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

Rebuttal submission of Guatemala

27 April 2015

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I. INTRODUCTION

1. It is a matter of public record that the U.S. Administration brought this case against Guatemala based on spurious allegations for short-term political gain. Whether the U.S. Administration succeeds in obtaining passage of Trade Promotion Authority is yet to be seen. If it does, it is unlikely that the decision to bring this case will have had more than a negligible impact on the political debate. On the other hand, the costs of the Administration's decision to pursue this case based on spurious allegations and driven solely by its own domestic political agenda will have been significant and long-term.

2. By bringing this case, the U.S. Administration unilaterally terminated a process of labor cooperation that was making significant progress. Cooperation on labor matters, not contestation, is at the heart of Chapter 16 of the CAFTA-DR. The Guatemala-United States Action Plan on labor cooperation was described by the Deputy U.S. Trade Representative as a "landmark agreement" that reflected "Guatemala's commitment to constructive engagement to meet its labor obligations under our trade agreement and the United States' commitment to working with our trade agreement partners to help ensure respect for labor rights."[1] The U.S. Acting Secretary of Labor stated that implementation of the Action Plan "will yield demonstrable improvements in Guatemalan labor law enforcement that will be a real victory for workers."[2]

3. The Action Plan was being implemented faithfully and was delivering concrete results. The U.S. Administration, however, abruptly decided that short-term domestic political objectives prevailed over long-term bilateral cooperation. As the Panel will have noticed, the United States has not offered any evidence that Guatemala was failing to faithfully implement its commitments under the Action Plan.

4. The U.S. Administration's decision to opt for litigation instead of cooperation will ultimately hurt Guatemalan workers the most, the parties that the United States claims to be trying to help. The United States' decision to pursue litigation under Chapter 16 has stigmatized Guatemala. It does not matter that the complaint is based on unfounded allegations which should be entirely dismissed by this Panel. The harm has been done. Multinationals companies who sourced their products in Guatemala will look to other countries. Job losses will ensue. The impact will be felt most strongly by Guatemalan workers. All for short term political gain in the United States.

5. To make matters worse, the United States has decided to subvert the rules-based dispute settlement mechanism of the CAFTA-DR by relying on an unfair litigation strategy that seeks to deliberately obstruct Guatemala's efforts to defend itself. The United States' case is based, in large part, on the testimony of secret witnesses. As the Panel itself has recognized, secret witness testimony is highly unreliable and gives rise to grave risks of error. The use of secret testimony is also unfair to the other Party who is denied an opportunity to test the veracity and credibility of the statements and to respond fully to the accusations made against it. The inherent unreliability of secret witnesses and the serious due process concerns that they raise, have led the vast majority of tribunals, domestic and international, to ban their use. Secret witnesses simply have no role to play in a rules-based adjudication system in the 21st century.

6. Apparently unsatisfied with undermining bilateral labor cooperation and subverting the CAFTA-DR's dispute settlement mechanism, the United States has also decided to sacrifice the independence and credibility of the dispute settlement mechanism for international investment. The United States, without consulting Guatemala or the Panel, chose to involve the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID") and her staff in this dispute. The ICSID Secretary-General and her staff have no role to play in this dispute under Chapter 16 or the Model Rules of Procedure (MRP"). ICSID's own rules and their status as international officials

[1] Exhibit GTM-50.
[2] Ibid.

prohibited them from receiving instructions from the United States and required them to be impartial and independent. Yet, for some unexplained reason, the United States and the ICSID-Secretary General chose to ignore these rules. The fact that the Secretary-General chose to receive instructions from the United States Government, and to put the resources of her office to work for the United States in this dispute, will hurt the credibility of the ICSID for years to come. Again, all of this for the U.S. Administration's short-term political gain.

7. Guatemala will demonstrate in this submission that the United States' case is:

- premised on an incorrect interpretation of Article 16.2.1(a) of the CAFTA-DR that is completely divorced from the text of the provision, its context and the Agreement's object and purpose;
- based on "evidence" that is inherently unreliable and that, if used, creates a high risk of error;
- refuted by evidence submitted by Guatemala that clearly demonstrates that there has not been inaction by Guatemala's authorities.

8. In particular, the United States' interpretation is based on an improper "strict liability" standard in which every instance of a government agency misses a statutory deadline would constitute a violation of Article 16.2.1(a).

9. As regards the United States' claim of inaction with respect to the reinstatement of employees, Guatemala demonstrates that:

- The United States acknowledges that the workers had access to the Guatemalan labor courts and were able to exercise their rights. The United States has not alleged, nor has it submitted any evidence to suggest, that the workers were denied access to the Guatemalan labor courts, were not able to fully exercise their rights, or were not afforded due process.
- The United States has failed to establish that there has been inaction by the Guatemalan labor courts or Public Ministry. In the cases cited by the United States, either: the employees failed to show up for the reinstatement order or appear before the labor court; the employees voluntarily terminated the reinstatement proceedings; the reinstatement order was quashed on appeal; the employees reached a voluntary settlement; or the United States failed to establish the existence of the reinstatement orders.

10. With respect to the second claim of the United States (i.e., inaction to perform inspections or impose penalties), Guatemala demonstrates that the United States failed to make a prima facie case of failure to effectively enforce labor laws with respect to all companies targeted in its complaint:

- In all cases, the United States did not put forward pertinent evidence. The vast majority of the evidence submitted by the United States, if any, was in the form of anonymous statements that do not have probative value or redacted documents that do not prove the facts that the United States intended to prove (e.g., inspectors' reports that are not a pertinent legal instrument to prove inaction regarding the imposition of penalties).
- Guatemala also demonstrated, in many of those cases, that the claims of alleged inactions were unwarranted because the authorities indeed took action or because the companies were in full compliance with their labor laws obligations.
- In view of the United States' failure to demonstrate inaction with respect to all companies targeted in its submissions, it also failed to demonstrate that the alleged inaction to perform inspections or impose penalties constitutes a failure to effectively enforce labor laws through a "sustained or recurring course of … inaction" in a manner affecting trade between the Parties.

11. In relation to the United States' allegations involving the registration of unions, Guatemala

demonstrates that:

- The delays were attributable to inaction by the workers who failed to meet the requirements under the Guatemalan law to register the union.
- The instances of delay alleged by the United States represent less than 1% of the unions registered in Guatemala between 2008 and 2014.

12. As regards the establishment of conciliation tribunals, Guatemala demonstrates that:

- The United States' allegations are premised on an incorrect understanding of Guatemalan law.
- Workers failed to comply with requirements of Guatemalan law or the United States failed to provide evidence that workers actually requested a conciliation tribunal.
- The United States is improperly asking the Panel to second-guess the decisions of the Guatemalan labor courts, contrary to the specific limitations on the scope of review agreed by the Parties to the CAFTA-DR.

13. Finally, Guatemala demonstrates that the United States' examination of trade effects is fundamentally flawed and is insufficient to meet the requirements of Article 16.2.1(a).

14. The fact is that labor enforcement is a challenging enterprise, one in which governments should be mutually supporting each other's efforts rather than trying to undermine them, as the United States unfortunately is doing in this case. Government agencies involved in labor enforcement face multiple practical difficulties and resource constraints. The CAFTA-DR negotiators recognized these realities. Thus, Article 16.2.1(a) requires a showing that the failure to enforce is part of "a sustained or recurring course of action or inaction". A complaining party therefore must establish more than isolated instances in which a government agency has failed to meet a statutory deadline. The same realities underlie the inclusion of Article 16.2.1(b), which clarifies 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".

15. Despite best efforts, no country's enforcement record is perfect. The United States has decided to focus attention on Guatemala's record. Yet, the United States' own record of labor enforcement is less than stellar. In fact, the U.S. labor enforcement suffers from many of the same deficiencies that underlie its allegations against Guatemala:

- The U.S. Department of Labor (DOL)'s administrative law judges hear cases arising from dozens of labor-related laws and programs, but black lung and longshore workers' compensation cases make up the most. In 2014 there was an accumulated backlog of more than 14,000 cases before the department's 36 judges. As it is, it takes on average 429 days for a case to be assigned to a judge, and then another 42 months before a decision is returned. And in the time miners are waiting, they'll often grow more ill, become dependent on bottled oxygen, and die before they get a decision.[3]
- The United Farm Workers of America (UFW) claims to have been prevented in its recent efforts to improve farm worker heat safety because of Cal/OSHA's "unreasonable and unlawful policies and practices." According to lawsuit filed by the UFW, in the summer of 2011, UFW staff filed or assisted farm workers in filing 78 complaints reporting serious violations of the Heat Illness Prevention regulation by agricultural employers. The union alleges Cal/OSHA failed to conduct any on-site inspection for at least 55 of the 78 complaints, did not attempt to initiate an on-site inspection within the statutory time frame for at least 43 of the 78 complaints, failed to contact the complainant regarding 32 of the 78 complaints and, despite documented violations, issued a citation for violation of the Heat

[3] http://www.bizjournals.com/pittsburgh/blog/energy/2014/08/casey-floats-plan-to-reduce-backlog-of-black-lung.html?page=all

Illness Prevention regulation in connection with only 3 of the 78 complaints.[4]

- Thousands of mining companies throughout the US continue operating despite owing millions in delinquent fines for past health and safety violations. A joint investigative report by National Public Radio (NPR) and Mine Safety and Health News (MSHN) released last week reveals that nearly $70 million in delinquent fines are owed by some 2,700 mining companies operating coal, metal, and mineral mines in the US. NPR/MSHN highlight the Kentucky Darby case to make the point: "Even after major disasters with multiple deaths, the owners of delinquent mines can continue to operate. MSHA does not shut them down even if they continue to commit violations, even when there are more injuries."[5]
- The Mine Safety and Health Administration (MSHA) failed to conduct legally required regular safety inspections at the Waste Isolation Pilot Plant, according to a news release from U.S. Senators. Tom Udall and Martin Heinrich. Udall and Heinrich asked to see all MSHA inspection records in March after a truck fire and subsequent radiation leak at WIPP the month before. The records showed that MSHA had only completed two inspections during the last three years leading up to the incidents. Under the WIPP Land Withdrawal Act, MSHA is required to inspect WIPP at least four times each year.[6]
- The U.S. Government Accountability Office filed 10 complaints with the Department of Labor's (DOL) Wage and Hour Division (WHD) and 9 were mishandled.[7]
    - 5 of the 10 complaints were not recorded in the DOL complaint database
    - 3 complaints were never investigated
    - In one case, a WHD investigator lied about investigative work performed and did no investigate the complaint.
    - At the end of the GOA investigation it was still waiting on the WHD to begin investigating three cases - a delay of nearly 5, 4 and 2 months.
    - When a caller complained to the WHD on four different occasions that he had not been paid overtime for 19 weeks, the WHD failed to return his calls for four months, and when it did the WHD official told him it would take 8 to 10 months to begin investigating his case.
    - The GOA report found that the WHD waited 22 months to investigate a complaint from a group of restaurant workers. Ultimately, the investigators found that the workers were owed $230,000 because managers had made them work off the clock and had misappropriated tips. When the restaurant agreed to pay back wages but not the tips, the WHD closed the case.
    - In another instance the GOA found the WHD division closed a case where workers were owed more than $200,000 of overtime after the employer offered to pay only $1,000.
    - The GOA report found that the WHD mishandled more serious cases 19 percent of the time. In such cases, the GOA said the WHD did not begin an investigation for 6 months, did not complete an investigation for a year, did not assess back wages when violations were clearly identified and did not

[4] See more at: http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/suit-alleges-calosha-failed-heat-rules.aspx#sthash.UjOxnCh3.dpuf
[5] http://www.wsws.org/en/articles/2014/11/19/mine-n19.html
[6] http://www.currentargus.com/carlsbad-news/ci_26277878/msha-failed-conduct-required-regular-safety-inspections-at
[7] Government Accountability Report GOA-09-458T –" Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable To Wage Theft" http://www.gao.gov/products/GAO-09-458T

refer cases to litigation when warranted.

- In one case detailed in the GOA report, a homeless woman receiving free room and board while working as a night attendant at a nursing home alleged her employer had failed to pay her wages for an entire year. According to the WHD, the employer admitted it had failed to pay any wages to the night attendant and considered the room and board to be paid, but stated it did not have any money to pay the back wages. The WHD dropped the case.

16. The United States' resources would be better spent correcting its own deficiencies than bringing spurious cases against other small developing countries.

II. MOST OF THE DOCUMENTATION SUBMITTED BY THE UNITED STATES AS EVIDENCE IS SERIOUSLY FLAWED AND DOES NOT SUPPORT A PRIMA FACIE CASE OF INCONSISTENCY WITH ARTICLE 16.2.1(A) OF THE CAFTA DR

A. INTRODUCTION

17. The United States is seeking to hold Guatemala internationally responsible under the CAFTA-DR on the basis of flawed evidence and anonymous witness statements that would be unacceptable in most, if not all, domestic and international adjudication systems based on the rule of law.

18. The uncontested fact is that United States' approach in these proceedings simply would not be tolerated in the US courts (or any other rules-based system of adjudication).[8] A conviction of an employer on the basis of anonymous witness statements would never be allowed in US labor proceedings.

19. The United States' approach is also plainly contrary to the standards that the CAFTA-DR requires for domestic labor proceedings.[9]

20. As the Panel has recognized, "[t]he anonymity of a witness may conceal possible motives or characteristics of the witness that affect the reliability of his or her evidence. *If the reliability of a witness remains unexamined, a decision can be unfair*" (emphasis added).[10]

21. Since the beginning of this dispute, Guatemala has repeatedly expressed concerns about the United States' efforts to deny basic due process rights to Guatemala throughout the course of these

[8] *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*.
[9] CAFTA-DR, Article 16.3, provides that each "Party shall ensure that proceedings before such tribunals for the enforcement of its labor laws are *fair, equitable*, and *transparent* and, to this end, each Party shall ensure that: (a) such proceedings comply with *due process* of law…(c) the parties to such proceedings *are entitled to support or defend their respective positions*, including by presenting information or evidence…" (emphasis added).
[10] Panel's reasons on request for extension, para. 57.

proceedings. In its rebuttal submission, the United States has continued such efforts, which further undermine not only Guatemala's due process rights, but also the authority of the Panel and the credibility of the new CAFTA-DR dispute settlement mechanism as a whole.

22. Guatemala has also repeatedly requested the Panel to instruct the United States to provide an un-redacted version of its exhibits. Guatemala has explained that it needs to know what is the evidence that is being used against it and must have a meaningful opportunity to contest its credibility, accuracy and reliability. Regrettably, the United States has persisted in its uncooperative approach.

23. At this stage of the proceedings, it is too late for the United States to provide an un-redacted version of its exhibits. Guatemala would no longer be afforded a meaningful opportunity to examine and respond to such evidence.

24. In this section, Guatemala will address the United States' rebuttal arguments regarding its evidence. In particular, Guatemala explains why the United States has no justification to submit anonymous statements and documents with redacted information; why such statements and documents do not have probative value; and why relying on them would be a violation of Guatemala's due process rights. Guatemala also explains the reasons why the Panel should reject the United States' attempt to involve members of the public, like the ICSID Secretary-General and her staff, to undertake the fact-finding attributions that belong exclusively to the Panel.

B. THE LEGAL STANDARD

25. Under Rule 65 of the MRP, the burden of proof to make a *prima facie* case of violation rest squarely on the complaining Party.

26. 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.[11] 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".[12]

27. The complaining Party cannot establish the existence of a fact based on simple assertions, conjectures, assumptions or remote possibilities.[13]

28. It is only once the complaining party makes a *prima facie* case of violation that the burden of proof shifts to the responding party to adduce evidence to rebut the presumption that the complaining party's assertions are true.[14]

29. Furthermore, it is not for a Panel "to make the case for a complaining party"[15] and a "panel may not take upon itself to rebut the claim (or defence) where the responding party (or complaining party) itself has not done so".[16]

30. In fact, a Panel must be satisfied that the complaining party has made a *prima facie* case of violation, even if the defending party does not contest the facts and legal claims.[17] For example, in several WTO cases against the United States, the United States did not contest the facts and legal claims put forward by the complaining parties. In these cases, the Panels, nonetheless, found that the

[11] Appellate Body Report, *EC – Hormones*, para. 104.
[12] Appellate Body Report, US – *Wool Shirts and Blouses*, p. 14; Appellate Body Report, *US – Carbon Steel*, para. 157.
[13] Final Arbitral Panel Report, *Costa Rica v. El Salvador – Tariff Treatment*, para. 4.145.
[14] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14; Panel reports in *US – Shrimp (Ecuador)*, paras. 7.7-7.11; *US – Shrimp (Thailand)*, paras. 7.20-7.21; and *US – Anti-dumping Measures on PET Bags*, paras. 7.6 – 7.7.
[15] Appellate Body Report, *Japan – Agricultural Products II*, para. 129.
[16] Appellate Body Report, *US – Gambling*, para. 282.
[17] Panel reports in *US – Shrimp (Ecuador)*, paras. 7.7-7.11; *US – Shrimp (Thailand)*, paras. 7.20-7.21; and *US – Anti-dumping Measures on PET Bags*, paras. 7.6 – 7.7.

"fact that the United States does not contest [the complainant's] claim is not a sufficient basis […] to summarily conclude that […] the claims are well-founded".[18] Rather, these Panels stated that they could only rule in favor of the complainant if they were satisfied that the complaining party has made a *prima facie* case.[19] In this way, the Panels were making an objective assessment of the matters at issue and, incidentally, protecting the due process rights of the United States.

31. Whether any particular element or proposition has been proven "depends not just on [a party's] own evidence but on the overall assessment of the accumulated evidence put forward by one or both parties, for the proposition or against it".[20]

32. Guatemala and the United States do not seem to disagree with any of the well-known and internationally-accepted legal principles, summarized above. Rather, both Parties disagree about the following:

a. Whether the submission of anonymous statements and documents with redacted information is justified.
b. Whether anonymous statements and exhibits with redacted information have probative value.
c. Whether the Panel may attribute probative value to the affidavit of the ICSID Secretary-General.
d. Whether the submission of anonymous statements and documents with redacted information violate Guatemala's due process rights.

