243] The United States' assertions are inaccurate and are contradicted by its own evidence.

433. The list of grievances to which the United States refers is contained in Exhibit US-134. A careful look at Exhibit USA-134 reveals that the list of grievances was submitted on September 4, 2009 to the Peace Court ("*Juzgado de Paz*") and not to the labor court (see stamp on the bottom of page 4, including cover page). Therefore, the list of grievances was improperly filed. In such circumstances, the file is transferred to the appropriate tribunal by the Supreme Court. This would explain why the list of grievances was received by the labor court on September 9, 2009. Consequently, the delay is attributable to an error on the part of employees and not to the labor court. Guatemala further notes that a conciliation tribunal was constituted by the labor court. The conciliation tribunal resulted in a collective agreement that was signed between Avandia and its employees.[244]

434. In sum, the United States has failed to demonstrate that the Guatemalan labor court failed to establish a conciliation tribunal in a timely fashion in the case of Avandia.

c) Fribo

435. The United States' claim with respect to Fribo rests on the following two factual allegations: (i) a six day delay by the labor court to acknowledge receipt of the workers' request to establish a conciliation tribunal;[245] and (ii) the labor court failed to take the steps set out in the Labor Code to set up a conciliation tribunal.[246] As Guatemala demonstrates below, the United States does not provide an evidentiary basis for its allegations and, in any event, neither factual assertion is accurate. All of the other assertions made with respect to Fribo are intended to distract the Panel and irrelevant for the claim put forward by the United States.

436. Guatemala first notes that the United States does not provide any evidence that the list of grievances was filed on August 18, 2007. The fact that the list of grievances is dated August 18, 2007 does not establish that the document was actually filed with the labor court on that day. Guatemala would draw the Panel's attention to the "Acta Constitutiva" included in Exhibit USA-136, which indicates that the workers' meeting concluded at 4:00 pm, which suggests that the workers would not have had sufficient time to file the list of grievances that same day. The stamp on the list of grievances indicates that the document was received by the court on August 24, 2007, and the United States has not offered any evidence to contradict this fact.[247]

437. Secondly, the United States presents an inaccurate picture with respect to setting up of the conciliation tribunal. On August 24, 2007, the labor court admitted the complaint and put in place the temporary protections requested by the workers. However, in that order, the court indicated that the workers had failed to indicate the place of notification of the employer and requested that they provide it with this information.[248] According to Article 293 of the Guatemalan Labor Code, the conciliation tribunal is comprised by a judge and representatives of the employees and employer and, in order to establish such a tribunal, the judge must notify each party. In this case, a conciliation tribunal could not be established because the place of notification of the employer had not been provided to the labor court. The United States has not provided any evidence that the employees provided the labor court

[242] US initial written submission, para. 232.
[243] US initial written submission, para. 233.
[244] Exhibit GTM-33. Tribunal resolution approving the collective agreement between Avandia and its employees.
[245] US initial written submission, para. 236.
[246] US initial written submission, para. 237.
[247] Thus, even assuming the redacted documents and anonymous statements submitted by the United States were to have probative value, they do not support the United States' allegation. The stamp dated August 24, 2007 is visible in Exhibit US-136. The anonymous statements in Exhibit US-11 indicate that the filing was made in August and do not provide an exact date. Exhibit US-137 does not indicate when the list of grievances was filed.
[248] Exhibit GTM-34. Contains confidential information. Labor court resolution. August 24, 2007.

with the information requested in the order of August 24, 2007. Consequently, the fact that the conciliation tribunal was not established is not attributable to an omission of the labor court.

438. Guatemala recalls that Article 16.3.8 of the CAFTA-DR provides that "[f]or greater certainty, decisions or pending decisions by each Party's administrative, quasi-judicial, judicial, or labor tribunals, as well as related proceedings, shall not be subject to revision or be reopened under the provisions of" Chapter 16. Thus, this Panel may not second-guess the merits of the labor court's decision of August 24, 2007.

