

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

**COMMENTS OF THE UNITED STATES ON THE  
WRITTEN VIEWS SUBMITTED BY NON-GOVERNMENTAL ENTITIES**

May 11, 2015

## I. Introduction

1. The United States received from the Responsible Office eight (8) submissions by non-governmental entities (“NGEs”) pursuant to the Panel’s grant to each of those entities of leave to submit written views.<sup>1</sup> The United States appreciates the efforts of the non-governmental entities in submitting these written views. The United States has reviewed each of the eight submissions in light of the Rules of Procedure and sees no reason to object, based on the requirements set out in those Rules, to the Panel’s receipt of these written views.

2. As an initial matter, the United States recalls its understanding of the role of the written views of the NGEs in these proceedings. In particular, the written views of an NGE, including factual information it may provide in its written views, serve to assist the Panel in evaluating the evidence and arguments submitted by the disputing Parties and do not serve the function of satisfying the burden of proof of either disputing Party in these proceedings.<sup>2</sup> Evidence or an argument presented by an NGE cannot be attributed to a disputing Party such that the Panel would be able to rely upon those materials as being submitted by that Party in respect of its burden of proof.

3. In these comments, the United States will speak to three aspects of the written views of the NGEs.

4. First, the written views of the NGEs provide additional context and background that support the U.S. claims about Guatemala’s failure to effectively enforce its labor laws. They also provide supplemental examples of Guatemala’s sustained and recurring course of inaction over several years.

5. Second, the NGE written views elaborate upon the U.S. demonstration that the failure by Guatemala to effectively enforce its labor laws has occurred in a manner affecting trade between the Parties.

6. Last, the written views of the NGEs describe examples of steps Guatemala has taken to improve the institutional foundation for its Ministry of Labor and its labor courts. The United States has taken note of these steps throughout its engagement with Guatemala in recent years. Nevertheless, these steps do not address the lack of effective enforcement of labor laws.

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<sup>1</sup> The United States received from the Responsible Office written views from the International Trade Union Confederation (ITUC); the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO); Global Unions of Guatemala/Autonomous and Popular Labor Movement/Labor Federation of Banking Employees and State Services of Guatemala/Confederation of Labor Unity of Guatemala (FESEBS); Guatemalan Labor Law Association (ASGUATRA); Guatemalan Chamber of Agriculture; Guatemalan Association of the Apparel and Textile Industry (VESTEX); Guatemalan Exporters’ Association (AGEXPORT); and, Guatemalan Coordinating Committee of Agricultural, Commercial, Industrial, and Financial Associations (CACIF).

<sup>2</sup> Rules 65 and 66 set out the allocation of burdens for each disputing Party.

## **II. The Written Views of the NGEs Provide Additional Examples in Support of the U.S. Claims**

7. In these proceedings, the United States has shown that Guatemala has failed to effectively enforce its labor laws through a sustained and recurring course of inaction in a manner affecting trade between the Parties. The NGE written views further confirm this failure based on the NGEs' collection of information as well as their study and research of the situation in Guatemala. Among the additional information provided by the NGEs are supplemental examples, including observations made by the International Labor Organization (ILO), in which the Guatemalan Ministry of Labor, labor courts, and other government agencies have not taken necessary steps to ensure effective enforcement of Guatemalan labor laws directly related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work.

8. For example, with respect to the first group of failures (failures by Guatemala to effectively enforce its labor laws relating to the right of association and right to organize and bargain collectively by not securing compliance with labor court orders),<sup>3</sup> the International Trade Union Confederation (ITUC) comments that the ILO has taken note of Guatemala's failure to ensure compliance with reinstatement orders by Guatemalan employers over the course of several years. As ITUC explains, after an ILO High Level Mission from 2013 "expressed its concern at the high rate of non-compliance with the judgments issued by the Labour Court,"<sup>4</sup> the ILO Committee of Experts asked the Government of Guatemala to "ensure compliance with judicial decisions."<sup>5</sup> The American Federation of Labor –Congress of Industrial Organizations (AFL-CIO) notes that in April 2014, Guatemalan labor unions "identified thirty-eight cases that still had outstanding court orders" and that, according to records of the Human Rights Ombudsman of Guatemala, there are 43 outstanding cases of unjust dismissals against union leaders and members in addition to those addressed in the U.S. submissions.<sup>6</sup> The AFL-CIO reports that these cases were brought to the attention of the Guatemalan authorities, but no reply was received. ITUC reports that the ILO Committee on Freedom of Association is also investigating three pending cases related to failure to comply with reinstatement orders.<sup>7</sup>