33. Guatemala addresses each of these issues in turn below.

C. THE UNITED STATES HAS NO JUSTIFICATION TO SUBMIT ANONYMOUS STATEMENTS AND DOCUMENTS WITH REDACTED INFORMATION.

34. The United States has repeatedly argued that the redactions it has made to factual information are "imperative to protect the safety and security of the workers"[21] and that individuals who offered statements and provided materials "did so on the condition that the United States would not disclose the workers' identities in this proceeding".[22]

35. The United States also claims to be "deeply concerned that disclosing identifying information regarding these workers could subject them to retaliation in the workplace, and the evidence submitted to the Panel amply justifies such concerns".[23]

36. These alleged concerns are unwarranted and stem from the fundamental misunderstanding of the nature of this dispute and of the parties involved.

37. First, the United States portrays the anonymity of the workers as imperative to protect their safety and security, particularly, in their workplaces. However, Guatemala notes that employers are not parties to this dispute and, therefore, they do not have access to any confidential information submitted under the present proceedings. The MRP contains detailed rules dealing with public release of written submissions and other documents, as well as for the protection of confidential information.[24] None of these rules would allow any employer to gain access to the exhibits submitted under confidentiality by the United States including personal identifying information.

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[18] Panel reports in *US – Shrimp (Ecuador)*, paras. 7.7-7.11; *US – Shrimp (Thailand)*, paras. 7.20-7.21; and *US – Anti-dumping Measures on PET Bags*, paras. 7.6 – 7.7.
[19] Ibidem.
[20] *Rompetro Group N.V v. Romania*, Award, ICSID Case No. ARB/06/3, 16 May 2013, para. 178, cited by the United States in its Rebuttal Submission, para. 12.
[21] US Letter of 25 November 2014.
[22] US Rebuttal Submission, para. 14.
[23] US Letter of 25 November 2014.
[24] Rules 13 to 23 and Appendixes 1 to 3 of the MRP.

38. Second, and for the sake of argument, even if the employers were to have access to the identity of the workers protected by confidentiality rules, such employers would not have more information than they already have. As a matter of fact, the employers and the workers already know the identity of each other. From the documents submitted in these proceedings is clear that, for example, the inspectors' reports are signed by the workers and the employers participating in conciliation meetings and inspections, and the courts' resolutions discloses the name of the workers and employers participating in the legal proceedings. Therefore, the United States' alleged measures to protect the identity of the workers from the employers are simply unwarranted.

39. Third, the United States makes reference to the "condition" under which it received the information from the individuals providing the materials used as evidence. That *condition* is something that was agreed between the United States and these individuals. Guatemala should not bear the consequences of such agreement or of the United States' decision to bring a dispute on an unsound evidentiary basis. Ultimately, the burden of proof in order to make a *prima facie* case of violation rests on the United States. The United States cannot use arrangements between itself and third parties to try to circumvent its evidentiary burden.

40. Fourth, the United States argues that the evidence it presented is "likely the only evidence that may exist to show…inaction".[25] It also asserts that "[i]naction, by its nature, likely will not be reflected in government documents".[26] This is incorrect.

41. The United States could have taken another approach to demonstrate the alleged inactions. It had available the possibility to request certifications to the labor courts and the administrative offices to demonstrate the latest status of each case and whether there was or not pending actions.

42. Pursuant to Article 171 of the *Ley del Organismo Judicial*, it is possible to request photocopies or certifications of the files in possession of the tribunals.[27] Article 174 of the same legal instrument requires inclusion of an indication, in all certifications, of whether or not there are pending actions.[28] These provisions are also applicable to any office of the Government, in accordance with Article 177. In other words, the labor courts, the Executive Branch offices, and the Public Ministry may provide photocopies or certifications of the files in their possession, stating whether or not there are pending actions.

43. Exhibit USA-233 is a good example of this. That exhibit shows that CONDEG received copies of inspectors' reports requested to the GLI within seven days.

44. These are basic rules that any attorney or "legal expert" should know. The United States, as indicated in its submissions, is being advised by a Guatemalan "legal expert". Therefore, it is hard to understand why the United States did not submit a certification for each of the cases that are part of its claims. Those certifications would have indicated the status of each of them and, from there, it could have ascertained whether there has been inaction. The United States had also available the possibility to provide a full photocopy of each administrative and judicial file of the cases at issue.

45. These two options are more straightforward to prove what the United States is trying to prove.

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[25] US Rebuttal Submission, para. 20.
[26] US Rebuttal Submission, para. 13.
[27] Article 171 of the Ley del Organismo Judicial: ARTÍCULO 171. Certificaciones. Los expedientes de las actuaciones que practiquen los tribunales no deben salir fuera de la oficina, pudiendo darse a quienes lo soliciten, fotocopias simples o certificaciones. Se exceptúan de esta regla los procesos fenecidos que, con fines docentes, soliciten las Facultades de Ciencias Jurídicas y Sociales y los demás casos que las leyes determinen. Cuando se trate de certificaciones y fotocopias parciales de los expedientes, será obligatoria la notificación de la parte contraria, si la hubiere, teniendo ésta derecho a que a su costa se complete la certificación o fotocopia solicitada con los pasajes que señale. De no hacer el depósito dentro del plazo de veinticuatro horas a partir del momento de entrega al tribunal de su solicitud, se emitirá la copia en los términos originalmente solicitados.
[28] Article 174 of *Ley del Organismo Judicial*: Recursos pendientes. En toda certificación de resoluciones que se extienda, se hará constar si existe o no recurso pendiente.

They do not require the submission of anonymous statements.

46. Fifth, with respect to redacted official documents (not to anonymous statements), the United States argues that they bear indicia of credibility, veracity and reliability because, for example the "labor court documents bear the official stamps of the court, the jurisdiction of the court, the court docket number, and often the name and signature of the Guatemalan judge overseeing the proceedings".[29] It also gives similar example for documents from the Guatemalan administrative agencies that "bear letterhead markers, the official stamps of the agency, and the names and signatures of the administrative personnel associated with the documents".[30]

47. The fundamental concern of Guatemala with the redaction of identifying information in official documents is that it constitutes a significant hindrance to Guatemala's ability to defend itself. Identifying and then locating the documents without the typical identifiers, such as the name of the plaintiff and case number, requires significant time and resources. Not being able to locate those documents, Guatemala is also unable to locate related documents in support of its defense. As demonstrated in its initial submission and further confirmed in this submission, the few cases in which Guatemala was able to locate the corresponding document submitted by the United States, Guatemala found that the United States allegations were unfounded. In some instances, the cases that the United States argues are pending resolution based on anonymous statements have been finalized to the satisfaction of the workers.[31]

48. Sixth, the United States further asserts that Guatemala "is in a position to have and produce" evidence, referring to court orders and other administrative and judicial documents.[32] That is misleading.

49. Without any legitimate justification, the United States has forced Guatemala into a resource-consuming exercise of localization of documents. The United States knows that Guatemala may find some, if not all, of the official documents. It thus seems that the real reason why the United States submitted redacted versions of the documents is because it knows that it will hinder Guatemala's ability to defend itself. Unfortunately, this is precisely what has happened.

50. There are serious risks entailed by the use of redacted documents. Examples of the risks of accepting such approach are found notably in the US Rebuttal Submission and will be addressed in detail below. However, for the moment, Guatemala points to paragraph 263, where the United States asserts that "upon comparing the relevant exhibits, USA-135 AND GTM-33, Guatemala appears to have mistaken the September 4, 2009 collective conflict for another proceeding. The court number for the proceeding reflected in USA-135 differs from the court number for the proceeding reflected in GTM-33".[33] The question here is, how can Guatemala know to which proceeding the United States was referring if it redacted the necessary identifying information, including the case number? Guatemala continues to search for the proceeding that the United States argues it is referring to without success. Clearly, this is unfair.

51. For the reasons discussed above, Guatemala reiterates that the United States has no valid justification to redact information from official documents. There is no question that redacting information is part of a broader strategy to obstruct Guatemala's ability to defend itself. That strategy is further confirmed by the fact that the United States waited so long to replace illegible pages of its exhibits and that, adducing disagreement, it did not provide replacement for all illegible pages identified by Guatemala on November 20, 2014.[34] It is extraordinary that the United States provided some replacement copies only last March 16, 2015. That is, almost four months since Guatemala brought this issue to the attention of the Panel and of the United States. Guatemala wonders why the

[29] US Rebuttal Submission, para. 23.
[30] US Rebuttal Submission, para. 23.
[31] See for example Guatemala's Initial Written Submission, para. 230.
[32] US Rebuttal Submission, para. 21.
[33] US Rebuttal Submission, para. 263.
[34] US Rebuttal Submission, para. 29.

United States is so diligent in submitting non-confidential versions of Guatemala's exhibits but not when it had to submit replacements of the illegible copies.

D. ANONYMOUS STATEMENTS AND EXHIBITS WITH REDACTED INFORMATION DO NOT HAVE PROBATIVE VALUE

52. In its Reasons on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence of 26 February 2015 ("Panel's reasons on request for extension"), the Panel was of the view that:

> "A Party to dispute settlement proceedings under Chapter 20 of the DR-CAFTA has a prerogative to submit such evidence as it see fit in support of its position. A corollary to this proposition is that a Party may choose not to submit particular evidence. In other words, a Party may choose which evidence to submit and which evidence not to submit".[35]

53. Guatemala agrees that it is for the complaining Party to decide which evidence it submits in support of its *prima facie* case. A completely different question is, however, the probative value of the evidence submitted.

54. The Panel was also of the opinion that the "Rules do not preclude a party from submitting evidence in the form of anonymous witness declarations. Nor do they require a Party to supplement the submission of witness declarations by providing personal identifier or other information that could help to put such declarations in context."[36] In this particular aspect, the Panel was focusing on the *procedural* aspects of the submission of evidence. It was not dealing with the *substantive* aspects of the evidence, namely, its probative value.

55. Indeed, the Panel indicated that "if and to the extent that [verifying or refuting the material allegations contained in the redacted exhibits submitted by the United States] proves to be impossible, the panel will consider at the appropriate time *whether particular redactions have prevented the United States from meeting its burden of establishing the facts* it has alleged or whether further relief may be required" (emphasis added).[37]

56. Furthermore, the Panel also stated that "tribunals should treat anonymous evidence with caution. The anonymity of a witness may conceal possible motives or characteristics of the witness that affect the reliability of his or her evidence. *If the reliability of a witness remains unexamined, a decision can be unfair*" (emphasis added).[38]

57. In view of the Panel's reasoning, while it found *procedurally* that the Rules do not preclude a Party from submitting evidence in the form of anonymous witness declarations, the Panel also found, *substantively*, that this does not prevent it from determining whether the United States has met its burden of establishing the facts it has alleged.

58. For its part, the United States argues that personally identifiable and other redacted information *has not been submitted* and Rules 15 and 16 of the MRP do not deal with information not submitted.

59. Additionally, the United States posits that personally identifying information does not diminish the value of the evidence because it is "*contemporaneous*" with documents from judicial and administrative bodies[39] and the "[anonymous statements] submitted by the United States bear the indicia of credibility, veracity, and reliability that would be expected of authentic documents created

[35] Panel's reasons on request for extension, para. 41.
[36] Panel's reasons on request for extension, para. 42.
[37] Panel's reasons on request for extension, para. 56.
[38] Panel's reasons on request for extension, para. 57.
[39] US Rebuttal Submission, para. 16.

contemporaneously to the events described therein" (emphasis added).[40]

60. Put simply, the United States submits that anonymous statements that include information *contemporaneous* to the events described in official documents make such statements credible, truthful and reliable.

61. The United States further contends that "[i]rrespective of personally identifiable information having been protected, each of the US exhibits at issue establishes a factual foundation for the instances set out in the U.S. Initial Written Submission and further detailed in [its] rebuttal submission".[41]

62. Finally, the United States appears to interpret the Panel's reasoning as a permission to submit redacted or anonymous documents and for that reason, apparently, there would not be a violation of Guatemala's due process rights.[42]

63. In sum, the United States defends the use of anonymous statements and exhibits with redacted information on the basis of the following arguments:

a. Submission of redacted or anonymous documents is permissible under the Rules of Procedure.
b. The United States did not submit the information redacted and such information is not subject to Rules 15 and 16 of the MRP.
c. Anonymous statements are "contemporaneous" to the official documents (also with redacted information) and that makes them credible, truthful and reliable.

64. Guatemala addresses each of these arguments in turn.

1. While *procedurally* the submission of redacted or anonymous documents may be permissible under the MRP, *substantively*, that does not attribute to them probative value.

65. The United States seems to interpret that, because the Panel found that nothing in the MRP precludes the submission of anonymous statements, then the submission of such statements would automatically be considered as having probative value. If that is the United States' interpretation, it misconstrues the Panel's reasoning.

66. Guatemala recalls that the Panel found, *procedurally*, that the Rules do not preclude a Party from submitting evidence in the form of anonymous witness declarations. However, the Panel also found, *substantively*, that this does not prevent it from determining whether the United States met its burden of establishing the facts it has alleged.

67. Furthermore, the Panel also stated that "tribunals should treat anonymous evidence with caution. The anonymity of a witness may conceal possible motives or characteristics of the witness that affect the reliability of his or her evidence. *If the reliability of a witness remains unexamined, a decision can be unfair*" (emphasis added).[43]

68. While the United States is not precluded from submitting anonymous statements, that submission, *per se*, does not attribute to them any probative value. The most appropriate manner to test the credibility, truthfulness or reliability of a witness's statement is through cross-examination, which is not possible when the witness is unidentified. On the contrary, if a witness remains unexamined, as is the case with all witnesses in the present dispute, a decision can be unfair if based on the statements of those anonymous witnesses.

[40] US Rebuttal Submission, para. 23.
[41] US Rebuttal Submission, para. 16.
[42] US Rebuttal Submission, para. 15.
[43] Panel's reasons on request for extension, para. 57.

2. The United States, by not submitting the information that it redacted, that information cannot be considered as evidence in these proceedings.

69. The Panel seems to agree with the United States that Rules 15 and 16 "deal only with information already *contained* in [written submissions and other documents filed in panel proceedings] (emphasis added)".[44] In other words, both the Panel and the United States understand that redacted information (including the one that makes the statements anonymous) is to be considered as "not submitted".

70. In view of the foregoing, logically, the information that *has not been submitted* cannot be considered as *evidence submitted* to the Panel and to the other Party. Following that rationale, in the circumstances of this case and as silly as it may sound, this means that each anonymous statement is just a set of simple assertions, conjectures, assumptions or remote possibilities made by *someone* who is *not part of the evidence submitted*. As decided in *Costa Rica v. El Salvador – Tariff Treatment,* cited by the United States, the "complaining party cannot establish the existence of a fact based on simple assertions, conjectures, assumptions or remote possibilities".[45]

3. Contemporaneity of anonymous statements with official documents does not make the statements credible, truthful or reliable and reliance on those statements would violate Guatemala's due process rights.

71. It is not readily clear how the contemporaneity of official documents with anonymous statements would give, to the latter, any probative value.

72. An anonymous statement cannot be considered more or less credible, truthful and reliable just because it is contemporaneous to another document. The most appropriate manner to test the credibility, truthfulness or reliability of a witness's statement is through cross-examination, which is not possible when the witness is unidentified.

73. The Panel simply cannot rely on anonymous statements without violating Guatemala's due process rights. There is no way around this. As the Panel rightly found "[t]he anonymity of a witness may conceal possible motives or characteristics of the witness that affect the reliability of his or her evidence. If the reliability of a witness remains unexamined, a decision can be unfair" (emphasis added)".[46]

74. In conclusion, contemporaneity between documents and anonymous statements does not change the fact that the latter are unreliable and do not have probative value. Nor does it change the fact that relying on them would violate Guatemala's due process rights.

E. THE PANEL MUST REJECT THE INVOLVEMENT OF THE ICSID SECRETARY-GENERAL AND ATTRIBUTE ABSOLUTELY NO VALUE TO HER AFFIDAVIT

75. As explained in Guatemala's letter of March 19, 2015, the United States acknowledges providing the non-redacted versions of the Exhibits to the Secretary-General of ICSID and her staff. The ICSID Secretary-General and her staff are members of the general public for purposes of this

[44] Panel's reasons on request for extension, para. 43.
[45] Final Arbitral Panel Report, *Costa Rica v. El Salvador – Tariff Treatment*, para. 4.145, cited in US Rebuttal Submission, para. 11.
[46] Panel's reasons on request for extension, para. 57.

dispute.[47]

76. The United States' actions in this regard further confirm that the real reason for its refusal to provide the non-redacted exhibits to the Panel and to Guatemala is not a concern about confidentiality, safety or security of the individuals providing the information, but rather a desire to prevent Guatemala from being given the full opportunity to defend its interests and to prevent the Panel from objectively assessing the matter before it.

77. Indeed, the United States is essentially asking the Panel to abdicate its fact-finding responsibilities in favor of outside persons (in this case, the ICSID Secretary-General and her staff).[48] Put simply, the United States wants its own hand-selected outside persons to evaluate the veracity of the evidence it is submitting in these CAFTA-DR proceedings, when that evaluation clearly falls within the in-delegable functions of this Panel.

78. The United States has also put the ICSID Secretary General and her staff in a truly unfortunate situation in which, apparently contrary to internal staff regulations[49], they have taken sides in a State-to-State dispute between two of ICSID's member countries. ICSID's favoring of the United States in this dispute will only result in complaint to and criticism of the ICSID Secretary General and her office.

79. Guatemala hereby confirms that it was not consulted about, and certainly did not agree to, the involvement of ICSID Secretary General and her staff in these proceedings. Guatemala takes note that the Panel has not had any communication with ICSID regarding any matter or evidence presented to it by the disputing Parties.[50] That confirms that the involvement of the ICSID Secretary-General and her staff responds to a unilateral decision of the United States.

80. The United States submits that independent and impartial examination of information submitted to an arbitral tribunal in arbitral proceedings is an accepted practice in international arbitration. However, the United States fails to note that recourse to such kind of independent examination is exceptional. More importantly, the United States fails to mention that in the two arbitration proceedings to which it refers in its letter of April 6, 2015 —*Canfor et al v. United States* and *Eli Lilly v. Canada*— the panel decided on the possible use of an independent reviewer to examine confidential information *after having consulted* the parties.