439. In sum, the United States has failed to demonstrate that the Guatemalan labor court failed to establish a conciliation tribunal in a timely fashion in the case of Fribo.

d) Ternium

440. The United States claims that the labor court failed to constitute a conciliation tribunal after "some of the nearly three hundred workers"[249] at Ternium filed a list of grievances on March 6, 2012.[250] This allegation is another illustration of the exaggeration and misinformation that underlie the United States' claims. The allegation is also unsubstantiated.

441. In support of its allegation, the United States submits Exhibit USA-138, which it claims contains the list of grievances submitted by LL, and Exhibit USA-139, an alleged summary of facts provided by the workers. Guatemala notes that the United States' description of Exhibit USA-138 is not accurate as it does not contain a list of grievances. Rather, it seems to contain an order of the labor court dated March 6, 2012 in response to a list of grievances filed by what appear to be 3 individuals. Guatemala further notes that the names of the workers and the file number have been redacted from Exhibit USA-138. It is therefore not possible to verify the authenticity of the document, the veracity of its contents or the credibility of the allegations made in the document. It is not even possible to confirm that the persons who filed the list of grievances were in fact employees of Ternium. The names of the workers allegedly providing the statement in Exhibit USA-139 have also been redacted and therefore the credibility of their statements cannot be tested. As a result, Exhibits USA-138 and USA-139 may not be given any probative value by the Panel and relying on them would violate Guatemala's due process right. Given that Exhibits USA-138 and USA-139 have no probative value, and that the United States did not submit any other evidence to support its allegation, the United States' allegation is unsubstantiated and must be rejected.

442. In any case, even if Exhibit USA-138 were to have probative value, it directly contradicts the United States' allegation. Exhibit USA-138 indicates that the labor court found deficiencies in the petition filed by the alleged employees of Ternium. In point VII of the order, the labor court indicates that the list of grievances does not meet the requirements of Article 381 of the Labor Court because it failed to provide the number of workers supporting the petition and the total number of employees who worked at the company. The labor court requested the petitioners to submit this information within 10 days. Pursuant to Guatemalan law, the labor court could not establish the conciliation tribunal until all of the requirements set out in the Labor Code had been fulfilled. The United States has not provided any evidence that the petitioners subsequently submitted the information requested by the labor court. Accordingly, there is no factual basis for the United States' allegation that the labor court failed to constitute the conciliation tribunal.

443. As noted earlier, Article 16.3.8 of the CAFTA-DR provides that "[f]or greater certainty, decisions or pending decisions by each Party's administrative, quasi-judicial, judicial, or labor tribunals, as well as related proceedings, shall not be subject to revision or be reopened under the provisions of" Chapter 16. Thus, this Panel may not second-guess the merits of the labor court's decision of March 6, 2012.

[249] US initial written submission, para. 239.
[250] US initial written submission, para. 240.

444. In sum, the United States has failed to demonstrate that the Guatemalan labor court failed to establish a conciliation tribunal in a timely fashion in the case of Ternium.

e) Summary

445. From the above review, it is clear that the United States has failed to substantiate its factual allegations with respect to any of the four companies. Since the United States has failed to substantiate its factual allegation, the Panel must reject the United States' claim that Guatemala is in breach of Article 16.2.1(a) of the CAFTA-DR because of the failure of the Guatemalan labor courts to constitute conciliation tribunals.

4. Even if the United States' factual allegations had been substantiated, the United States has failed to demonstrate that they would constitute a "sustained or recurring course of … inaction"

446. Guatemala has demonstrated above that the United States has not substantiated its allegations that the GLD has failed to register unions formed at 3 companies and that the labor courts have failed to institute conciliation proceedings with respect to 4 other companies. However, even if the United States had substantiated its allegations, they would not establish a "course of sustained or recurring … inaction" within the meaning of Article 16.2.1(a) of the CAFTA-DR.