9. ITUC and the Global Unions of Guatemala/Autonomous and Popular Labor Movement/Labor Federation of Banking Employees and State Services of Guatemala/Confederation of Labor Unity of Guatemala (FESEBS) comment that the ILO Committee of Experts has made note of the long delays for wrongfully dismissed workers to be reinstated, sometimes as the result of a stalled appeal.<sup>8</sup> Such extended delays based on what ITUC calls pro forma appeals further exemplify the problem described by the United States in

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<sup>3</sup> See U.S. Initial Written Submission, paras. 19-111.

<sup>4</sup> Submission of ITUC, p. 6, citing the High Level Mission Report, ILO GB.319/INS/7, Annex 1.

<sup>5</sup> Submission of ITUC, p. 6.

<sup>6</sup> Submission of AFL-CIO, pp. 3, 4.

<sup>7</sup> Submission of ITUC, p. 3, citing CFA Cases 2989, 2445, and 2203.

<sup>8</sup> Submission of ITUC, p. 6; Submission of FESEBS, Section 2.2.

the first group of failures by Guatemala: workers receive reinstatement orders after being wrongfully dismissed but are not reinstated due to inaction by Guatemalan authorities.

10. ITUC and FESEBS further note that the maquila (apparel and textile) sector, which, according to the Guatemalan Association of Apparel and Textile Industry (VESTEX), employs at least 60,000 workers throughout Guatemala,<sup>9</sup> is particularly notorious for its sustained and recurring labor violations despite that these violations have been brought to the attention of the Guatemalan government. ITUC explains that Guatemala has “largely failed to ensure the reinstatement of those illegally fired [in the maquila sector], even though it had additional tools at its disposal by which it could have suspended generous tax and other benefits to exports for violations of labour rights.”<sup>10</sup>

11. With respect to the second group of failures by Guatemala (not carrying out adequate inspections as well as not imposing penalties after having found violations of Guatemalan labor laws during an inspection), ITUC highlights commentary by the ILO Committee of Experts that speaks to this group of failures. This commentary underscores the problem identified by the United States.<sup>11</sup> For example, ITUC states that in 2015, the ILO Committee of Experts noted that it had, in prior years, asked the Government of Guatemala to improve labor inspections and again requested the Government to provide information on penalties imposed following inspections.<sup>12</sup> ITUC explains that inspectors refer very few labor law violations to the courts for the imposition of penalties.<sup>13</sup>

12. ITUC also notes two cases before the ILO Committee on Freedom of Association regarding failures on the part of the Guatemalan General Labor Inspectorate to inspect appropriately.<sup>14</sup> ITUC notes that the Committee has issued requests to the Government of Guatemala in those cases to respond regarding the allegations made by the workers and unions. The AFL-CIO likewise described an instance in which the General Labor Inspectorate failed to inspect in accordance with the law.<sup>15</sup> With respect to the inadequate inspections in the maquila sector specifically, ITUC comments that the ILO has asked Guatemala to “ensure full respect for trade union rights in the maquila sector,”<sup>16</sup> particularly regarding hours of work and wages.<sup>17</sup>

13. With respect to the third group of failures identified by the United States (Guatemala’s delayed registration of unions and delay in setting up or failure to set up conciliation tribunals), ITUC discusses two cases before the ILO Committee on Freedom of Association in which the

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<sup>9</sup> Submission of VESTEX, p. 2.