81. In the same letter, the United States additionally refers to the World Intellectual Property Organization ("WIPO") Arbitration Rules, which provides for the possibility of appointing an independent expert in order to report on specific issues designated by the Tribunal without disclosing confidential information. However, the United States again fails to note that Article 57(a) of the WIPO Arbitration Rules requires the Tribunal *to consult the parties before appointing the expert.*

82. Moreover, neither Chapter 20 of the CAFTA-DR nor the MRP expressly provides for an "independent and impartial examination of information not submitted to an arbitral tribunal". Following the Panel's approach regarding cross-examination, the Panel should not accept the United

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[47] In addition, as the ICSID Secretary-General and her staff are not even included in the list of Authorized Persons submitted by the United States to this Panel, the United States has failed to abide by Rule 4 of Appendix 2 of the Model Rules of Procedures. The U.S. Rebuttal Submission and Exhibit US-170 do not even describe any special procedures adopted by the United States to secure the confidentiality of the information.

[48] See, for example, U.S. Rebuttal Submission, paras. 95 and 108.

[49] Principle 3 of the World Bank Staff Manual requires that staff members :

> • respect the international character of their positions and maintain their independence by not accepting any instructions relating to the performance of their duties from any governments; and
>
> • conduct themselves at all times in a manner befitting their status as employees of an international organization. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the Organizations. They shall avoid any action and, in particular, any public pronouncement or personal gainful activity that would adversely or unfavorably reflect on their status or on the integrity, independence and impartiality that are required by that status[.]

[50] Panel's letter of March 30, 2015.

States' proposition in this regard.[51]

83. The Panel should not reward the United States for obstructing Guatemala's defense. There is simply no valid justification for the United States to refuse to provide un-redacted versions of the exhibits to the Panel and to Guatemala if it wants to make a *prima facie case*. In view of the United States' uncooperative approach and considering the evidence on its own merits, Guatemala requests the Panel to rule that it will not attribute probative value to any of the redacted exhibits and anonymous statements submitted by the United States, including the affidavit provided by the ICSID Secretary-General.

F. THE ATTRIBUTION OF PROBATIVE VALUE TO ANONYMOUS STATEMENTS AND DOCUMENTS WITH REDACTED INFORMATION WILL VIOLATE GUATEMALA'S DUE PROCESS RIGHTS

84. In view of the foregoing, Guatemala has made abundantly clear that the United States does not have any valid justification to redact information from its exhibit and that its approach only pursues the objective of obstructing Guatemala's ability to defend itself.

85. The United States had a number of opportunities to provide those and, nonetheless, it persisted in its uncooperative position. At this stage of the proceedings, it is too late for the United States to submit non-redacted versions of the exhibits because Guatemala would not have a meaningful opportunity to examine and respond to the evidence. In that scenario, the violation of Guatemala's due process right would be further exacerbated.

86. Therefore, for the reasons stated above, the Panel cannot rely on evidence with redacted information without violating Guatemala's due process rights. The Panel must rule that it will not attribute any probative value to redacted exhibits.

87. Guatemala recalls a number of reasons why the Panel cannot attribute any probative value to redacted exhibits:

a. With respect to anonymous statements:

   i. Fundamentally, the witnesses would remain unexamined and any decision based on their statements will be unfair.

   ii. The distinction between "submitted" and "not submitted" information is artificial. However, following that artificial and illogical proposition, information that has not been submitted (namely, personally identifying information) cannot be considered as evidence submitted, rendering the content of the anonymous statements as a set of simple assertions, conjectures, assumptions or remote possibilities. The "complaining party cannot establish the existence of a fact based on simple assertions, conjectures, assumptions or remote possibilities".[52]

   iii. Contemporaneity between anonymous statements and redacted official documents does not make the statements any credible, truthful or reliable. Accepting that proposition would be ingenuous and would open dangerously the door to any Party or individuals providing the statements to *create* a story around the dates and events in an official document. This is, precisely, what is happening in the present case.

[51] Ruling of February 26, 2015, para. 66.
[52] Final Arbitral Panel Report, *Costa Rica v. El Salvador – Tariff Treatment*, para. 4.145, cited in US Rebuttal Submission, para. 11.

iv. Based on the information before the Panel, it cannot determine that the workers suffering from the alleged failures of effective compliance in fact provided the anonymous statements, if they really signed the declarations and their statements were spontaneous.

v. The Panel neither can deduct from redacted official documents that the facts claimed by the anonymous witnesses are truthful or reliable.

vi. The Panel has no basis to consider that persons taking the declarations were attorneys and that the anonymous statements are sworn declarations.

b. With respect to redacted official documents:

vii. The United States did not appear to have submitted the latest documents of each of the administrative and/or judicial domestic proceedings. Rather, it seem to have submitted the initial or documents relating to intermediate phases of the proceedings (e.g. complaints, inspectors' reports, reinstallation court resolutions, etc.) to afterwards rely on anonymous statements indicating that nothing happened after the diligences provided for in those documents. This is not an appropriate way to show "inaction" and the Panel cannot ascertain whether the witnesses making the statements are the persons involved in the domestics proceedings mentioned in the redacted official documents.

viii. Redaction of personally identifying information makes extremely difficult the localization of the documents that should have been submitted by the United States. Lacking valid justification to redact information, is clear that the United States approach seeks to obstruct Guatemala's ability to locate the information by itself.

ix. The Panel cannot rely on the affidavit of the ICSID Secretary-General because she is a member of the public and the Panel is the sole fact-finding authority in these proceedings. Furthermore, neither Chapter 20 of the CAFTA-DR nor the MRP expressly provides for an "independent and impartial examination of information not submitted to an arbitral tribunal". Following the Panel's approach regarding cross-examination, the Panel should not accept the United States' proposition in this regard.

x. If the Panel were to rely on the affidavit of the ICSID Secretary-General in clear violation of the Rules, the Panel must note that the Secretary-General and her staff only compared that the names of the individuals in the redacted official documents were referenced or coincided in some way in the anonymous statements. However, that does not mean that she or her staff could verify that the signatures of the statements really corresponded to the individuals that allegedly provided such statements; or whether the statements were provided spontaneously or the persons receiving the statement were attorneys.

III. THE INTERPRETATION PUT FORWARD BY THE UNITED STATES IS NOT SUPPORTED BY THE TEXT OF ARTICLE 16.2.1(A) OR BY OTHER PROVISIONS OF THE CAFTA-DR

88. In this section, Guatemala addresses the interpretation of Article 16.2.1(a). Guatemala will not repeat the detailed interpretation of Article 16.2.1(a) that it developed in its Initial Written Submission. Instead, Guatemala will focus on the arguments put forward by the United States in its Rebuttal Submission.

A. ARTICLE 16.8 OF THE CAFTA-DR EXPRESSLY PROVIDES THAT ONLY STATUTES AND REGULATIONS ENFORCEABLE BY ACTION OF THE GUATEMALAN EXECUTIVE BRANCH FALL WITHIN ARTICLE 16.2.1(A)

89. Guatemala's interpretation of the scope of Article 16.2.1(a) is firmly grounded in the text of the CAFTA-DR. Article 16.2.1(a) provides that a Party shall not fail to effectively enforce its "labor laws". The term "labor laws" is defined in Article 16.8 as a "Party's statutes or regulations, or provisions thereof, that are directly related to" certain listed internationally recognized labor rights. Article 16.8 then goes on to expressly define the term "statutes or regulations" for each of the CAFTA-DR Parties. In the case of Guatemala, Article 16.8 of the CAFTA-DR provides that "statutes and regulations" means "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". Thus, the scope of the laws or regulations that are considered to fall within the definition of "statutes and regulations" in the case of Guatemala is limited to laws or regulations "that are enforceable by action of the executive body". The limitation is express and unambiguous.

90. The United States is improperly seeking to read out the phrase "that are enforceable by action of the executive body" from the text of the CAFTA-DR. An interpretation that fails to give effect to the plain text of a treaty is not compatible with the customary rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties.[53] This is a rule of interpretation that the United States repeatedly emphasizes in its submissions. Yet, in the case of the definition of "statutes or regulations", the United States seeks to conveniently ignore the plain language of the provision and specific reference to "enforceable action of the executive body".

91. The flaw in the United States' argumentation can be illustrated by reference to the definition of "statutes or regulations" in the case of the United States, which refers to "acts of Congress or regulations promulgated pursuant to an act of Congress that are enforceable by action of the federal government". If the reference to "enforceable action by the executive body" in the definition relating to Guatemala does not delimit the scope of review under Article 16.2.1(a) then, by the same logic, neither should the reference to "action of the federal government" in the case of the United States. Thus, under the logic of the United States' interpretation, CAFTA-DR arbitral panels acting under Article 16.2.1(a) would have the authority to review labor law enforcement by U.S. sub-federal states.

92. The term "executive body" is very specific. It denotes a deliberate choice of including the actions of one branch of government (the Executive) and excluding the other branches. The significance of using "executive body" can be appreciated by comparing it to language used in other treaties that contain similar obligations. For example, the U.S. Model Bilateral Investment Treaty[54]

[53] See footnote 102 of Guatemala's Initial Written Submission.
[54] The text of the U.S. Model BIT is available at: http://www.state.gov/r/pa/prs/ps/2012/04/188199.htm

includes an obligation similar to Article 16.2.1(a) and also includes definitions of "labor laws" and "statutes or regulations". The definition of "statutes or regulations" in the U.S. Model BIT refers to "enforceable by action of the central level of government".[55] The reference to "central level of government" would include actions of branches other than the Executive. Had the negotiators of the CAFTA-DR intended to include actions of branches other than the Executive, they would have used the term "central level of government". But they did not. Instead, they used "actions enforceable by the executive body", which clearly excludes actions by other branches. The deliberate choice of language by the negotiators must be given meaning.

93. None of the arguments provided by the United States in its Rebuttal Submission provide a valid reason to ignore the plain text of Articles 16.2.1(a) and Article 16.8. First, the United States argues that there "is no question" that the provisions of the Guatemalan Labor Code and the Best Practices for labor Inspections are "labor laws" as defined in Chapter 16.[56] The United States' argument is premised on an incorrect interpretation of Articles 16.2.1(a). As Guatemala explained above, the term "labor laws" in Article 16.2.1(a) is defined in Article 16.8, which in turn, defines "statutes or regulations". In the case of Guatemala, the definition includes only laws and regulations "that are enforceable by action of the executive body". It does not include laws and regulations enforceable by action of other branches of the Guatemalan government, such as laws and regulations enforceable by action of the labor courts or the Public Ministry.

94. The United States next claims that Article 16.8 only serves to define which statutes or regulations fall within the definition of "labor laws". It adds that once a statute or regulation is within the definition of "labor law", then the obligation under Article 16.2.1(a) applies to the law and Guatemala is under an obligation not to fail to ensure that the law is effectively enforced.[57]

95. The logic of the United States' argument is flawed and once again ignores the actual text of Articles 16.2.1(a) and Article 16.8. The term "labor laws" in Article 16.2.1(a) must be interpreted in the light of the definitions in Article 16.8. After all, Article 16.8 expressly states that the definitions set out in that provision apply "For purposes of this Chapter", that is, Chapter 16. The scope of the term "labor laws" in Article 16.2.1(a) cannot extend beyond the scope defined in Article 16.8. In other words, the "labor laws" in Article 16.2.1(a) cannot include matters that are not included with the definition of "labor laws", which in turn is circumscribed by the definition of "statutes or regulations". The definitions in Article 16.8 are as much part of Chapter 16 and have as much validity as Article 16.2.1(a).

96. Nor can the United States selectively pick from the definitions provided in Article 16.8. It cannot rely on definition of "labor laws" while choosing to ignore the definition of "statutes or regulations". The latter definition serves to clarify the definition of the term "labor laws", which in turn clarifies the meaning of Article 16.2.1(a).

97. In addition, the United States submits that each Article of the Labor Code and each provision of the Inspection Protocol that it has referred to in its First Written Submission fall squarely within the definition set out in Article 16.8.[58] The United States' submission is incorrect. In the case of Guatemala, the definition of "statutes and regulations" in Article 16.8, which in turn informs the definition of "labor laws" in the same provision, includes only laws and regulations "that are enforceable by action of the executive body". It does not include laws and regulations enforceable by action of other branches of the Guatemalan government, such as laws and regulations enforceable by action of the labor courts or the Public Ministry.

98. The United States further argues that the phrase "effectively enforce" in Article 16.2.1(a) does not give guidance as to how the Parties meet this obligation and that it "allows each CAFTA-DR Party to undertake enforcement in the way it choose, including through the use of the judiciary or

[55] See footnote 17 of the U.S. Model BIT.
[56] U.S. Rebuttal Submission, para. 35.
[57] U.S. Rebuttal Submission, para. 40.
[58] U.S. Rebuttal Submission, para. 37.

independent branch".[59] The phrase "effectively enforce" cannot expand the scope of the term "labor laws". Thus, the United States is correct that the phrase "effectively enforce" does not give guidance for purposes of the scope of the term "labor laws". The scope of the term "labor laws" is defined in the definitions provided in Article 16.8. The phrase "effectively enforce" cannot limit the scope of the term "labor laws", but neither can it expand its scope beyond the boundaries set out in Article 16.8.

99. Moreover, the United States asserts that Article 16.2.1(b) "speaks only to the scope of a Party's discretion" and "does not set limits on areas or types of enforcement". It further argues that, in any event, the term "compliance matters" in Article 16.2.1(b) would encompass judicial action.[60] As Guatemala has explained[61], Article 16.2.1(b) provides contextual guidance for the interpretation of Article 16.2.1(a). Article 16.2.1(b) 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 16.2.1(a). 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.

100. The United States also asserts that Article 16.3 "confirms rather than rejects the proposition that judicial actors are subject to the requirement of effective enforcement".[62] The United States misunderstands the significance of Article 16.3. 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 thus confirms that the drafters did not intend to include actions or inactions by judicial entities within the scope of Article 16.2.1(a).

101. The United States further claims that the object and purpose of the CAFTA-DR reinforces its interpretation.[63] The United States quotes selectively from one of the twenty paragraphs in the Preamble of the CAFTA. The paragraph states in full:

> **PROTECT**, enhance, and enforce basic workers' rights and strengthen their cooperation on labor matters;

102. It is particularly noteworthy that the United States chose to ignore the last part of the paragraph that refers to "cooperation on labor matters". Perhaps it is an implicit recognition by the United States that its decision to suspend labor cooperation with Guatemala under the Action Plan and to initiate these proceedings is contrary to the objective of the CAFTA-DR to which it refers. If the United States wishes to give full meaning to the CAFTA-DR's objective, it should terminate this dispute and resume cooperation with Guatemala under the Action Plan.

103. In any event, recognizing the limited scope of Article 16.2.1(a) is not only faithful to the text of the treaty, it is consistent with its object and purpose, including the paragraph in the Preamble cited by the United States. Article 16.2.1(a) would still be applicable with respect to statutes or regulations that are enforceable by action of the executive body. Moreover, arbitration proceedings under Article 16.2.1(a) are but one of the mechanisms established in Chapter 16 that seek to protect, enhance, and enforce basic workers' rights and strengthen cooperation on labor matters. Some of the other provisions in Chapter 16 relate specifically to matters involving action by the judicial branch.[64] All of these provisions would apply in parallel to Article 16.2.1(a) and would contribute to the objective to which the United States refers.

104. The United States' position is based on the incorrect premise that the CAFTA-DR is a labor

[59] U.S. Rebuttal Submission, para. 41.
[60] U.S. Rebuttal Submission, para. 42.
[61] Guatemala's Initial Written Submission, para. 144.
[62] U.S. Rebuttal Submission, para. 43. (emphasis omitted)
[63] U.S. Rebuttal Submission, para. 44.
[64] See, for example, Article 16.3.

agreement and that enforcement of labor standards through Article 16.2.1(a) is the exclusive means of improving labor standards. The CAFTA-DR is a trade agreement. The objectives of the CAFTA-DR extend beyond the improvement of labor standards. While improving labor standards is an objective of the CAFTA-DR, it is a limited objective as would be expected given that the CAFTA-DR is a trade agreement and not a labor agreement. And Chapter 16 of the CAFTA-DR sets out a number of mechanisms to improve labor standards that do not involve wasteful litigation.

105. The United States additionally submits that adoption of Guatemala's interpretation "would result in outcomes that cannot be reconciled with the text of Article 16.2.1(a)".[65] There is no contradiction between the interpretation put forward by Guatemala and the text of Article 16.2.1(a). On the contrary, the interpretation put forward by Guatemala gives full effect to the term "labor laws" in Article 16.2.1(a) as expressly defined by the drafters in Article 16.8. By contrast, the interpretation put forward by the United States conveniently ignores the definitions in Article 16.8. The fact that the correct interpretation of Article 16.2.1(a), in the light of the definitions of Article 16.8, yields an outcome that does not suit the United States is completely irrelevant. The correct interpretation of Article 16.2.1(a) is one that faithfully reflects the text, context and object and purpose in accordance with Article 31 of the Vienna Convention on the Law of Treaties, and is not one that results in the outcome preferred by the United States.

106. Finally, the United States incorrectly asserts that Guatemala does not dispute that all labor laws are enforceable by its executive body.[66] The fact that a labor law may generally be enforceable by the executive branch does not necessarily mean that all aspects of the law's enforcement fall within the scope of Article 16.2.1(a). As Guatemala has explained in detail in the preceding paragraphs, the term "labor laws" in Article 16.2.1(a), read in the light of the definitions in Article 16.8, includes only the application of provisions involving action by the executive branch of the Guatemalan Government and excludes provisions involving action or inaction by other branches of the Guatemalan Government, such as the Judiciary and the Public Ministry.