447. The alleged delays in registering the unions or constituting the conciliation tribunals could not be characterized as a "sustained or recurrent course of action or inaction", even under the standard advocated by the United States.[251] The alleged delays in union registration would have been temporary lasting only a few weeks, which could hardly be characterized as a "prolonged" period or as having been "maintained at length without interruption".[252] Each registration process was separate and the United States has failed to demonstrate any relationship between them. Ultimately, the United States is attempting to base it claims on alleged delays of a few weeks with respect to separate registration processes of unions of only 3 companies that occurred during a span of more than 8 years. This is simply not enough to constitute a "sustained or recurrent course of action or inaction".

448. As regards the establishment of the conciliation tribunals, the United States claim is similarly flawed. The United States attempts to characterize the alleged failure to constitute conciliation tribunals with respect to four companies during a span of more than 8 years (13 if you consider the United States' pre-CAFTA-DR allegations) as "a sustained or recurrent course of … inaction". Yet, the picture that the United States attempts to portray does not even meet the United States' standard of "sustained or recurrent course of … inaction". The United States itself admits that "sustained" conduct requires consistency over a prolonged period and that "recurrence" requires repetition of related occurrences.[253] Four unrelated instances in which a judge allegedly failed to constitute a conciliation tribunal in a span of over 8 years cannot constitute either consistent conduct over a prolonged period of time or repetition of related occurrences.

449. The United States tries to artificially create repetition by counting each grievance separately. However, all of the grievances concerned the four companies and in all cases the premise of the United States' Article 16.2.1(a) claim is the alleged failure to institute the conciliation proceedings. The fact that the United States feels compelled to rely on such tactics further reveals the weakness of its case.

450. Finally, Guatemala notes that, in order to constitute a "fail[ure] to effectively enforce its labor laws, through a sustained or recurrent course of … inaction", the omissions would have to form part of

[251] US initial written submission, paras. 88 and 89.
[252] US initial written submission, para. 88.
[253] US initial written submission, paras. 88 and 89.

a deliberate policy of neglect with respect to the observance or compliance of laws that protect certain labor rights with the intended consequence of having an effect on the exchange of goods or services among all of the States that are part of CAFTA-DR. The United States has failed to provide any evidence that the alleged delay in the registration of the three unions or the alleged failure to constitute conciliation tribunals with respect to four companies form part of a deliberate government policy of neglect with respect to the observance of or compliance with Articles 6, 103, 116-118, 121-122, 126-130, 197, 211, and 217-219 of the Labor Code. Nor has the United States provided any evidence of the existence of such policy. The United States, furthermore, has failed to provide evidence that the policy was intended to have an effect on trade.

E. THE UNITED STATES HAS FAILED TO ESTABLISH THAT TRADE BETWEEN THE PARTIES HAS BEEN AFFECTED, AS REQUIRED BY ARTICLE 16.2.1(A) OF THE CAFTA-DR

451. In the preceding sections, Guatemala demonstrated that the United States has failed to make a prima facie case with respect to the requirements set out in the first two clauses of Article 16.2.1(a) of the CAFTA-DR. In other words, the United States has not established that Guatemala has "failed to effectively enforce its labor laws, through a sustained or recurring course of action or inaction".

452. The requirements in the various clauses of Article 16.2.1(a) of the CAFTA-DR are cumulative.[254] As a result, to the extent that the Panel agrees with Guatemala that the United States has failed to establish the elements required under the first two clauses of Article 16.2.1(a), it would have to reject the United States' claims. In such circumstances, it would not be necessary for the Panel to examine whether the arguments and evidence provided by the United States are sufficient to meet the requirements of the third clause of Article 16.2.1(a).[255]

453. However, if the Panel were to find that the United States' has established the elements of the first two clauses of Article 16.2.1(a), it would still need to ensure that the United States has met its burden of establishing the requirements of the third clause of Article 16.2.1(a). The effect on trade may not be presumed. It is a separate requirement clearly set out in Article 16.2.1(a) that must be established by the United States.