<sup>10</sup> Submission of ITUC, p. 7. The United States has provided examples of inaction by Guatemala with respect to five major textile manufacturers: Alianza Fashion, Koa Modas, Serigrafía Seok Hwa, Fribo, and Avandia.

<sup>11</sup> See U.S. Initial Written Submission, paras. 112-191; U.S. Rebuttal Submission, paras. 135-229.

<sup>12</sup> Submission of ITUC, p. 5.

<sup>13</sup> Submission of ITUC, p. 5.

<sup>14</sup> Submission of ITUC, p. 3, discussing Cases 2948, 2445.

<sup>15</sup> Submission of AFL-CIO, p. 5.

<sup>16</sup> Submission of ITUC, p. 7.

<sup>17</sup> Submission of FESEBS, Section 2.2.

Committee has issued urgent appeals to Guatemala to take action in response to the complaints of labor groups that their unions have not been registered in accordance with Guatemalan law.<sup>18</sup> FESEBS refers also to ILO Committee of Experts commentary on the obstacles unions face in the registration process.<sup>19</sup> These examples further confirm Guatemala's failure to effectively enforce its labor laws by not registering unions in a timely manner as discussed by the United States.<sup>20</sup>

14. Finally, the United States observes that some NGE written views reflect misinterpretations of the Article 16.2.1(a) standard similar to those advanced by Guatemala in its submissions. The United States has responded to these misplaced arguments in its submissions and incorporates here its prior statements to that effect.<sup>21</sup>

### **III. The NGE Written Views Further Illustrate How Guatemala Has Failed to Effectively Enforce its Labor Laws . . . in a Manner Affecting Trade**

15. Several of the NGEs underscore that Guatemala's failures to effectively enforce its labor laws affect trade between the Parties. Specifically, the NGEs emphasize that Guatemala's failures to enforce its labor laws with respect to companies engaged in cross-border activity influence conditions of competition between the Parties. The written views also leave no doubt that Guatemala trades in high volume with the United States and the other CAFTA-DR Parties. The NGEs affirm the U.S. position and further buttress the U.S. demonstration that Guatemala's failures have occurred in a manner affecting trade between the Parties, contrary to Article 16.2.1(a) of the CAFTA-DR.

16. First, the NGEs reinforce the U.S. showing that significant trade is occurring between Guatemala and the CAFTA-DR Parties, including in the agricultural and textile and apparel sectors, among others.<sup>22</sup> According to one entity, Guatemala's exports in these sectors in the region have grown since the CAFTA-DR came into force.<sup>23</sup> AGEXPORT notes that, nine years after entry into force of the CAFTA-DR, trade between Guatemala and the United States has grown by over 38 percent.<sup>24</sup> VESTEX confirms that, as stated in the U.S. Initial Written

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<sup>18</sup> Submission of ITUC, p. 3, citing CFA Cases 3035 and 2989.

<sup>19</sup> Submission of FESEBS, Section 2.2., referring to Report of the ILO Committee of Experts on Application of Conventions and Recommendations (2015), p. 94.

<sup>20</sup> See U.S. Initial Written Submission, paras. 192-215; U.S. Rebuttal Submission, paras. 230-288.

<sup>21</sup> For example, Article 16.2.1(a) does not require a showing of a deliberate policy of failure to enforce domestic labor laws as CACIF suggests, nor does the United States need to demonstrate that 100 percent of trade is affected by Guatemala's failures as the Chamber of Agriculture suggests.

<sup>22</sup> See Submissions of the Chamber of Agriculture (noting that the apparel and palm sectors are export industries); AGEXPORT; VESTEX.

<sup>23</sup> Submission of AGEXPORT, p. 2. AGEXPORT also notes that, according to figures of the Central Bank of Guatemala, imports into Guatemala have doubled over the past ten years. p. 2.

<sup>24</sup> Submission of AGEXPORT, p. 2. According to data from the Central Bank of Guatemala, trade between the United States and Guatemala grew from USD 2,781.8 million in 2006 to USD 3,846.5 million in 2014, a growth of over 38 percent. Also according to the Central Bank, in 2014 alone, Guatemala exported products to the United States under approximately 1200 tariff headings. pp. 2-3.