B. THE UNITED STATES' INTERPRETATION IMPROPERLY READS OUT THE REQUIREMENT THAT THERE BE A "SUSTAINED OR RECURRING COURSE OF ACTION OR INACTION"

107. Guatemala's position is that "a sustained or recurring course of action or inaction requires continuous or repetitive conduct denoting observable consistency. The recurring or sustained course of action or inaction implies a composite obligation on the relevant party which occurs only after a series of acts or inactions take place establishing a pattern as opposed to isolated individual unrelated acts as such. Ultimately, Article 16.2.1(a) is intended to capture a deliberate policy of action or inaction adopted by the relevant party.[67]

108. Moreover, Article 16.2.1(a) must be read together with 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.

109. As the text quoted above shows, Article 16.2.1(b) includes a cross-reference to Article 16.2.1(a). It provides specific guidance on the intended meaning of the terms "course of action or

[65] U.S. Rebuttal Submission, para. 45.
[66] U.S. Rebuttal Submission, para. 37.
[67] See Guatemala's Initial Written Submission, paras. 129-135.

inaction" by specifying 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". In essence, Article 16.2.1(b) makes clear that Article 16.2.1(a) does not set out a strict liability standard. It reinforces the notion that isolated instances of failure to enforce do not give rise to a violation of Article 16.2.1(a). Rather, Article 16.2.1(b) clarifies that Article 16.2.1(a) establishes a reasonableness standard. To succeed under Article 16.2.1(a), the complaining Party must establish that the failure to enforce involves an unreasonable exercise of discretion or is not the result of a bona fide decision regarding the allocation of resources.

110. By denying the import of Article 16.2.1(b), the United States is brazenly trying to renegotiate the CAFTA-DR. Article 16.2.1(b) reflects the precise mandate given to U.S. negotiators at the time CAFTA-DR was being negotiated. The negotiating mandate for the CAFTA-DR was provided in the Bipartisan Trade Promotion Authority Act of 2002. The Act specifically provided that the negotiating objectives with respect to labor included:

> …to recognize that parties to a trade agreement retain 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 or environmental matters determined to have higher priorities, and to recognize that a country is effectively enforcing its laws if 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, and no retaliation may be authorized based on the exercise of these rights or the right to establish domestic labor standards and levels of environmental protection;[68]

111. As the Panel will no doubt have noted, practically identical language was incorporated in Article 16.2.1(b) of the CAFTA-DR. It is rather ironic that the United States is now trying to avoid language that U.S. negotiators included in the CAFTA-DR by mandate of the U.S. Congress.

112. The explanation lies in the change that occurred in U.S. negotiating objectives subsequent to CAFTA-DR. In May 2007, the U.S. Congress, under a Democratic majority, worked with the Bush Administration to develop the "New Trade Policy with America."[69] The new mandate instructed U.S. negotiators to abandon the U.S. government's position on discretion and allocation of resources and instead provided that discretion and budget priorities could not be justification for patterns of action or inaction.[70]

113. The fact that the U.S. Congress saw the need to provide new instructions to U.S. negotiators confirms that, until 2007, free trade agreements negotiated by the United States, including the CAFTA-DR, were not intended to apply a strict liability standard to the enforcement of labor law. Instead, Article 16.2.1(a) and similar provisions in other agreements were intended to address situations where there was manifest culpability or a deliberate policy, and in which the action or inaction was not the result of the exercise of discretion or the need to prioritize in allocating resources. It also reveals what is the true intention of the United States in these proceedings. The United States is improperly trying to amend unilaterally and ex-post Chapter 16 of the CAFTA-DR to reflect the negotiating mandate adopted after the CAFTA-DR had been concluded.

114. Furthermore, contrary to the United States' allegation, Guatemala is not attempting to import the requirements of Article 16.2.2 into Article 16.2.1(a), collapsing the two provisions in a way that renders the obligation imposed by Article 16.2.1(a) redundant and without effect.[71] Guatemala only seeks to show that an encouragement for trade or investment as stipulated in Article 16.2.2 implies a deliberate action or inaction on the part of a government. This does not in any way render Article 16.2.1(a) redundant. Rather, Articles Article 16.2.1(a) and 16.2.2 complement each other.

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[68] 19 U.S. Code § 3802.
[69] See P.C. Albertson, "The Evolution of Labor Provisions in U.S. Free Trade Agreements: Lessons Learned and Remaining Questions", (2010) *Stanford Law and Policy Review* 493 (Exhibit GTM-51).
[70] Ibid.
[71] U.S. Rebuttal Submission, para. 53.

C. IN A MANNER AFFECTING TRADE BETWEEN THE PARTIES

115. Guatemala has explained that 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 consequence is to "affect [] trade between the Parties". The term "affect" means to "[h]ave an effect on". 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.[72]

116. The United States asserts that Guatemala does not provide evidence or argumentation that would support the proposition that the phrase "in a manner affecting trade" refers to a deliberate government policy.[73] The third clause of Article 16.2.1(a) is linked back to the preceding clause, which refers to a "sustained or recurring course of action or inaction". As Guatemala has explained, this phrase denotes the existence of a deliberate policy of action or inaction. The third clause of Article 16.2.1 describes the intended consequences of such policy.

117. Next, the United States argues that "the plain meaning of the term 'manner' is a 'way of doing something,' or a form of conduct".[74] The United States improperly reads the term "manner" in isolation. The term "manner" must be read in the context of the entire clause and in light of the other clauses of Article 16.2.1(a) to which it is linked. The United States' understanding of the third clause as referring to "a form of conduct" simply cannot be reconciled with the preceding clauses of Article 16.2.1(a). Indeed, the preceding clauses described the conduct that is covered by Article 16.2.1(a), whereas the third clause describes the consequences. By making the third clause about the "form of conduct", the United States is effectively emptying the last clause of meaning.

118. The United States further submits that Guatemala errs in arguing that the phrase "in a manner affecting trade" requires a relationship of cause and effect.[75] Guatemala's interpretation faithfully reflects the text of the third clause of Article 16.2.1(a). By its plain terms, Article 16.2.1(a) requires that the alleged course of action or inaction "affect" trade between the Parties. This can only be interpreted to mean that the course of action or inaction has an effect of trade. In other words, there must have been a trade effect and the cause of the trade effect must be the course of action or inaction established by the complaining party. Article 16.2.1(a) was never intended to capture mere happenstance.

119. The United States additionally notes that "Guatemala disagrees with the U.S. view … that a failure to enforce labor laws may 'affect' such cross-border economic activity with the meaning of Article 16.2.1(a) by changing or influencing the conditions of competition between trade goods".[76] The United States goes on to state that "[i]nterpreting Article 16.2.1(a) as prohibiting a Party from influencing the conditions of competition between the CAFTA-DR Parties through a failure to effectively enforce its labor laws is consistent with this objective of promoting fair competition".[77] In this statement, the United States actually supports a point that Guatemala has been making: the statement recognizes that the purpose of Article 16.2.1(a) is to prevent Parties from deliberately failing to enforce their labor laws in order to gain an unfair competitive advantage. The United States' statement essentially acknowledges that Guatemala is right on this point.

120. The United States provides some examples of situations of the type of "competition" to which it refers and tries to tie these examples to the standard set out in Article 16.2.1(a). In particular, the United States asserts that:

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[72] Guatemala's Initial Written Submission, para. 136.
[73] U.S. Rebuttal Submission, para. 57.
[74] U.S. Rebuttal Submission, para. 58.
[75] U.S. Rebuttal Submission, para. 59.
[76] U.S. Rebuttal Submission, para. 64.
[77] U.S. Rebuttal Submission, para. 64.

> When labor laws are not enforced and producers are able to incur decreased labor costs—whether, for example, through avoidance of collective bargaining or the payment of less than minimum wage—the conditions of competition between these producers and their competitors in the CAFTA-DR region have been altered. And where an entity's ability to benefit from the reduced labor costs is part of a sustained or recurring course of action or inaction with respect to labor law enforcement, the effect on the conditions of competition between the CAFTA-DR Parties results in a breach of Article 16.2.1(a).[78]

121. There are a number of helpful acknowledgements in this statement. First, the United States acknowledges that the complaining party must demonstrate that alleged course of action or inaction has had an "effect" on trade between the Parties. As Guatemala will show in subsequent sections of this submission, the United States has not provided any evidence that the isolated instances of inaction that underlie its complaint had an effect on trade between the Parties. The United States' argumentation on trade effects is based exclusively on hyperbole and speculation.

122. Second, in the statement, the United States provides concrete examples of the kind of analysis that could be undertaken to support an allegation of trade effects. For example, the United States could have sought to demonstrate that the alleged inaction allowed the specific firms targeted in the U.S. complaint to lower their labor costs and that these lower labor costs gave them an advantage with respect to competitors. The United States has provided no such evidence. In fact, the United States has not provided any evidence that producer "incur[ed] decreased labor costs" or "benefit[ed] from the reduced labor costs". Nor has the United States provided any evidence to support its contention that the "conditions of competition" between the firms it targets and their competitors have been affected.

123. Finally, the United States rejects Guatemala's interpretation that the terms "between the Parties" refers to trade between all CAFTA-DR Parties. The United States asserts that Guatemala is "wrong" but tellingly avoids discussing the plain language of the provision.[79] The United States provides no explanation as to why the negotiators used the terms "between the Parties" rather than "between two Parties". The fact is that the terms "between the Parties" can only be interpreted as referring to all the CAFTA-DR Parties and the United States' suggestion that it refers to at least two Parties cannot be reconciled with the specific language chosen by the negotiators. The United States is again attempting to ignore the plain language of Article 16.2.1(a) because it does not suit its needs.

IV. THE UNITED STATES' CLAIM RELATING TO COURT ORDERS

A. INTRODUCTION

124. As the Panel examines the United States' claim, it is useful for it to consider, first, what the United States is *not* alleging in this case.

125. In every instance in which the United States claims lack of enforcement, the United States acknowledges that the workers had access to the Guatemalan labor courts and were able to exercise their rights. The United States has not alleged, nor has it submitted any evidence to suggest, that the workers were denied access to the Guatemalan labor courts, were not able to fully exercise their rights, or were not afforded due process.

126. Moreover, in many of the instances cited by the United States, the workers obtained favorable

[78] U.S. Rebuttal Submission, para. 65.
[79] U.S. Rebuttal Submission, para. 68.

rulings from the Guatemalan labor courts. The United States also recognizes that, where the employers failed to comply with the court orders, the Guatemalan labor courts imposed monetary fines in accordance with Guatemalan law.

127. The United States' claim is based on the alleged failure of the Guatemalan labor courts to impose additional monetary fines and the alleged failure by the Public Ministry to pursue criminal penalties in addition to the monetary fines. The United States claim also seeks to have Guatemala condemned because the Guatemalan authorities did not pursue further action against employers after the workers had voluntarily reached a settlement and waived their right to reinstatement and to any further monetary claims.

128. As Guatemala explains below, the United States is asking this Panel to apply a standard that is much higher than that foreseen by Article 16.2.1(a) and that the United States itself would fail to meet.

B. THE UNITED STATES' INCORRECTLY ARGUES THAT ACTION OR INACTION BY GUATEMALA'S COURTS AND PUBLIC MINISTRY FALLS WITHIN THE SCOPE OF ARTICLE 16.2.1(A)

129. Guatemala explained in detail in section III.A that, correctly interpreted, Article 16.2.1(a) does not cover the actions or inactions of the Guatemalan labor courts or Public Ministry because neither belongs to Guatemala's Executive branch. Guatemala also addressed, in section III.A, the flawed arguments put forward by the United States in its Rebuttal Submission. Guatemala will not repeat the arguments here.

130. The United States' claim is entirely based on the alleged inaction of the Guatemalan labor courts and Public Ministry. The United States, however, does not contest that the Guatemalan labor courts and Public Ministry are not part of Guatemala's executive body. Because the Guatemalan labor courts and Public Ministry are not part of the executive body, their alleged actions or inactions do not fall within the scope of Article 16.2.1(a) of the CAFTA-DR. As a result, the Panel must dismiss the United States' claim in its entirety.

131. Guatemala nevertheless proceeds to examine the United States' arguments below on the *arguendo* assumption that the Panel disagrees with Guatemala's interpretation of Article 16.2.1(a).

a) The United States Has Failed to Demonstrate Inaction by Guatemala's Labor Courts and Public Ministry

132. As there is a significant amount of contestation in this case about the facts, Guatemala begins by recalling the applicable rules of the burden of proof. 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.

133. 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.[80]

[80] Appellate Body Report, *Japan – Apples*, para. 157.

134. In the case of this particular claim, the above implies that the United States must provide positive and credible evidence to establish that:

(i) there was an obligation on the part of the Guatemalan labor courts and the Public Ministry to take the specific action identified by the United States.

(ii) the action was not taken; and

(iii) the failure to take action is directly and exclusively attributable to the Guatemalan labor courts or the Public Ministry.

In examining these elements the Panel must also consider whether there were any factors that precluded the Guatemalan labor courts or Public Ministry from taking action or that otherwise excused the lack of action. It must also consider whether the lack of action was the result of the proper exercise of discretion or was not the result of bona fide decisions made by the Guatemalan Government with respect to the allocation of resources.[81]

135. The United States seems to believe that by repeatedly stating in its Rebuttal Submission that Guatemala has failed to rebut its *prima facie* case, it has actually made such a case. Repeating this statement does not substitute for providing positive and credible evidence. The United States' allegations are based on redacted documents and anonymous witness statements that are inherently unreliable and therefore lack any probative value and credibility. The United States has failed to make a *prima facie* case and its allegations must be dismissed by the Panel on this basis alone.

136. Nonetheless, out of an abundance of caution, Guatemala reviews below each of the allegations made by the United States. In doing so, Guatemala will not tire the Panel by identifying each redacted document and anonymous statement submitted by the United States that lacks probative value and which raises due process concerns. Guatemala however wishes to make it clear for the record that it considers that all such documents lack probative value and that reliance on any such document will violate Guatemala's due process rights.

137. Guatemala has made strenuous efforts to identify the court proceedings to which the United States refers and to provide a complete picture of those proceedings to this Panel. While it has been able to locate some of the relevant case documents for ITM, NEPORSA and ODIVESA, it has not been able to identify and locate the case files for the other firms. The fact that Guatemala presents some court documents and not others should not be misunderstood. It does not mean Guatemala agrees with the allegations made by the United States nor does it mean that the court records would not have contradicted the United States' allegations. Rather, it simply reflects the fact that, with the United States failing to provide the identifying information, it has not been possible for Guatemala to identify and locate all of the documents of each of the proceedings.

138. Finally, Guatemala will not address each unsubstantiated allegation made by the United States in its bid to make what is a completely unfounded claim. Rather, for the sake of efficiency, Guatemala focuses below on the key facts. This does not mean that it accepts the United States' other allegations, be they legal or factual in nature.

i. ITM

139. In its Rebuttal Submission, the United States alleges that 14 stevedores who had been wrongfully dismissed had not been reinstated. Guatemala has obtained court documents for 15 employees which could correspond to the individuals mentioned by the United States. The court documents obtained by Guatemala and submitted as Exhibit GTM-52_ demonstrate that, in all cases, the employees were not reinstated as a result of inaction on the part of the employees themselves and not the Guatemalan labor courts.

[81] See Article 16.2.1(b) of the CAFTA-DR.

140. The following table summarizes the information contained in Exhibit GTM-52:[82]

No.	Status
1	Employee failed to show up for reinstatement
2	Employee failed to show up for reinstatement. (Employee again failed to show up for reinstatement in 2014).
3	Employee voluntarily withdrew request for reinstatement.
4	Employee failed to show up for reinstatement. (The labor courts gave the employee 3 opportunities to show up, and he failed to show up each time.) Referral to the Public Ministry was not possible because the employee failed to provide evidence that the individual against whom the investigation was requested was a legal representative of the employer.
5	Court could not carry out reinstatement because the employee had provided the wrong address of the employer.
6	Employee failed to show up for reinstatement.
7	Court could not carry out reinstatement because the employee failed to show up and provided the wrong address of the employer.
8	Employee did not show up for reinstatement.
9	Employee did not show up for reinstatement.
10	Employee did not show up for reinstatement.
11	Employee did not show up for reinstatement.
12	Employee did not show up for reinstatement.
13	Employee did not show up for reinstatement.
14	Employee did not show up for reinstatement.
15	Court could not carry out reinstatement because employee provided wrong address of the employer.

141. The table above shows that in the majority of cases, the reinstatement orders could not be executed because the employees did not show up for the reinstatement. In another case the employee voluntarily withdrew the reinstatement request and in two other cases the employees failed to provide information to the court that was necessary to execute the reinstatement. Thus, the reinstatements did not take place due to the actions of the employees and not to the inaction of the Guatemalan labor courts. Furthermore, given that the employees did not pursue their reinstatements, there was no basis for the Public Ministry to take criminal action against ITM.

ii. NEPORSA

142. The United States' claim that there has been inaction with respect to 40 stevedores allegedly wrongfully dismissed by NEPORSA is also contradicted by the facts. Guatemala has been able to

[82] A more detailed table that includes confidential information is provided in Exhibit GTM-55.

locate 25 cases that appear to correspond to the individuals that form part of the United States' complaint. The case documents contained in Exhibit GTM-54_indicate that the labor court could not execute the reinstatement of these individuals because they failed to show up for the reinstatement or failed to appear in court.

143. The table below summarizes the information provided in Exhibit GTM-54.[83]

No.	Status
1	Employee did not show up for reinstatement.
2	Employee did not show up for reinstatement.
3	Proceedings could not move forward because employee failed to appear before the court.
4	Proceedings could not move forward because employee failed to appear before the court.
5	Proceedings could not move forward because employee failed to appear before the court.
6	Proceedings could not move forward because employee failed to appear before the court.
7	Proceedings could not move forward because employee failed to appear before the court.
8	Proceedings could not move forward because employee failed to appear before the court.
9	Proceedings could not move forward because employee failed to appear before the court.
10	Proceedings could not move forward because employee failed to appear before the court.
11	Proceedings could not move forward because employee failed to appear before the court.
12	Proceedings could not move forward because employee failed to appear before the court.
13	Proceedings could not move forward because employee failed to appear before the court.
14	Proceedings could not move forward because employee failed to appear before the court.
15	Proceedings could not move forward because employee failed to appear before the court.
16	Proceedings could not move forward because employee failed to appear before the court.
17	Proceedings could not move forward because employee failed to appear before the court.
18	Proceedings could not move forward because employee failed to appear before the court.
19	Proceedings could not move forward because employee failed to appear before the court.
20	Proceedings could not move forward because employee failed to

[83] A more detailed table that includes confidential information is provided in Exhibit GTM-55.

	appear before the court.
21	Proceedings could not move forward because employee failed to appear before the court.
22	Proceedings could not move forward because employee failed to appear before the court.
23	Proceedings could not move forward because employee failed to appear before the court.
24	Proceedings could not move forward because employee failed to appear before the court.
25	Proceedings could not move forward because employee failed to appear before the court.