454. Guatemala submits that the arguments and evidence put forward by the United States do not establish that Guatemala has failed to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, "in a manner affecting trade between the Parties". The United States' claim fails to meet the requirements of Article 16.2.1(a) for the following reasons. First, the United States is proposing a legal standard that contradicts the text, context, and object and purpose of the CAFTA-DR. Secondly, the United States' arguments are based on unfounded and unsustainable overgeneralizations. Thirdly, even accepting the legal standard and the generalizations proposed by the United States, it did not submit any evidence of the modification of conditions of competition. These reasons are discussed in more detail below.

455. When interpreting the phrase "in a manner affecting trade between the Parties", the United States considers that this Panel may find it helpful to rely on interpretations of "similar language" by other international dispute settlement tribunals. In the view of the United States, "[t]hese tribunals have found occasion to interpret 'affecting trade' such that it may encompass any measures having a bearing on conditions of competition".[256] In that regard, the United States submits that this Panel may find guidance in GATT and WTO jurisprudence regarding the interpretation of Article III:4 of the GATT and Article 1.1 of the General Agreement on Trade in Services ("GATS").

456. Guatemala disagrees that the case law on Article III:4 of the GATT 1994 and Article I.1 of the

[254] See Section VI.
[255] It also follows logically that, if the requisite conduct did not exist, there could not have been effects on trade.
[256] US initial written submission, para. 99.

GATS are relevant for the interpretation of the third clause of Article 16.2.1(a) of the CAFTA-DR. While these provisions may also use the term "affecting", the context in which these terms are used differs significantly from Article 16.2.1(a) of the CAFTA-DR.

457. Article 16.2.1(a) of the CAFTA-DR, on the one hand, and Articles III:4 of the GATT 1994 and Article I.1 of the GATS, on the other, are different provisions that address very different matters. Article III:4 sets out a national treatment obligation. For its part, Article I.1 of the GATS defines the scope of application of that Agreement. The national treatment obligation is a key principle of the GATT 1994. The GATS, which contains the disciplines on trade in services, is one of the pillars of the system of multilateral trade rules that is the WTO. Given the centrality of these provisions, one can understand why the term "affecting" may have been interpreted expansively in such context.

458. By contrast, while the labor commitments in Chapter 16 are important, they are a carefully negotiated set of disciplines that are limited in scope in recognition of the fact that the CAFTA-DR is not a labor agreement, but rather a trade agreement. Article 16.2.1(a) provides a cause of action that is even more limited in scope and is subject to strict conditions, as reflected in its various clauses containing cumulative conditions that must be met by the complaining party. There is therefore no basis for an expansive interpretation of the terms "affecting trade" in Article 16.2.1(a). On the contrary, as Guatemala explained in Section VI, Article 16.2.1(a) is intended to establish a high threshold requiring an unambiguous showing that the challenged conduct has had an effect on trade between the Parties. In the absence of such a showing, there is no justification to use the CAFTA-DR as a mechanism to enforce a Party's domestic labor laws.

459. Guatemala further notes that the assessment under Article III:4 of the GATT 1994 involves making a comparison between the treatments accorded to the imported product and the like domestic product. It is in this comparative exercise that the modifications of the conditions of competition as between the imported and domestic products are relevant. No such comparative exercise is required under Article 16.2.1(a) of the CAFTA-DR, and thus an assessment of the modification of conditions of competition is simply not pertinent.

460. In the light of the above, there is no basis to import the concept of "modification of conditions of competition" to the CAFTA-DR. The text, object and purpose of the CAFTA-DR would not support the incorporation of that concept.

461. Furthermore, as explained earlier, the third clause of Article 16.2.1(a), which reads "in a manner affecting trade between the Parties" is linked back to the preceding clauses through the terms "in a manner". The third clause of Article 16.2.1(a) sets out an additional condition that concerns the *intended consequence* of the Party's "course of action or inaction". The intended consequence is to "affect[] trade between the Parties". The term "affect" means to "[h]ave an effect on" and was included in present continuous. This, in turn, means that there must be an existing and continuous relationship of cause and effect between the "course of action or inaction" and the alleged trade effects.

462. The United States has not only failed to identify any trade effects, it has also failed to establish that such effects are caused by the alleged failure of Guatemala to effectively enforce its labor laws. The United States' arguments relating to the third clause of Article 16.2.1(a) are based on unfounded assertions and generalizations.