Submission, 97 percent of Guatemalan apparel and textile exports go to the CAFTA-DR region, including the United States.<sup>25</sup>

17. The NGEs further support the U.S. demonstration that Guatemala’s failures to enforce its labor laws have influenced the conditions of competition between the Parties.<sup>26</sup> For example, in VESTEX’s view, the presentation by the United States that Guatemala’s failures have altered conditions of competition in the apparel and textiles sector “has been substantiated.”<sup>27</sup>

18. Several submissions speak to the manner in which Guatemala’s failures have affected trade by unfairly decreasing the input cost of labor. The AFL-CIO states that Guatemala’s failure to enforce its labor laws “artificially lowers the cost of labor” and therefore “distorted the labor market to the injury of the United States and other CAFTA-DR Parties.”<sup>28</sup> Other NGEs, including ITUC and FESEBS, reiterate that the failure to enforce laws protecting fundamental labor rights artificially depresses wages, thereby conferring an unfair competitive advantage.<sup>29</sup>

19. The United States observed in its Rebuttal Submission that the non-compliance of certain companies can have a spillover effect on a whole sector.<sup>30</sup> The NGEs likewise describe how the lack of compliance with labor laws by one company may affect others involved in the supply chain. AGEXPORT notes that of the approximately 1,100 Guatemalan companies that export directly to the United States, thousands of small- and medium-size companies or small growers in rural areas are involved and form the “exporting value chain.”<sup>31</sup> Thus, in AGEXPORT’s view, spillover effects may extend beyond the non-compliant company to still more companies or even other sectors.

20. In sum, the NGEs provide further support for the U.S. showing that Guatemala’s failures to enforce its labor laws have influenced the conditions of competition between the Parties by creating an unfair competitive advantage for Guatemalan companies competing in the CAFTA-DR marketplace.

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<sup>25</sup> Submission of VESTEX, p. 2; U.S. Initial Written Submission, para. 187.

<sup>26</sup> See Submissions of AFL-CIO; FESEBS; ITUC; AGEXPORT; VESTEX.

<sup>27</sup> Submission of VESTEX, p. 4.

<sup>28</sup> Submission of AFL-CIO, pp. 1, 10.

<sup>29</sup> Submission of ITUC, p. 9; Submission of FESEBS, p. 6 (representing several labor unions).

<sup>30</sup> U.S. Rebuttal Submission, p. 130.

<sup>31</sup> Submission of AGEXPORT, pp. 3, 7. According to AGEXPORT, the exporting sector in Guatemala generates approximately 1.5 million direct and indirect jobs.

**IV. Guatemala’s Institutional Reforms Identified by the NGEs Are Welcome but Irrelevant to the Panel’s Examination of Guatemala’s “Effective Enforcement” of its Labor Laws under Article 16.2.1(a)**

21. Some of the NGEs provide information about new labor-related developments undertaken by Guatemala, such as the enactment of new legislation, the establishment of new programs, and the creation of additional resources in the labor courts and Ministry of Labor. The NGEs also refer to private labor enforcement programs such as those established by VESTEX, the Guatemalan Chamber of Agriculture, and the Guatemalan Coordinating Committee of Agricultural, Commercial, Industrial, and Financial Associations (CACIF), and other privately organized training programs focusing on corporate social responsibility.<sup>32</sup>

22. The United States welcomes these efforts to enhance the protection of internationally recognized workers’ rights, to improve capacity, and, with respect to the private programs, to support access to resources and training. Nevertheless, these structural changes and additional resources do not pertain to whether Guatemala is effectively enforcing its labor laws, the issue in this proceeding, and, therefore, are not relevant to the Panel’s analysis.