144. Hence, the evidence submitted by Guatemala shows that the reinstatement could not proceed because the employees failed to appear when the reinstatement was going to be executed or failed to appear in court. Thus, any failure to reinstate cannot be attributed to inaction by the Guatemalan labor courts. Furthermore, given that the employees did not pursue their reinstatements, there was no basis for the Public Ministry to take criminal action against NEPORSA.

iii. ODIVESA

145. As regards ODIVESA, the United States asserts that there has been inaction with respect to reinstatement proceedings involving 11 stevedores. Guatemala's records search yielded 13 cases which would appear to correspond to the individuals that form part of the United States' complaint. The case documents contained in Exhibit GTM-53 indicate that the reinstatement orders were quashed on appeal and, in some cases, that the employees themselves requested termination of the proceedings.

146. The table below summarizes the information contained in Exhibit GTM-53.[84]

No.	Status
1	The Appeals court invalidated the reinstatement order. The Appeals court's ruling was affirmed by the Guatemalan Constitutional Court. Consequently, the labor proceedings were terminated.
2	The Appeals court invalidated the reinstatement order. The Appeals court's ruling was affirmed by the Guatemalan Constitutional Court. Consequently, the labor proceedings were terminated.
3	The Appeals court invalidated the reinstatement order. The Appeals court's ruling was affirmed by the Guatemalan Constitutional Court. Consequently, the labor proceedings were terminated.
4	The Appeals court invalidated the reinstatement order. The Appeals court's ruling was affirmed by the Guatemalan Constitutional Court. Consequently, the labor proceedings were terminated.
5	The Appeals court invalidated the reinstatement order.
6	The Appeals court invalidated the reinstatement order. The Appeals court's ruling was affirmed by the Guatemalan Constitutional Court. Consequently, the labor proceedings

[84] A more detailed table that includes confidential information is provided in Exhibit GTM-55.

	were terminated.
7	The Appeals court invalidated the reinstatement order. The Appeals court's ruling was affirmed by the Guatemalan Constitutional Court. Consequently, the labor proceedings were terminated.
8	The Appeals court invalidated the reinstatement order. Consequently, the labor proceedings were terminated. The employee subsequently submitted a request to terminate the proceedings.
9	The Appeals court invalidated the reinstatement order. Consequently, the labor proceedings were terminated.
10	The Appeals court invalidated the reinstatement order. The Appeals court's ruling was affirmed by the Guatemalan Constitutional Court. Consequently, the labor proceedings were terminated
11	The Appeals court invalidated the reinstatement order. Consequently, the labor proceedings were terminated.
12	The Appeals court invalidated the reinstatement order. Consequently, the labor proceedings were terminated. The employee subsequently submitted a request to terminate the proceedings.
13	The Appeals court invalidated the reinstatement order.

147. In sum, the evidence presented by Guatemala demonstrates that the reinstatement orders were quashed on appeal and that, in some cases, the employees requested termination of the reinstatement proceedings. Because the reinstatement orders were invalidated on appeal and/or the employee requested termination of the proceedings, there is no basis for the United States' claim of inaction both with respect to the labor court and the Public Ministry.

iv. Fribo

148. The United States' allegation against Fribo is a case of the United States wanting the Guatemalan labor courts and Public Ministry to continue "beating a dead horse". This allegation reveals the utter lack of reasonableness of the United States' case.

149. In its Rebuttal Submission, the United States acknowledges that the employees of Fribo reached a voluntary settlement and abandoned their claims for reinstatement and for any other monetary payments.[85] In the light of the fact that the employees had voluntarily settled their claims, there was simply no further reason for the Guatemalan labor courts to impose additional fines or pursue criminal penalties.

150. Furthermore the decision not to impose additional fines or pursue criminal penalties once employees have voluntarily settled their claims is entirely consistent with a policy of prioritizing the allocation of resources and with a reasonable exercise of discretion, both of which are relevant factors that this Panel must consider in accordance with Article 16.2.1(b):

[85] U.S. Rebuttal Submission, paras. 96 and 97.

> 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.

The United States has not provided any evidence that the manner of proceeding of the Guatemalan labor courts and the Public Ministry with respect to Fribo was an unreasonable exercise of discretion or did not result from a *bona fide* decision regarding the allocation of resources. Consequently, in accordance with Article 16.2.1(b), this Panel must find that Guatemala is in compliance with Article 16.2.1(a).

151. Perhaps because it is aware of how unreasonable its position is, the United States suddenly asserts that the Guatemalan Labor Ministry has allegedly failed to take corrective action against Fribo.[86] Yet, the United States' claim from the beginning of this case concerned the alleged inaction of the Guatemalan labor courts and Public Ministry.[87] The United States is improperly seeking to expand the scope of its claim in its Rebuttal Submission. In any event, the allegation of the United States is unsubstantiated. The only support that the United States provides is a reference to a general provision in the Guatemalan Labor Code.[88]

152. The United States also accuses Guatemalan labor inspectors of having advised workers to accept less money than they were entitled to receive. [89] The United States' accusation is unfounded and unfair.

153. In its Rebuttal Submission the United States refers to three anonymous statements, one allegedly provided jointly by 5 alleged employees of Fribo (K, L, M, N, and O)[90], and the other two allegedly provided individually by P and R.[91] Leaving aside their anonymous nature and the other serious flaws in these statements, Guatemala draws the Panel's attention to the fact that the United States is not alleging or providing any evidence that the inspectors compelled the workers to accept the settlement against their will. Even if taken at face value, the statements merely indicate that the inspectors warned the employees of the imminent closure of the company. Guatemala also has serious concerns about the probative value and credibility of the statements. For starters, Guatemala has not even been able to confirm that the persons providing the statements were employees of Fribo. Nor has Guatemala been able to cross-examine or otherwise evaluate the credibility of the individuals providing the statements. Not only do the statements fail to identify the employee providing the statement, they also fail to identify the inspectors who allegedly made the comments to the employees. If the inspectors had been identified, Guatemala could at least try to contact the inspectors in order to verify whether the allegations are true.[92] Yet, the United States has deliberately obstructed Guatemala from even doing this. There are other reasons to question the reliability of the statements. Exhibit USA-11 is a joint statement of five different individuals who have exactly the same recollection of events dating back more than 5 years. Guatemala could point to other reasons to doubt the reliability of the statements, but will not do so for the sake of brevity.

154. The United States also refers to an anonymous statement by a so-called "Guatemalan labor

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[86] U.S. Rebuttal Submission, para. 97.
[87] See, for example, U.S. Initial Written Submission, para. 63.
[88] U.S. Rebuttal Submission, para. 97. (referring to the first paragraph of Article 278 of the Guatemalan Labor Code)
[89] U.S. Rebuttal Submission, para. 98.
[90] Exhibit USA-11.
[91] Exhibits USA-184 and 185.
[92] In what can only be described as an insulting and inconsiderate remark, R refers to the inspector as the "fat inspector from the capital". (Exhibit USA-185).

attorney" who claims labor inspectors led workers to believe that it is better to settle.[93] Because the so-called labor lawyer who provided the statement has not been identified, Guatemala has not been able to cross-examine him/her or to otherwise confirm the veracity of his/her statement or his/her credibility. Moreover, the so-called labor lawyer who provided the anonymous statement is speaking from second-hand knowledge. It is also a general statement. The so-called labor lawyer does not refer specifically to Fribo. Nor does the statement include evidence to substantiate the allegations. A document containing unsubstantiated allegations by an anonymous witness simply cannot be given any probative value in proceedings that are supposed to be based on the rule of law. Even if one were to take the statements submitted by the United States at face value, none indicates that the labor inspectors compelled the workers to accept the settlements against their will.

155. The fact is that plaintiffs, be they employees or other parties, regularly settle for less than the amount claimed or the amount awarded by the trial court. An appeal always brings with it risks that the trial court award will be overturned. There are also risks involved in the collection of awards. These risks are compounded when, as was the case with Fribo, the company against which the claims must be collected has gone out of business. That plaintiffs voluntarily settle for less than the amount awarded by the trial court is common not only in Guatemala, but also in the United States.[94]

156. It is completely unreasonable for the United States to expect this Panel to make a finding against Guatemala under Article 16.2.1(a) because the labor courts and Public Ministry did not pursue further action after the employees had reached a voluntarily settlement and abandoned their claims.

v. RTM

157. Guatemala will not repeat the arguments about the lack of probative value of the exhibits provided by the United States in support of its allegation nor the due process concerns that it outlined in its Initial Written Submission.[95] It will only address the United States' assertion that Guatemala failed to provide an explanation with respect to the points it raised about the report of Mr. Argueta.

158. Guatemala invites the Panel to review the table on page 3 of Mr. Argueta's report and, in particular, the last three columns. As the Panel will note, for each of the four cases, Mr. Argueta indicated that imposing additional fines and referring the matter to criminal prosecution were "not applicable". The distinction between a "no" response and a "not applicable" response is important. "Non applicable" means that the conditions that would give rise to the increase in the fine and the referral for prosecution had not been met and thus there would not have been a basis for the labor court to take such actions. Mr. Argueta later confirms that the labor courts did not have a legal basis to impose additional fines or refer the matter for criminal prosecution. He states that reinstatement had not been validly attempted and thus the employer could not legally be deemed to be in a situation of disobedience ("*aún no se había intentado válidamente la ejecución de la reinstalación por lo tanto no constan los elementos de una desobediencia del patrono*".[96] Therefore, the United States' own witness contradicts its position that the Guatemalan labor court and Public Ministry were under a legal obligation to increase the fines or pursue criminal prosecution in the case of RTM. If no such legal obligation existed, there is no basis for a claim of inaction under Article 16.2.1(a).

vi. Mackditex

159. In the case of Mackditex, the United States asserts that 17 employees have not been reinstated. However, the United States acknowledges that these workers received a payment, but denies that such payment constituted a legal settlement.[97] Yet, what other reason could there have

[93] U.S. Rebuttal Submission, para. 98 (referring to Exhibit USA-164).
[94] See, for example, United States v. City of Miami, Fla., 614 F.2d 1322, 1330 (5th Cir. 1980) on reh'g, 664 F.2d 435 (5th Cir. 1981).
[95] Guatemala invites the Panel to review paragraphs 236-237 of its Initial Written Submission.
[96] Exhibit USA-63, p. 5.
[97] U.S. Rebuttal Submission, para. 103.

been for the company to make the payment other than to reach a settlement of their legal claims? Companies do not go around making gratuitous payments. The United States also points out that the payment was made by a company other than Mackditex.[98] The source of the payment is irrelevant. What matters is that the employees voluntarily accepted the payment and abandoned their claims. In such circumstances, there is no basis for the Guatemalan labor courts and the Public Ministry to have taken action.

160. Guatemala notes that the United States has also acknowledged that there are problems with respect to the identities of the workers allegedly providing the statement. A statement that the United States initially claimed was provided by W and Z now apparently belongs to X and Z. Similarly, the United States admits the internal contradictions in the statements of W and X who, in their statement, admit to having been employed at Mackditex through 2012.[99] The United States fails to explain this contradiction away. As a matter of logic, a worker cannot consider him/herself employed at Mackditex and at the same time claim to be seeking reinstatement. These problems and contradictions bring to bear the serious risks that arise from the use of anonymous statements and from denying Guatemala an opportunity to fully investigate the veracity of the statements and the credibility of the persons providing the statements.

vii. Alianza

161. The United States' allegations about Alianza are extraordinary in many respects. First, in an astonishing mischaracterization of the burden of proof, the United States asserts that "Guatemala has not presented any evidence to show that it has taken effective enforcement action regarding the Alianza company".[100] However, the burden of proof rests squarely on the United States and not on Guatemala, as Rule 65 of the MRP makes absolutely clear. Guatemala does not have to demonstrate effective enforcement action. Rather, the United States has the onus of demonstrating that Guatemala has failed to effectively enforce its labor laws through a sustained or recurring course of inaction. And it is the United States' burden to demonstrate each element of its claim.

162. The United States next asserts that it "has presented five declarations in which individuals have attested that many Alianza workers accepted settlements for less than what they were owed from the company because they believed the Guatemalan authorities would not take action or because they could not afford to wait any longer for action".[101] In this statement, the United States acknowledges that it does not have any direct evidence with respect to the other 25 workers that it recognizes accepted a settlement. Moreover, the United States has not provided any evidence about the precise amount allegedly owed to each worker and the amount received. All the United States offers is the unsubstantiated, unconfirmed allegations of five anonymous individuals who seem to have a vested interest in seeing Guatemala condemned in these proceedings. Thus, the United States is offering hearsay testimony of anonymous witnesses who claim to have knowledge of other individuals' beliefs as to what the Guatemalan authorities would or would not do. This is far from sufficient to satisfy the United States' burden of proof.

163. Even if such statements had any probative value, the workers' belief as to what the Guatemalan authorities would or would not do cannot constitute evidence of inaction by the Guatemalan courts. Article 16.2.1(a) does not allow claims on the basis of an individual's belief of the conduct that would or would not be pursued by the authorities of a Party, but rather only allows claims on the basis of evidence of actual conduct by such authorities.

164. The United States additionally alleges inaction by the Guatemalan labor courts despite the fact that the workers had voluntarily waived their right to be reinstated. This is taking Article 16.2.1(a) to the extreme.

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[98] U.S. Rebuttal Submission, para. 103.
[99] U.S. Rebuttal Submission,
[100] U.S. Rebuttal Submission, para. 105.
[101] U.S. Rebuttal Submission, para. 106.

165. Employees in many jurisdictions regularly settle with employers and sometimes accept payments that are below the amount that they may have been owed. Courts do not interfere with these decisions of the employees.

166. The United States is seeking to have this Panel apply a standard that its courts do not even apply. A U.S. court will not interfere with a settlement between an employer and an employee even if it considers that the employee received less money than it was owed.[102]

167. The United States additionally claims that there are 3 workers who have continued to pursue their claims. The United States seeks to support this assertion by providing the anonymous statement of BB and CC. However this statement does not say that 3 workers have continued to pursue their claims.

168. Therefore, it is uncontested that the employees of Alianza reached a voluntary settlement and waived their right to reinstatement. Furthermore, the voluntary settlements covered back wages and other payments that they may have been due. Consequently, there was no basis for the Guatemalan labor courts or Public Ministry to take any further action. Further, as Guatemala noted above, a decision not to impose additional fines or pursue criminal penalties once employees have voluntarily settled their claims is entirely consistent with a policy of prioritizing the allocation of resources and with a reasonable exercise of discretion, both of which are relevant factors that this Panel must consider under Article 16.2.1(b).

viii. Avandia

169. The United States fails in its attempt to explain the flaws in the "evidence" that it has presented in relation to Avandia. In fact, once again, the United States' allegations are contradicted by its own "evidence". The United States has submitted prepared questionnaire responses by a legal advisor from the Trade Federation of Workers of the Food, Agribusiness and Similar Industries[103] in which this individual acknowledges that Avandia had ceased to exist.[104] While the United States complains of inaction, it never explains what steps precisely the Guatemalan labor courts should have taken in such circumstances. As the Trade Federation's legal adviser describes it, the execution of court awards in situation where a company ceases to exist is "complex"[105] and poses significant obstacles to the courts

ix. Solesa

170. The United States claims that Guatemala has not taken action to effectively enforce its labor laws with respect to 23 workers of Solesa. The United States' claim is premised on there being reinstatement orders for each of the 23 workers. Consistent with applicable rules on the burden of proof, to succeed in its claim the United States, at the very least, has to establish that valid reinstatement orders were issued with respect to each of the 23 workers. The United States has not met this burden.

171. What evidence has the United States presented as to the existence of the 23 reinstatement orders? The United States has submitted nothing that establishes the existence of the reinstatement orders for the 23 employees, as Guatemala explains below.

a. ILO Complaint: The United States submits a complaint apparently filed by a labor union with the International Labor Organization. The complaint does not include the reinstatement orders nor does it provide any evidence to substantiate the allegations. The United States has not proffered any evidence that the allegations in the complaint

[102] See, for example, United States v. City of Miami, Fla., 614 F.2d 1322, 1330 (5th Cir. 1980) on reh'g, 664 F.2d 435 (5th Cir. 1981).
[103] The United States never explains why a legal advisor of a trade federation of the food and agriculture sector is advising employees in an apparel manufacturing company.
[104] Exhibit USA-169.
[105] Exhibit USA-169.

have been independently verified. Thus, the ILO complaint does not establish the existence of the 23 reinstatement orders.

b. Exhibit USA-83 would appear to contain a ruling relating to the reinstatement of a single worker. Thus, even if its inherent unreliability could be overcome, Exhibit USA-83 would at most suggest the existence of one reinstatement order.[106]

c. Exhibit USA-192 is a complaint filed by a single employee. While the complaint refers to a reinstatement order, it does not provide a copy of the reinstatement order. Thus, Exhibit USA-192 does not establish the existence of the reinstatement order, much less of 23 of them.

d. Exhibit USA-197 appears to be court ruling rejecting a single worker's request for reinstatement on grounds that the worker had already been reinstated. Hence, at most, Exhibit USA-197 could serve as evidence of the existence of one reinstatement order. Moreover, it is a reinstatement order that was duly executed and therefore cannot give rise to a claim of inaction by Guatemala's labor courts.

e. Exhibit USA-86 is a petition filed by a single unidentified individual. The petition does not include a copy of the reinstatement order. The existence of the reinstatement order is not supported or confirmed by other evidence. As a mere unsubstantiated allegation of what appears to be a party with vested interests (who, in addition, is anonymous because of the redactions), Exhibit USA-86 does not provide any evidence of the existence of a reinstatement order, much less of 23 of them.

f. Exhibit USA-87 is a ruling rejecting a request filed by an unidentified party. While the ruling refers to a "reinstallation request", there is nothing in the ruling that indicates that a reinstallation order was issued.

g. Exhibits USA-194, 195, 196 contain documents filed by the plaintiffs with the plaintiffs' own exposition of events.[107] The exhibits do not include copies of the reinstatement orders. Nor do they contain any other document that independently confirms the veracity of the exposition of events. In fact, none of the three documents specifically identifies the reinstatement order by date or by number.