463. The starting point of the United States' reasoning is that because allegedly some companies are in a situation of non-compliance with labor laws, *the whole sector* to which these companies pertain would be benefiting from better conditions of competition. From this proposition, which in itself is flawed, the United States concludes that trade between the Parties is affected.

464. For example, in its first claim, the United States cites the case of three apparel companies that allegedly violated labor laws directly related to the right of association and the right to organize and

bargain collectively.[257] Immediately after, the United States takes a huge logical leap by pointing out that

> "the garment factories employed hundreds of workers, making a major contribution to the Guatemalan export economy. Between 2007 and 2013, Guatemala's exports of apparel averaged over 1.2 billion USD annually. 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".[258]

465. Even if the United States had demonstrated that there had been a failure to effectively enforce labor laws with respect to the three companies, there is no basis to support the statement that the whole apparel sector is in the same situation. The fact that the United States sees the need to artificially magnify any effects by such overgeneralizations reveals that the United States itself does not believe that conduct relating to the three companies on which it focused would have had an effect on trade between the Parties.

466. Secondly, and only for the sake of the argument, even if the United States were correct that the entire apparel sector is in the same situation as the three companies cited in its initial written submission (which definitely it is not the case), the United States neither indicated how or to what extent there has been any modification of the conditions of competition.

467. Another example, in the second claim of the United States, is the situation of some coffee farms. The United States submitted evidence of alleged violations of labor laws for only two coffee farms.[259] It then improperly extrapolated the situation of these two companies to 70 coffee farms. In its analysis of trade effects, the United States asserts that Guatemala's exports of coffee averaged, between 2007 and 2013, 1 billion USD annually and that CAFTA-DR took 35 percent of these exports of which 34 percent went to the United States.[260] The United States' logic is flawed. The United States cannot make allegations with respect to only one company and then claim effects for the entire sector. Again, the fact that the United States has seen to need to rely on this type of argumentation reflects its own assessment of the weakness of its case.

468. The United States also indicates that Guatemalan imports of coffee also compete with imports of coffee from other CAFTA-DR countries.[261] It is difficult to see what is the conclusion that the United States seeks to draw from this assertion.

469. Finally, Guatemala notes that even under its proposed legal standard, the United States has failed to substantiate the existence of any alleged modification of the conditions of competition.

470. As with the other examples, the United States applies the same standard to all companies and sectors. Through unfounded overgeneralizations, simple assertions, lack of evidence and in-depth analyses, the United States intends to obtain condemnatory findings against Guatemala. That position is untenable.

471. The fact is that any link between the United States' allegations and trade between the Parties of CAFTA-DR is negligible at best. As Guatemala underscored earlier, none of the 16 Guatemalan companies targeted in the United States' complaint exports to the other CAFTA-DR Parties, except one. The exports of this one company to CAFTA-DR Parties in 2014 amounted to less than US$

[257] US initial written submission, para. 53, 107.
[258] US initial written submission, para. 107.
[259] Las Delicias and Santa Elena.
[260] US initial written submission, para. 186.
[261] Ibid.

13,000.[262]

472. For the reasons explained above, the United States has not demonstrated that trade between the Parties has been affected, even under its own proposed standard involving any modification of the conditions of competition. Moreover, even assuming without conceding that there had been an effect on trade between the Parties, the United States has nevertheless failed to demonstrate that this effect was caused by the failure of Guatemala to effectively enforce its labor laws through a sustained or recurring course of action or inaction.

VIII. CONCLUSIONS

473. For the reasons set out in the preceding sections, Guatemala respectfully requests that the Panel find that it does not have the authority nor the jurisdiction to consider the complaint of the United States and reject the United States' claims in their entirety.

474. Alternatively, Guatemala requests that the Panel find that the United States did not make a *prima facie* case and reject the United States' claims in their entirety.

[262] Exhibit GTM-35. Contains confidential information. Report by the *Superintendencia de Administración Tributaria –SAT-*. January 27, 2015.