23. Effective enforcement is demonstrated through outcomes. As some NGEs point out, these recent structural changes have not resulted in the compliance outcomes required by Article 16.2.1(a). An increase in the number of annual labor cases or measures of labor infractions do not themselves show effective enforcement. The quantitative presentations made by CACIF and the Guatemalan Labor Law Association (ASGUATRA), for example, reflect just how few enforcement proceedings have been undertaken, complementing the evidence presented by the United States that shows that many violations by employers continue unchecked by Guatemalan authorities. Likewise, the “New Labor Ministry Management Model, implemented by the Supreme Court of Justice”<sup>33</sup> and other changes to the court system appear to be positive developments, but, as the AFL-CIO comments: “the critical issue regarding labor rights enforcement has never been a lack of tools, but a lack of political will on the part of the Guatemalan government”<sup>34</sup> to take the necessary actions to effectively enforce Guatemala’s labor laws.

24. As demonstrated in the submissions of the United States, significant deficiencies in enforcement continue, whether in reference to court orders, inspections, the establishment of conciliation tribunals, or the registration of unions. With respect to the critical element of compliance outcomes, the NGE submissions show that Guatemala is still lacking in meeting its CAFTA-DR obligations. Likewise, the private programs are not action “by Guatemala” and cannot constitute or substitute for “enforcement” “by Guatemala.” To the contrary, private

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<sup>32</sup> Submission of AGEXPORT, III; Submission of VESTEX, para. F. AGEXPORT also makes note of Business Social Compliance Agreements, Supplier Ethical Codes, and a Code of Vendor Product with which its members must comply as part of their relationship with their foreign partners or “to gain a position in the North American Market.” AGEXPORT, III.d-f.

<sup>33</sup> Submission of CACIF, p. 4; Submission of ASGUATRA, pp. 1-9.

<sup>34</sup> Submission of AFL-CIO, p. 1.

programs may even be seen as trying to fill a void created by Guatemala’s failure to effectively enforce its labor laws.

25. Moreover, not all institutional developments intended to enhance the protection of workers’ rights or improve the enforcement of labor laws succeed in doing so. The United States has shown how other developments such as the creation of “dialogue tables” are having the opposite effect. As the United States has explained in its Rebuttal Submission, these alternative adjudication mechanisms, in which employers who admit to violating labor laws are not compelled to comply, are counterproductive to enforcement.<sup>35</sup>

26. The question relevant to the Panel is whether any of the recent steps to which some NGEs make reference have meant that the laws have been effectively enforced – has there been compliance with the laws? For the reasons the United States has explained in its submissions, the answer to this question is unfortunately “no.” Information provided by the NGEs also reflects the gravity of the situation facing workers in Guatemala. The AFL-CIO describes specific recent instances of violence against labor activists and union members.<sup>36</sup> This information further confirms the seriousness of the issues before the Panel as described in the U.S. submissions.<sup>37</sup>

## **V. Conclusion**

27. The written views of the NGEs provide helpful context for the situation in which Guatemalan workers find themselves as a result of Guatemala’s failure to effectively enforce its labor laws. Although Guatemala’s reforms to its labor administration system are important, this case is not about the new laws or institutions. The task before the Panel is to evaluate whether Guatemala has effectively enforced the laws already on the books. From the U.S. submissions, there is no doubt of Guatemala’s failures with respect to effective enforcement of its labor laws.<sup>38</sup> The NGEs further illustrate these failures as well as the impact of Guatemala’s failures on its workers and its trade.

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<sup>35</sup> See U.S. Rebuttal Submission, paras. 184-185, 198, 203-205, 210.

<sup>36</sup> Submission of AFL-CIO, p. 9 (“Guatemala has utterly failed to enforce its own laws with respect to freedom of association, by failing to provide a minimal baseline of security that would allow workers to freely exercise their rights.”). FESEBS also notes how a culture of non-enforcement has severely limited workers’ ability to exercise their rights and discourages them from organizing to safeguard those rights. Submission of FESEBS, Section 2.2.

<sup>37</sup> See, e.g., U.S. Rebuttal Submission, para. 28.

<sup>38</sup> Submission of ITUC, p. 10.