172. The Panel may wish to take note of the manner in which the United States has attempted to improperly magnify the import of the evidence that it has submitted, a theme that is recurrent in these proceedings. Take Exhibit USA-197 as an example. The United States describes it as ordering the company to pay the salaries and other payments owed to workers in the plural. Yet, the fact is that Exhibit USA-197 concerns a single worker.

173. The United States has not made a *prima facie* case with respect to the 23 workers. It simply could not have made a *prima facie* case because it did not submit evidence to demonstrate that 23 reinstatement orders had been issued. The United States' claim is premised on the existence of the reinstatement orders. Given that the United States has failed to prove their existence, the United States' claim must necessarily fail.

C. THE UNITED STATES HAS FAILED TO ESTABLISH A "SUSTAINED OR RECURRING COURSE OF … INACTION"

174. In the preceding section, Guatemala demonstrated that the United States has failed to establish that there has been inaction by the Guatemalan labor courts or Public Ministry with respect to ITM, NEPORSA, ODIVESA, Fribo, RTM, Mackditex, Alianza, Avandia, and Solesa. Guatemala

[106] USA-82 would seem to refer to the same employee, but Guatemala is unable to confirm this because the identifying information is redacted.
[107] Given the redactions, Guatemala cannot confirm whether the documents were all filed the same plaintiff or by different ones.

has demonstrated that, in these cases, either: the employee failed to show up for the reinstatement order or appear before the labor court; the employees voluntarily terminated the reinstatement proceedings; the reinstatement order was quashed on appeal; the employees reached a voluntary settlement; or the United States failed to establish the existence of the reinstatement orders.

175. As the United States has failed to establish that there was inaction by the Guatemalan labor courts or the Public Ministry, by force of logic it could not have established that there is a "sustained or recurring course of … inaction". This is yet another reason why the United States' claim fails.

176. In its Initial Written Submission, Guatemala provided extensive arguments as to why, even if the United States' had succeeded in proving all of its allegations of inaction, it would not have established a "sustained or recurring course of … inaction". As the United States does not provide any new evidence to substantiate its claim that there is a "sustained or recurring course of inaction", Guatemala will not repeat the arguments it made in its Initial Written Submission. Instead, Guatemala invites the Panel to review paragraphs 273-278 of Guatemala's Initial Written Submission. Finally, Guatemala notes that, should the Panel find that there was inaction in some cases, the analysis of whether there is a "sustained or recurring course of … inaction" would have to proceed solely on the basis of the subset of specific cases on which there is affirmative finding by the Panel, and could not encompass the instances for which the United States failed to establish inaction.

D. THE UNITED STATES HAS FAILED TO ESTABLISH THAT THE ALLEGED FAILURE TO IMPOSE ADDITIONAL FINES OR PURSUE CRIMINAL PROSECUTION HAD TRADE EFFECTS WITHIN THE MEANING OF ARTICLE 16.2.1(A)

177. To the extent the United States has failed to establish a "sustained or recurring course of … inaction", there are no effects to examine under the third clause of Article 16.2.1(a) of the CAFTA-DR. This is because the only trade effects that are relevant under the third clause are the effects of the "sustained or recurring course of … inaction". Logically, if there is no "course of … inaction", there are no relevant effects.

178. Even assuming the United States had succeeded in establishing a "sustained or recurring course of … inaction", it would not have succeeded in establishing trade effects. This is because its analysis of trade effects is deficient and does not meet the requirements of Article 16.2.1(a).

179. The United States' allegation of trade effects is based exclusively on the companies having exported and the existence of imports. Neither factor is sufficient to establish that the alleged course of inaction relating to the imposition of additional fines or failure to pursue criminal prosecutions "affected trade between the Parties".

180. First, Guatemala reiterates that Article 16.2.1(a) requires an effect on trade between all CAFTA-DR Parties. The figures submitted by the United States cover only bilateral trade between Guatemala and the United States and therefore are insufficient.

181. Second, the export figures submitted by the United States are aggregate figures covering a nine-year period. The evidence submitted by the United States does not specifically indicate that the relevant companies exported to the United States when the alleged failure to impose additional fines or pursue criminal prosecutions occurred. In the absence of such evidence, it would be improper for the Panel to assume that the relevant companies exported to the United States during the relevant periods.

182. Third, even assuming for the sake of argument that the relevant companies did export to the United States during the relevant years, the data in itself does not show a trade effect. There is no basis for the United States to claim that all of these companies' exports were the effect of the alleged failure to impose additional fines or pursue criminal prosecutions.

183. In order to fulfill the requirements of Article 16.2.1(a), the United States has to establish a

specific link between the alleged inaction (alleged failure to impose additional fines or pursue criminal prosecutions) and the trade effect. If the United States intends to claim that the effect was felt in exports to the United States, it must establish such effect. It cannot simply assume there is an effect because exports were taking place. Instead, the United States has to show that the level of each company's exports (whether in volume or in price) was different in the relevant year than it otherwise would have been had the labor court imposed additional fines or the Public Ministry pursued criminal prosecution. It would also have to duly account for other factors that could have affected the exports. The United States has failed to provide any evidence specifically linking the alleged failure to impose additional fines or pursue criminal prosecution with the level of exports of the relevant companies. Consequently, the United States has failed to meet the requirements of Article 16.2.1(a).

184. The United States additionally relies on Guatemalan imports from the United States between 2006 and 2014. This approach is also insufficient under Article 16.2.1(a). The United States does not provide any evidence that the products imported from the United States competed against the products manufactured or services provided by the firms that are part of the United States' allegation. Any claim of effects must necessarily be based on the existence of competition between the imported products or services and the domestic products or services. This would include proof that Mackditex, Alianza, Avandia, Fribo and Solesa were producing for the domestic Guatemalan market. Nor does the United States provide any analysis of how the level of imports of from the United States was different than it would otherwise have been if additional fines had been imposed or criminal prosecutions had been pursued. In the absence of such evidence, it would be improper for the Panel to assume that any failure to impose additional fines or pursue criminal prosecution had an effect on imports from the United States.

185. In conclusion, the United States' claim does not meet the requirements of Article 16.2.1(a) and therefore must be rejected by the Panel in its entirety.

V. THE UNITED STATES' CLAIM RELATING TO INSPECTIONS AND PENALTIES

186. The United States failed to make a *prima facie* case of violation with respect to effective enforcement of Guatemalan labor laws regarding the conduct of inspections and imposition of penalties.

187. In its rebuttal submission, in an attempt to overcome the clear deficiencies of its case, the United States continues its efforts of distorting the reality through unsubstantiated assertions, conjectures, assumptions or remote possibilities.

188. These unsubstantiated assertions, conjectures, assumptions or remote possibilities were submitted by the United States as "evidence" through anonymous statements of individuals that cannot be cross-examined.

189. Moreover, these individuals arrogate to themselves the task of rebutting Guatemala's initial written submission on behalf of the United States. See, for example, exhibit USA-182, where an individual responds to Guatemala through unsubstantiated assertions.

190. Apparently, the United States believes that, because *procedurally* it is not precluded from submitting anonymous statements, then such statements are immune from scrutiny and simple assertions by anonymous individuals are to be given weight as evidence. That approach is erroneous in all respects. As explained earlier, no evidentiary weight can be given to unsubstantiated assertions made by anonymous individuals that will remain unexamined.

191. Guatemala recalls that, as indicated above,[108] the United States did not need to submit

[108] Section II.C.

witnesses' statements, anonymous or otherwise. Instead, it had many other straightforward options with better probative value to prove the alleged violations in support of its case. So-called "legal experts" have been advising the United States. There was no reason to resort to anonymous statements.

192. It is uncontested that the complaining Party cannot establish the existence of facts based on simple assertions, conjecture, assumptions or remote possibilities.[109]

193. Only when the complaining party makes a *prima facie* case of violation, the burden of proof shifts to the responding party to adduce evidence to rebut the presumption that the complaining party's assertions are true.[110]

194. In this case, the alleged evidence of the United States is based exclusively on anonymous statements.[111] For the reasons above,[112] anonymous statements do not have probative value.

195. Therefore, the United States has not submitted sufficient evidence to make a *prima facie* case of violation. Consequently, the burden of proof has not shifted to Guatemala to adduce evidence to rebut the United States' assertions. On this basis alone, the Panel must reject the United States' claims in their entirety.

196. Nonetheless, for reasons of completeness and with a view to cooperate with the Panel as it seeks to discharge of its responsibilities, Guatemala will address each of the United States' allegations in turn. Before doing so, it is important to clarify certain general aspects of the United States' introduction to Section V of its rebuttal submission.

197. First, the United States misunderstands Guatemala's arguments. The United States believes that Guatemala is arguing the following: "(1) no violation of a labor law has occurred until an inspection takes place; (2) all inspections are carried out in accordance with the law; and (3) sanctions may not have been imposed because there may not have been a violation of the law".[113] This is not what Guatemala argued in its initial written submission.

198. A plain reading of Guatemala's initial submission leaves no doubt that, 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, as further confirmed in its rebuttal submission, 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.[114]

199. 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. 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. The United States appears to agree with this proposition.[115]

200. Therefore, if there is no investigation (as the United States alleges), one cannot draw a *legal presumption* that there was a violation of labor laws relating to working conditions. Put another way,

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[109] Final Arbitral Panel Report, *Costa Rica v. El Salvador – Tariff Treatment*, para. 4.145.
[110] Appellate Body Report, US – Wool Shirts and Blouses, p. 14; Panel reports in *US – Shrimp (Ecuador)*, paras. 7.7-7.11; *US – Shrimp (Thailand)*, paras. 7.20-7.21; and *US – Anti-dumping Measures on PET Bags*, paras. 7.6 – 7.7.
[111] Guatemala observes that the United States submitted some official documents with redacted information. However, the issues that the United States intends to prove (inaction in conducting inspections or imposing penalties) rely exclusively on the content of the anonymous statements.
[112] Section II.D.
[113] US Rebuttal Submission, para. 136.
[114] US initial written submission, paras. 135, 137, 139.
[115] US Rebuttal Submission, para. 146.

it cannot be *automatically* concluded that there was a violation of such labor laws based solely on the allegation that the GLI did not conduct an (or conducted a deficient) investigation to determine the existence (or not) of that violation.

201. If and when the United States proves that there was no inspection (or the inspection was insufficient), the United States would have demonstrate, that Guatemala did not apply its labor laws with respect to the *conduct* of such inspections. However, that would not have demonstrated the violation of other substantive obligations such as the Labor Code Articles relating to acceptable conditions of work. This is, because, the determination of labor laws violations under Guatemalan laws corresponds to the administrative and judicial authorities.

202. Moreover, the United States' burden of proof to show a violation of provisions relating to acceptable conditions of work would be higher and would require the Panel to exercise jurisdiction that correspond exclusively to domestic courts. That, however, would be outside of the Panel's terms of reference.

203. This Panel is not vested with authority to determine whether individuals (i.e., the employers), who are not even parties to this dispute to defend themselves, are in breach of its obligations under Guatemalan labor laws. Rather, this Panel is required to examine whether Guatemala is effectively enforcing its labor laws. That means that the Panel's assessment should focus on Guatemala's activities of enforcement and not on whether or not individuals complied with domestic labor laws.

204. Finally, Guatemala brings to the Panel's attention that not only witnesses but also "legal experts"[116] are anonymous in the United States' rebuttal submission. The United States has not even tried to justify the anonymity of alleged "legal experts". Anonymous statements of alleged "legal experts" also lack probative value. Guatemala now proceeds to address the United States' rebuttal for each of the companies targeted in its claims.

A. LAS DELICIAS AND 69 OTHER COFFEE FARMS

205. This is a good example how the United States exaggerates and attempts to artificially magnify the extent of its claims. Essentially, the United States provides a copy of a single complaint to argue the existence of more than 80 complaints, and focuses on a situation that allegedly happened in one coffee farm, based on unsubstantiated anonymous statements; to conclude that the same situation applies for the other 69 coffee farms that the United States fails to identify.

206. Moreover, the United States proposes to give more probative weight to anonymous statements (that in its view describe facts that are "contemporaneous" to the events described elsewhere) than to hard evidence submitted by Guatemala that demonstrates full and effective enforcement of its labor laws. Needless to say, Guatemala reiterates that anonymous statements do not have probative value.

207. Nonetheless, for reasons of completeness, Guatemala takes issue with paragraph 153 of the U.S. rebuttal submission in which the United States claims to have "demonstrated a course of inaction by the Ministry of Labor within the *agricultural sector*" (emphasis added).

208. Apparently, the extension of the United States claims to the "agricultural sector" stems from the anonymous statement of FFFF (exhibit USA-162). A closer reading of exhibit USA-162 indicates, however, that FFFF refers to six farms that produce, *respectively*, bananas, coffee and sugar cane. The agricultural sector of Guatemala is not composed of bananas, coffee and sugar cane producers only.

209. More importantly, exhibit USA-162 refers to alleged events that happened in banana farms and not in coffee farms (much less in the agricultural sector as a whole). As FFFF clearly states, only six farms out 59 were surveyed because only in those six farms they had contacts. This means that FFFF is claiming knowledge about events of which he has no knowledge. This is a seriously worrisome matter that highlights yet again the risks involved adjudicating a dispute that could have

[116] See for example, footnote 191 of the US Rebuttal Submission.

irreparable repercussions on Guatemala based on anonymous statements. On that basis alone, FFFF's statements are undoubtedly unreliable.

210. Furthermore, the United States claims that Guatemala "attempts to minimize the significance of the U.S. evidence, claiming that the 'United States submits only one (1) complaint and not 70' as initially claimed".[117] The United States unnecessarily clarifies that it put forward one collective complaint that notified Guatemala of "*purported* labor violations at 59 coffee farms" (emphasis added) and that the collective complaint was "extended to cover eleven additional coffee farms on September 30, 2008".[118] Immediately after, the United States makes reference to the workers of *Las Delicias*, asserting that they "filed at least 80 labor complaints, often with other farms".[119]

211. Guatemala is not attempting to minimize anything. Nor was it necessary for the United States to "clarify" how many farms were covered by the collective complaint. The complaint is simply irrelevant to prove any point of the United States' claims. The single collective complaint (or two as characterized by the United States) only proves that there was a complaint of "purported labor violations".

212. In contrast, that single collective complaint *does not* prove: a) that there were labor law violations; or b) that the other 80 labor complaints existed.[120]

213. Therefore, the single collective complaint submitted as evidence in exhibits USA-95 and USA-204 is insufficient to demonstrate any alleged inaction by the Guatemalan authorities.

214. The United States also takes issue with exhibit GTM-5. Guatemala notes that the United States did not dispute nor address in its rebuttal submission exhibits GTM-6 and GTM-7.

215. With respect to exhibit GTM-5, the United States argues that "compliance with the law on one particular day does not demonstrate that the employer remained in compliance thereafter or that Guatemala effectively enforced its laws".[121]

216. Guatemala finds this statement revealing. First, the United States does not dispute that there was *compliance with the law* when inspections took place in response to the one single complaint contained in exhibits USA-95 and USA-204.

217. Second, if there is compliance, it is hard to envisage the need to "enforce" the law, if one is to follow the United States interpretation of the term "enforce".[122]

218. Third, exhibit GTM-5 fully addresses the United States' original claim. In view of its unsuccessful attempt to demonstrate a violation that does not exist, the United States now appears to extend its claims to further allegations of non-compliance with labor laws that it has not explicitly made in these proceedings.

219. Fourth, it is unclear why Guatemala should be regarded as not "effectively enforce[ing] its laws" if there are no violations that need the authorities' intervention.

220. The United States' attempts to minimize the relevance of exhibit GTM-5 are also unavailing. First, the United States argues that the summary table is undated. Without much effort, however, one can easily see that the sixth column of that table includes the dates of each of the inspections. The title of exhibit GTM-5 gives account of the nature of the visits "*Informe Del Plan Operativo de Visitas…2008*" (Report on the Operative Plan of Visits … 2008). Second, the United States appears to ignore the existence of exhibit GTM-6, which supplements the table's information with some inspectors' reports.

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[117] US Rebuttal Submission, para. 154.
[118] US Rebuttal Submission, para. 154.
[119] US Rebuttal Submission, para. 154.
[120] It is unclear whether such additional complaints referred only to Las Delicias, or any or all of the 70 farms identified in the single collective complaint
[121] U.S. Rebuttal Submission, para. 157.
[122] US Initial Written Submission, para. 29.

221. Additionally, the United States claims that the "evidence shows that the farms were alerted to the inspections beforehand and that the Ministry did not coordinate the inspections with MSICG.* The workers complained to the Ministry that informing the farm owners in advance about the inspections put the workers at risk and allowed the employers to prepare for the inspections" (*footnote omitted).[123]

222. The alleged evidence referred to by the United States consists of the anonymous statements of some individuals and the said of MSICG through a complaint addressed to the Ministry of Labor.[124] While these statements do not have probative value given their anonymous nature [and the fact that they are unsubstantiated], the United States' claims reflect its misunderstanding of Guatemala's labor laws and the purpose of inspections.

223. First, there is no legal requirement to coordinate inspections with the unions.

224. Second, the United States does not explain why and how the workers were put at risk. Pursuant to the Labor Code and the Inspection Protocol, the inspectors interview employers and workers. Normally, representatives of both sides sign the inspectors' reports. Anonymity is not allowed in Guatemala's legal proceedings (as it is not allowed in the United States' legal proceedings either).

225. Third, the United States clearly reveals that its real motivations behind this case are the sanctions to the employers instead of compliance with the law and welfare of the workers. A legitimate question to ask is why would it be negative for the employers and workers to "prepare for the inspections" when that preparation means to *comply* with the law?

226. The United States also cites reports by the ILO and United Nations officials. These reports are contained in exhibits USA-207, USA-208 and USA-209. The reports are unsupportive of the United States' arguments for several reasons.

227. All of the documents are outdated or refer to outdated data. For example, the Report of the Special Rapporteur contained in exhibit USA-207 was issued in January 2010 and the statistics it refers to in the paragraphs cited by the United States (paras. 27-28) are from 2006. That means that the data used to prepare such statistics pre-date 2006 (i.e. more than a decade ago).

228. Furthermore, the subject matter of this Report is food. The Special Rapporteur did not address in the paragraphs cited by the United States issues concerning labor law enforcement. In view of this, it is difficult to see what relevance this Report may have for the United States' claims of alleged failures to enforce Guatemalan labor laws.

229. However, even if the Report of the Special Rapporteur in exhibit USA-207 were to have any relevance for the present dispute, Guatemala submits exhibit GTM-58, which contains Guatemala's statement delivered during the 13th Session of the Human Rights Council in reference to this Report. In that statement Guatemala explained how it adopted comprehensive policies, strategies, programs and projects of diverse nature to address food security issues. The document is self-explanatory and Guatemala considers irrelevant for the purposes of this dispute to address food security issues that have no relation, at all, with the United States' claims.

230. Exhibit USA-208 relies on the document in exhibit USA-207 and thus, it also contains outdated data. Similarly, the Annual Report of the UN High Commissioner for Human Rights relies on outdated information.

231. More importantly, Guatemala notes that none of these reports refers to the specific situation of the coffee farms targeted by the United States. In the light of this, the pertinence of these exhibits is not readily clear.

232. The United States also misunderstands Guatemala's labor laws and misreads the inspector's

[123] US Rebuttal Submission, para. 158.
[124] US Rebuttal Submission, footnotes 207-210.

report in exhibit USA-100. Guatemala explained in its initial written submission that the inspector's report in exhibit USA-100 shows that the workers requested the termination of administrative procedures for conciliation.[125]

233. Guatemala also explained that the United States mistakenly construed that report as the "Ministry warn[ing] the employer that it needed to raise wages in the next 30 business days to avoid further action taken against it".[126] 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".[127]

234. Exhibit USA-100 does not support the United States' reading of the inspector's report. 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 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.[128]

235. In its rebuttal submission, the United States posits that the "fact that workers chose not to continue the conciliation proceedings did not relieve the Ministry of its obligation to ensure compliance with the labor laws at issue".[129] This statement also reveals the United States' misunderstanding of the Guatemalan legal system. Once the workers *exhaust* the administrative proceedings, the Ministry of Labor (which is part of the Executive Branch) has no further involvement with the issues that are referred to the labor courts. The GLI is to be considered as a party in legal proceedings before a labor court only in limited situations, none of which apply to this case.[130]

236. The United States' misunderstanding of Guatemalan law is further confirmed when it asserts that the GLI has the authority to bring proceedings for the imposition of penalties to domestic courts in cases of labor law violations.[131]

237. Notably, the United States did not indicate whether in the case of *Las Delicias* the issues were discussed before a labor court. However, relying on anonymous statements with no probative value, the United States asserts that as "of October 2014, *Las Delicias* was still not paying the minimum wage",[132] implying that despite ongoing conciliation meetings, the Ministry of Labor was under the obligation to undertake legal proceedings for the imposition of penalties.

238. The United States still confuses the legal proceedings to *enforce* labor rights with the legal proceeding for the *imposition of penalties*. Regarding the latter, the United States also appears to believe that penalties must be imposed on the employer irrespective of whether there is an ongoing conciliation process.

239. The Inspection Protocol, which was reviewed and adopted with the support of the United States Agency for International Development, provides that an inspector:

> "Debe mantener una actitud persuasiva que apunte a revertir una posible situación de incumplimiento, pero a la vez cumplir una función de asesoría y

[125] Exhibits USA-100, page 2.
[126] US initial written submission, para. 144.
[127] Ibid.
[128] 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*…".
[129] US Rebuttal Submission, para. 163.
[130] Labor Code, Article 280.
[131] US Rebuttal Submission, para. 163.
[132] US Rebuttal Submission, para. 161.

> colaboración, orientando a la persona empleadora hacia el cumplimiento y respeto de las normas laborales".[133]

240. "Debe ser objetiva en la obtención de resultados, mostrando absoluta imparcialidad en los mismos".[134]

241. That is harmonious with the labor principles and provisions of the Labor Code as further developed in a GLI's circular submitted by the United States in exhibit USA-211. In that circular, the GLI instructs inspectors to impose penalties *after exhaustion of the conciliation mechanism*.[135] Put differently, inspectors are not instructed to impose penalties while the parties undertake efforts to resolve their problems through conciliation.

242. In view of the foregoing, the United States failed to make a *prima facie* case of violation with respect to *Las Delicias* & 69 other coffee farms.

B. KOA MODAS

243. With respect to this company, the United States claims that the Ministry "[a]t no point did … 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".[136]

244. In support of its claim, the United States provided redacted copies of some inspectors' reports and the anonymous statements of five individuals.

245. As explained by Guatemala, the inspector's reports are not the instrument by which the GLI take steps with the labor courts pursuant to Article 281(m) of the Labor Code to impose sanctions.[137] Furthermore, anonymous statements have no probative value. Therefore, the United States failed to put forward any pertinent evidence to support its *prima facie* case of non-imposition of sanctions.

246. It is curious, however, that the United States affirms that Guatemala "has presented nothing in its submission beyond mere assertions".[138]

247. Unlike the United States, Guatemala has put forward arguments that are directly supported by hard evidence and that further call into question the credibility of the anonymous statements submitted by the United States.

248. In its rebuttal submission, the United States contends that "contrary to these assertions [referring to Guatemala's alleged 'mere assertions'], the United States has presented statements by three workers confirming that, on many if not most occasions, inspectors did not conduct inspections in the presence of workers who had filed the complaint.* When they did come, it was in the presence of a group of workers selected by the employer*" (*footnotes omitted).[139]

249. The workers statements, however, cannot be reconciled with the inspector's reports submitted by the United States in exhibits USA-118, USA-119 and USA-121. The United States has redacted all identifying information in its exhibits, with the exception of some as a result of its inattention. In these exhibits, the United States did not redact the name of the union participating in the inspections. That union was the one that filed the complaint and the one that was not selected by the employer. Thus, contrary to the unsubstantiated allegation of the United States, the inspection was conducted in the presence of workers who had filed the complaint.

250. This example further reveals why the United States redacted identifying information:

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[133] Exhibit USA-91, p. 8.
[134] Exhibit USA-91, p. 10.
[135] Exhibit USA-211, p. 3.
[136] US Initial Written Submission, paras. 167, 168.
[137] Guatemala's Initial Written Submission, para. 312.
[138] US Rebuttal Submission, para. 169.
[139] US Rebuttal Submission, para. 169.

precisely, to distort the facts.

251. Guatemala also notes the statement by, allegedly, a "Koa Modas union leader affirming that: 'I have not had knowledge of any sanction proceedings through the courts in practically all of the complaints that have been filed with the Ministry of Labor, including for situations where the company fails to appear at conciliation meetings'".[140] The United States adds that "Guatemala has not offered any argument or evidence to undermine the U.S. showing".[141]

252. Guatemala does not need to offer any additional argument or evidence to undermine the alleged "U.S. showing". Anonymous statements do not have probative value.

253. Furthermore, the fact that an individual states that he/she has not had knowledge of any sanction that does not mean that the Ministry did not initiate proceedings for the imposition of a sanction or that no sanction was imposed on the employer. The statement is simply neutral as to the existence of the fact.

254. Irrespective of the above, the fact that the union leader was not informed only reflects how Guatemalan domestic procedures work. This is something that the United States has difficulties understanding. In a proceeding for the imposition of a sanction only the GIL and the employer are parties to the dispute (not the workers). Therefore, the GIL and the employer are the only ones notified of all actions in such proceeding. Put differently, the union leader would not be expected to have access to this kind of information.

255. In sum, the United States failed to make a *prima facie* case of violation with respect to Koa Modas.

C. MACKDITEX

256. 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;[142] and b) the inspectors did not follow-up on known violations to ensure compliance.[143]

257. Again, in support of its contentions, the United States relies on redacted copies of the inspectors' reports and anonymous statements.

258. With respect to the first allegation of the United States, in its Initial Written Submission Guatemala confirmed 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.[144] Therefore, the assertion that, during inspections, inspectors only met with employees selected by the employer is plainly inaccurate.

259. Regarding the second allegation of the United States, Guatemala has demonstrated that 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.[145] The inspector conducted the conciliation meeting on

[140] US Rebuttal Submission, para. 170.
[141] US Rebuttal Submission, para. 170.
[142] US initial written submission, para. 138.
[143] US initial written submission, para. 165.
[144] 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.
[145] Exhibit GTM-9. Contains confidential information. Inspector's report. October 7, 2011.

October 11, 2011, and found the existence of labor law violations.[146] However, the employees requested termination of the administrative conciliation proceedings.[147] The same inspector then initiated a proceeding before a labor court with the view of imposing penalties to the employer.[148]

260. Thus, the evidence submitted by Guatemala directly contradicts the allegations of the United States. As for the anonymous statements submitted by the United States, they have no probative value. Furthermore, the redacted inspectors' reports submitted by the United States do not prove what the United States is arguably trying to prove. Therefore, United States simply failed to put forward any pertinent evidence to support its *prima facie* case of violation.

261. In its rebuttal submission, the United States does no more than restate its initial arguments and further relies on statements of anonymous individuals.

262. Based on such anonymous statements, the United States first submits that the workers were given a payment and then argues that such a payment "was not a settlement of the dispute between the workers and Mackditex". It is difficult to see the pertinence of these allegations to the issues raised by the United States.

263. The United States also questions whether exhibit GTM-11 refers to the same violations or whether the inspector waited10 months to begin to pursue penalties against an offending employer.[149]

264. In view of the uncooperative approach of the United States and that all of the information that it submitted in this case is redacted, Guatemala is unable to respond to the United States' question. Neither the Panel, nor the disputing Parties, will know the response until the United States decides to cooperate.

265. The United States also asserts that "as the workers further note, [the discussions with inspectors] occurred on or after their date of dismissal from the company".[150] The workers referred to by the United States are, no surprise, anonymous.

266. Tellingly, the workers themselves did not provide their statements. Exhibit USA-180 contains an email addressed to the USTR officials. Someone else describes, in English, what he/she says was the result of his/her conversation with the implicated workers.

267. Such statement does not have probative value and is contradicted by the arguments and exhibits submitted by the United States. For example, the date of the events in paragraphs 171 and 175 of the US Rebuttal Submission cannot be reconciled.

268. For the reasons above, the United States also failed to make a *prima facie* case of violation with respect to Mackditex.

D. AFRICAN PALM OIL COMPANIES

269. The United States refers to four companies (Tiki Industries, NAISA, REPSA and Ixcan Palms). In its Initial Written Submission, Guatemala demonstrated that the United States failed to make a *prima facie* case of violation with respect to these companies, either because it failed to adduce evidence demonstrating the lack of enforcement; or because Guatemala demonstrated full compliance of these companies with their respective labor law obligations.

270. In its Rebuttal Submission, the United States attempts to correct the deficiencies of its case. This time, however, with "evidence" that is even more unreliable: additional anonymous statements, copies of emails with redacted personally identifying information and a report from an NGO whose

[146] Exhibit GTM-10. Contains confidential information. Inspector's report. October 11, 2011.
[147] Ibid.
[148] Exhibit GTM-11. Contains confidential information. Inspector's request for the imposition of penalties against Mackditex.
[149] US Rebuttal Submission, para. 174.
[150] US Rebuttal Submission, para. 175.

objectivity is questionable.

271. Without any sound evidentiary basis, the United States expects the Panel to find that Guatemala failed to enforce its labor laws. However, it would be unjustifiable to see a Panel's decision where an email that "someone" wrote to "someone else" would be attributed more weight than the inspectors' reports. The fact that the United States had available other evidentiary options and that it did not need to resort to anonymous statements raises the presumption that the facts do not support a *prima facie* case of violation. Rather, the United States needs to distort the facts in an attempt to convince the Panel to find Guatemala accountable for something that it shouldn't.

272. Guatemala will address each of the United States' arguments with respect to the African palm oil companies in turn.

a) Tiki Industries:

273. The United States refers to "studies that have been carried out by international organizations working in the region" in support of its claim that Tiki Industries is not in full compliance with labor laws directly related to acceptable conditions of work.[151]

274. In footnote 266, by "studies" the United States appears to refer to:

a. "A Verite [sic] Report, Labor and Human Rights Risk Analysis of the Guatemalan Palm Oil Sector (March 2014)" (Exhibit USA-214);
b. "Report of the Mission in the Municipality of Sayaché, Petén, Office of the UN High Commissioner for Human Rights in Guatemala" (February 27, 2012 – March 1, 2012) (Exhibit USA-102);
c. Email from IIII (Exhibit USA-231).

275. The United States does not explain the relevance of these alleged "studies" to demonstrate the otherwise unproven inactions with respect to Tiki Industries.

276. Guatemala also has difficulties understanding how an alleged report that has no indicia of being made by the UN High Commissioner or an email from III could be considered as "studies".

277. Regardless of the characterization of the documents submitted by the United States as evidence (i.e., whether or not they can appropriately be described as "studies"), none contradicts the inspectors' reports attesting that Tiki Industries was and continues to be in full compliance with Guatemalan labor laws.

278. In particular, the Panel should consider that:

a. With respect to the Verité's Report, Guatemala understands it has links to the U.S. Department of Labor or the U.S. Labor Unions that would not make it an independent observer for purposes of these proceedings. For example:
    i. The Chair of the Board of Directors of Verité is Mr. Michael Musuraca. Mr. Musuraca is Independent Pension Consultant for U.S. Labor Unions.[152]
    ii. The Verité's Report indicates that this research was conducted under the supervision of Shawn MacDonald and Erin Klett.[153] Mr. Shawn, before joining Verité, was Director of Accreditation at the Fair Labor Association.[154] Mrs. Klett, prior to joining Verité, she worked on policy research at the ILO's Washington Office.

[151] US Rebuttal Submission, paras. 178, 179.
[152] See http://www.verite.org/AboutUs/Board. Exhibit GTM-49.
[153] Exhibit USA-214, p. 84.
[154] See https://www.verite.org/user/9. Exhibit GTM-49.

iii. The Verité's Report also indicates that "Quinn Kepes managed and carried out desk and field research and wrote the final report".[155] Mr. Kepes manages Verité's research project for the U.S. Department of Labor.[156]

iv. The Verité's Report also gives account of the fact that "[f]ield research was also carried out by Natali Kepes Cardenas who translated interview instruments and the final report".[157] Natali Kepes Cardenas is currently the research coordinator for a project on labor issues in the coffee sector for the U.S. Department of Labor.

b. Regarding the alleged Report of the UN High Commissioner for Human Rights in Guatemala, the Panel should note that:

i. It is the United States who asserts that exhibit USA-102 is a Report of the UN High Commissioner for Human Rights in Guatemala. Nothing in exhibit USA-102, however, confirms that.

ii. Guatemala observes that the United States redacted the names of the members of the Mission, making the document anonymous.

iii. Guatemala also observes that the document is unsigned, without any official stamp, letterhead markers or any indication that such documents is, in fact, coming from the office of the UN High Commissioner for Human Rights in Guatemala.

iv. More substantially, the alleged report clearly states that *no single company permitted* the Human Rights Ombudsman and the Office of the UN High Commissioner for Human Rights in Guatemala to observe the labor conditions of the workers. The report describes, however, such alleged labor conditions on what can only be considered to be a completely speculative basis.

c. Finally, in respect of the anonymous email from IIII, needless to repeat that it does not have probative value. Furthermore, a closer look at its contents raises even more questions about its credibility. For example, it was written in perfect English. Presumably, the individual writing the email is not a worker of Tiki Industries. It does not explain how he/she had knowledge about the alleged events that occurred regarding this company. Furthermore, the individual makes reference to a number of inspections and cites certain official documents by number. Arguably, the individual contacting Officials of the USTR has these documents in his/her possession. Guatemala presumes that the documents were not submitted because they do not support the United States' claims and, again, for that reason, the United States resorted to anonymous statements from individuals that will remain unexamined.

279. As noted, the exhibits submitted by the United States in support of its claim against Tiki Industries lack probative value, do not support the United States' allegations and do not contradict Guatemala's evidence.

280. In its Initial Written Submission, Guatemala provided several inspectors' reports attesting to the fact that Tiki Industries was in full compliance with its labor law obligations.[158]

281. The United States asserts that these reports "do not paint an accurate picture".[159] This assertion is based on a second statement of AAAA.[160] Leaving aside the lack of probative value of this statement, interestingly, individual AAAA works for CONDEG[161] and "looks after … workers of

[155] Exhibit USA-214, p. 84.
[156] See https://www.verite.org/user/7. Exhibit GTM-49.
[157] Exhibit USA-214, p. 84.
[158] See exhibits GTM-13, GTM-14, GTM-15 and GTM-16.
[159] US Rebuttal Submission, para. 182.
[160] US Rebuttal Submission, fn. 271.
[161] Exhibit USA-40.

African palm oil companies in Sayaché, Petén".[162] This individual, presumably, does not work in any of the African palm oil companies and the statements provided cannot reflect "direct" knowledge of the facts.

282. More importantly, the content of the inspectors' reports and the statement of individual IIII directly contradict the statements of individual AAAA. For example, while individual AAAA asserts that "Tiki Industries workers have maintained that they *rarely* see inspectors after complaints about working conditions have been filed with the Ministry of Labor" (emphasis added),[163] individual IIII states that "from 2012 to date [April 7, 2015], labor laws violations have been found during *approximately 25 visits/inspections"* (emphasis added).[164]

283. These contradictions further confirm the unreliability of anonymous statements.

284. Finally, the United States contends that "Guatemala provides no indication of any action taken by the labor court in response to the March 14, 2012 sanction process initiated by the Ministry of Labor".[165]

285. The United States misunderstands the rules and principles on the burden of proof. The United States has the burden demonstrating inaction, as it claims happened in the present case. Guatemala has described several options to demonstrate inaction.[166] So-called "legal experts" are advising the United States and they certainly know that they have these options available. A simple assertion of inaction does not shift the burden of proof to the defending Party. In view of the lack of sound evidentiary basis for the United States' claims, Guatemala did not even have to submit exhibit GTM-12 showing the initiation of proceedings before a labor court for labor offenses.[167] Guatemala submitted that piece of evidence to show lack of credibility and reliability of the United States' evidence. Guatemala does not accept, however, an improper reversal of the burden of proof that would be contrary to the CAFTA-DR Rules.

286. In conclusion, the United States failed to make a *prima facie* case of violation with respect to Tiki Industries.

b) LA REFORESTADORA DE PALMA (REPSA)

287. In its Initial Written Submission, Guatemala demonstrated that the GLI conducted inspections in REPSA regularly, on its own initiative or at the request of the workers, and without delay. Guatemala also proved, through exhibits GTM-17, GTM-18, GTM-19, GTM-20 and GTM-21 that REPSA has been in full compliance with its labor law obligations.

288. In its Rebuttal Submission and relying exclusively on anonymous statements that do not have probative value, the United States contests the "sufficiency" of the inspections. According to the United States, "these inspections [referring to Guatemala's exhibits] do not rebut the U.S. showing that inspectors were not effectively enforcing the law, given their deficient inspections".[168]

289. The United States is second-guessing the inspectors' assessment of the facts based on anonymous statements of individuals that presumably did not participate in the inspections and do not even work in REPSA.

290. Leaving aside the fragility of the United States' claims, the United States' approach is in clear contradiction with Article 16.3.8 of the CAFTA-DR which 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

[162] Exhibit USA-40.
[163] US Rebuttal Submission, para. 182; Exhibit USA-181.
[164] Exhibit USA-231.
[165] US Rebuttal Submission, para. 181.
[166] Section II.C.
[167] Guatemala's Initial Written Submission, para. 329.
[168] US Rebuttal Submission, para. 183.

provisions of this Chapter". Thus, Article 16.3.8 does not allow the United States to second-guess the inspectors' findings.

291. The United States also attempts to find support for its allegations in events unrelated to its claims. In its Initial and Rebuttal Submissions, the United States asserts that "[t]welve thousand palm plantation workers from REPSA, NAISA, Tiki Industries, Palmas del Ixcan and other companies took to the streets in protest in response to the lack of effective enforcement of labor laws".[169] This assertion is completely out of context.

292. The protests referred to by the United States were organized by CONDEG with other Union Organizations.[170] The purpose of the protest was to address the claimed "violation of right of way of indigenous persons and communities".[171] The protests were not in "response to the lack of effective enforcement of labor laws" as the United States mistakenly asserts.[172] While Guatemala expresses no opinion about the legitimacy of the workers' demands, it is not readily clear what relevance this event has for purposes of the present dispute.

293. Finally, the United States argues against the dialogue tables ("*mesas de diálogo*"). According to the United States "some organizations and labor lawyers" have commented that the "dialogue tables have been used to subvert, rather than enhance, the Ministry's responsibility to enforce the law". The United States also asserts that "agreements coming out of the dialogue tables are rare and when reached, are rarely honored".[173]

294. Unsurprisingly, these unsubstantiated assertions are based on statements made by anonymous individuals that lack probative value. They don't need refutation. Nonetheless, Guatemala brings to the attention of the Panel the following considerations against the United States' assertions:

a. First, dialogue tables are not compulsory and do not replace any legal option available to workers to pursue their interests. Workers and employers participate in those dialogue tables voluntarily.
b. Second, dialogue tables have served not only the purpose of enforcing labor laws more efficiently, but also have served as a forum to improve working conditions beyond those minimum rights provided for in the domestic legislation.

295. In view of the above, Guatemala has demonstrated that the United States has not made a *prima facie* case of violation against REPSA. Moreover, Guatemala has demonstrated that REPSA is in full compliance with its labor obligations.[174]

c) NAISA:

296. The United States contends that "[w]ithout providing any evidentiary support, Guatemala asserts that it 'conducted several inspections' at NAISA between November 2012 and November 2013".[175]

297. The United States then argues that Guatemala's assertions "are directly contradicted by a representative from CONDEG who has attested that inspections that were conducted were done in violation of the regulatory Inspection Protocol as the inspectors neglected to speak with the workers in the field".[176]

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[169] US Rebuttal Submission, para. 184.
[170] Exhibit GTM-48. Letter of CONDEG, http://www.cooperaccio.org/wp-content/uploads/2012/05/petén.pdf.
[171] Exhibit GTM-48. Letter of CONDEG, http://www.cooperaccio.org/wp-content/uploads/2012/05/petén.pdf, paras. 6, 7 and 8.
[172] US Rebuttal Submission, para. 184.
[173] US Rebuttal Submission, para. 185.
[174] Guatemala's Initial Written Submission, paras. 341-348.
[175] US Rebuttal Submission, para. 186.
[176] US Rebuttal Submission, para. 186.

298. Finally, the United States relies on the anonymous statement of an individual to assert that "workers have maintained their concerns and sought further government action as of October 2014".[177]

299. The United States relies entirely on anonymous statements to support its claim of lack of effective enforcement of labor laws with respect to NAISA. These anonymous statements do not have probative value. That means that the United States failed to make a *prima facie* case of violation and, consequently, the burden of proof did not shift to Guatemala. Even if Guatemala had made assertions "without providing any evidentiary support", those assertions do not change the fact that the United States failed to make a *prima facie* case of violation.

300. Nonetheless, Guatemala hereby submits exhibit GTM-46, containing the inspectors' reports referenced in paragraphs 352 to 355 of its Initial Written Submission, respectively. These reports, as explained in Guatemala's Initial Written Submission, demonstrate that inspectors acted promptly, in conformity with the law and that they enforced labor laws directly related to working conditions. Additionally, the reports show that NAISA is in full compliance with its obligations under Guatemalan labor laws.

301. The United States failed to make a *prima facie* case of violation with respect to NAISA.

E. FRIBO

302. The United States claims "inaction" by Guatemalan authorities with respect to Fribo. In support of its claim, the United States provides anonymous statements and redacted copies of some inspectors' reports.

303. The United States appears to believe that, because the inspectors' reports show that there were labor laws violations then it automatically demonstrates inaction by Guatemala. The United States further argues that Guatemala has to demonstrate "action" implying that it made a *prima facie* case of violation and that the burden of proof shifted to Guatemala to adduce sufficient evidence to rebut the United States' assertions. As indicated earlier, the United States misunderstands the rules on burden of proof and it has not demonstrated inaction by Guatemala.

304. 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*. One thing is to demonstrate the existence of labor law violations and another, completely different, to demonstrate that the authorities did not take action regarding those labor law violations.

305. Furthermore, as indicated in Guatemala's Initial Written Submission, 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.

306. To the contrary, those reports show that the inspectors conducted themselves with professionalism and complied with their duties rigorously.

307. The Panel should note that the inspectors visited the premises of Fribo S.A. on several occasions, some of them within a very short period of time (e.g., three consecutive visits during the month of July 2009). The inspectors also met directly with the affected workers.

308. With respect to exhibit USA-61, the United States also takes issue with Guatemala's contention that the time periods to which the United States referred in its submission were not accurate. These time periods continue to be inaccurate.

309. In its Rebuttal Submission, the United States alleges that the inspector's report in exhibit USA-61 found four types of infractions and that the inspector gave the company a different deadline to remedy each of the four classes: "for the workers' reinstatement, the employer was to act

[177] US Rebuttal Submission, para. 186.

immediately; for the repayment of lost wages, the employer was to act within 10 days; for the changes to the physical plant, the employer was given 30 days; and, for the submission of employment documents, the employer was given five days".[178] The United States then concludes that "contrary to Guatemala's explanation, the re-inspection of July 22 (8 working days) was not inappropriate to verify compliance by the company through reinstatements and submission of documents".

310. 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[179] (i.e., the company had until August 21, 2009 to comply).

311. 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.

312. 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:

> "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."180

313. 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).

314. More importantly, the reinstatements that the United States claims were not verified compliance occurred on July 10, 2009 as evidenced in exhibit USA-61 itself.[181] The inspector further interviewed those reinstated workers in its inspection of July 27, 2009, as indicated in exhibit USA-114.[182] Again, the United States misunderstands the facts and there is no factual basis for its allegations.

315. In view of the foregoing, the United States failed to make a *prima facie* case of violation with respect to Fribo.

F. ALIANZA

316. In this case, the United States also failed to show "inaction" by Guatemalan authorities. The evidentiary basis for its claim regarding this company is one inspector's report (which is not the legal instrument by which Guatemala takes action for the imposition of penalties) and a joint anonymous statement of two individuals (allegedly a lawyer and a law student).

317. As indicated earlier, one thing is to demonstrate the existence of labor law violations and another, completely different, to demonstrate that the authorities did not take action regarding those labor law violations.

318. The United States notes again that "it is unlikely that the lack of government action would be memorialized by any official record". The United States is incorrect. As explained above,[183] the United States had available other options to demonstrate inaction, if any. It chose, however, to rely exclusively on anonymous statements that do not have probative value and that nevertheless show that

[178] US Rebuttal Submission, para. 191.
[179] U.S. initial written submission, para. 160.
[180] Exhibit USA-114, page 2.
[181] Exhibit USA-61, p. 2.
[182] Exhibit USA-114, p. 1.
[183] Section II.C.

the authorities took actions.

319. The statement of BB and CC shows that penalties were imposed on Alianza.[184] That means that actions were taken. The two individuals, however, claim that no seizures of the company's assets or the detention of the company's representative were ever requested. This is precisely what Guatemala demonstrated through exhibit GTM-24, which contains a court's resolution for the seizure of Industrias D/B's assets and the detention of the company's representatives.

320. In its Rebuttal Submission, the United States argues that this court's resolution is "long before the March 2013". That is irrelevant. It still shows action by Guatemala. Because the United States decided to provide snapshots of each of the cases and redact personally identifying information, there is no way to know what happened after March 2013 or whether there is a link with the court's resolution. That is still part of the burden of proof of the United States.

321. The United States also claims to be concerned about "Guatemala's failure to penalize [Alianza] for lack of appearance at a mandatory meeting".[185] Guatemala penalized Alianza in several respects; not only regarding the lack of appearance at a mandatory meeting but for labor laws violations. For example, in exhibit GTM-47, Guatemala demonstrates the kind of actions that were taken against Alianza. In addition to the imposition of penalties, seizure of the company's assets and order of detention of the company's representatives, Guatemala also revoked tax benefits under Decree 29-89 (*Ley de Maquilas*).

322. In sum, the United States claims of inaction in the case of Alianza are unwarranted. Rather, the exhibits submitted by both Parties actually show action by Guatemalan authorities. Therefore, the United States also failed to make a *prima facie* case of violation with respect to Alianza.

G. SANTA ELENA & EL FERROL FARMS

323. The United States asserts that it presented evidence of inadequate inspections by Guatemalan labor inspectors.[186] It did not. The United States submitted anonymous statements of individuals declaring that inspections were deficient.[187] These anonymous statements do not have probative value and are directly contradicted by evidence put forward by Guatemala.

324. The United States also misunderstands the facts. As demonstrated by Guatemala in its Initial Written Submission, several inspections, including follow-up inspections, were conducted expeditiously, at the request of the workers or on the GLI's own initiative, to compel compliance, including compliance of agreements reached between the employer and the workers under the supervision of Guatemalan authorities.[188]

325. In response, the United States takes issue with conciliation processes. It asserts that "Guatemala is mistaken in suggesting that the points agreed to by the employer and workers cancelled its enforcement obligations" and appears to view negatively that "inspectors encourage conciliation toward settlement rather than enforcement".[189]

326. First, it is not readily clear where in Guatemala's Initial Written Submission the United States interpreted that Guatemala was suggesting that agreements between the employer and workers "cancelled its enforcement obligations". Guatemala has certainly not suggested that. In fact, Guatemala, in accordance with its domestic law, has accompanied the workers and verified compliance with the agreements. The Inspection Protocol, which was reviewed and adopted with the support of the United States Agency for International Development and other American Companies

[184] Exhibit USA-61, p. 2, 3.
[185] US Initial Rebuttal, para. 196.
[186] US Rebuttal Submission, para. 198.
[187] Exhibits USA-
[188] Guatemala's Initial Written Submission, paras. 377 – 383.
[189] US Rebuttal Submission, para. 199 and fn. 302.

(and that the United States claims that must be observed), provides that an inspector:

> "Debe mantener una actitud persuasiva que apunte a revertir una posible situación de incumplimiento, pero a la vez cumplir una función de asesoría y colaboración, orientando a la persona empleadora hacia el cumplimiento y respeto de las normas laborales".[190]

327. Second, the Inspection Protocol and the Labor Code encourages conciliation rather than litigation. Cooperation between the parties, in particular the cooperation from the employer, is always to be preferred. There is nothing wrong with this approach. It is more efficient and the authorities are in charge of verifying full compliance with the labor law obligations.

328. Third, the United States appears to confuse enforcement of labor laws and negotiation of improving working conditions. Certainly, as the United States aptly states, the rights guaranteed by labor laws are the minimum standard owed to workers. However, in some instances, the workers legitimately pursue the improvement of those minimum rights. In these instances, conciliation processes are, of course, important tools to achieve satisfactory results.

329. Fourth, and more importantly, the United States appears to give more weight to sanctions rather than to the solution of the problems affecting the workers. That is revealing. The United States prefers to see the employers being sanctioned rather than workers obtaining a solution to their demands. Guatemala does not follow this approach. Guatemala's priority is the workers. Only if the employers do not comply with the law, then a proceeding for the imposition of sanctions is initiated. That is consistent with Guatemalan law. See, for example, GLI's circular submitted by the United States in exhibit USA-211. In that circular, the GLI instructs inspectors to impose penalties *after exhaustion of the conciliation mechanism*.[191]

330. The United States also appears to suggest that, because the employer in this case arguably offered "fewer rights than that to which they are legally entitled", then conciliation process do not serve the purpose of enforcing labor rights.[192] In support of this suggestion, the United States offers an inspector's report in exhibit USA-212.

331. First, the United States is incorrect in concluding that conciliation meetings are mechanisms to provide "the employer with a free pass – both for past violations of the law, and for future violations, given that the agreement provides for salaries set at below the minimum wage".[193] No such conclusion can be derived from exhibit USA-212 that, by the way, concluded with no agreement.[194] There is no basis to assert that the authorities would have accepted such an agreement.

332. Second, the United States further misconstrues certain agreements between the employer and the workers, namely, the fact that the employer agreed to pay in full the Members of the Executive Committee and no other allegedly wrongfully dismissed workers. While the United States appears to prefer an "all or nothing" approach, Guatemala sees value in an incremental solution. That is, to solve as many issues in the conciliation process at possible. As explained earlier, workers and employers are not required to negotiate. Workers still have their legal options available. In the present case, as may be seen in the inspectors' reports submitted by both Guatemala and the United States, the employer and the workers dispute the legality of the dismissal of some workers. There are allegations of workers stealing coffee, refusing to work, stealing equipment as well as allegations about the employer not paying minimum wages, etc. These are issues that either can be solved through conciliation or by pursuing litigation.

333. Third, Guatemala also notes that, in the present case, the workers are being well represented.

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[190] Exhibit USA-91, p. 8.
[191] Exhibit USA-211, p. 3.
[192] US Rebuttal Submission, paras. 203, 204.
[193] US Rebuttal Submission, para. 204.
[194] Exhibit USA, 212, p. 6.

They appear at the conciliation meetings with several (strong) union organizations, legal advisors and staff of the ILO also participate. Even assuming, without conceding, that the Ministry of Labor were to accept an agreement with fewer rights than that to which the workers are legally entitled, it is likely that workers would have been in a strong position to reject it. The United States assertions, therefore, are unfounded.

334. Finally, Guatemala would like to bring to the attention of the Panel that the United States seeks to rebut Guatemala's Initial Written Submission *essentially* with the statement of FFF (exhibit USA-182). Tellingly, individual FFF assumes the task of rebutting Guatemala's submission, as he/she believes to have a free pass to present mere assertions where creativity is the only limitation. This statement has no probative value. However, it is interesting to see that, instead of making unsubstantiated assertions in his/her own name, the United States asks the anonymous individual to make them on its behalf. The fact that an anonymous individual -and not the United States- makes these assertions does not render them accurate, truthful or reliable.

335. The statement of FFF starts with the expression "I have read Guatemala's initial written argument and I have personal knowledge regarding the following information". Then, individual FFF attempts to rebut Guatemala's submission with a number of statements that relate to events where it acknowledges not having been present. For example, in reference to exhibits which "Guatemala mentions in its initial written submission", this individual states that "I was not present, but I talked with other workers who were present and I have read the documents related to the meetings".[195] That means that this individual does not have personal knowledge of the information he/she states but made it up from what he/she heard and read from the documents related to the meetings (namely, the inspectors' reports).

336. There is no question that anonymous statements are unreliable and do not have probative value. In this case, the United States also failed to make a *prima facie* case of violation.

H. SERIGRAFÍA SEOK HWA:

337. This claim hardly needs refutation. The United States argues that "Guatemala has not rebutted evidence demonstrating that it failed to effectively enforce its labor laws with respect to Serigrafia Seok Hwa, S.A ("Serigrafia")".[196] The question here is: what evidence? The United States refers *exclusively* to anonymous statements. Anonymous statements, needless to repeat lack probative value.

338. Based on those statements, the United States formulates a number of unfounded allegations. One of those is that the employer failed to appear at seven of "approximately 15 meetings between the workers and the company to resolve the issues raised by the workers".[197] Leaving aside the anonymous nature of the statements, the United States does not submit evidence to substantiate its allegation that the employer failed to attend these meetings. It could have provided copy of the inspector's reports. It did not.

339. In contrast, in its Initial Written Submission Guatemala explained that, during the conciliation meetings, the good faith and willingness of the workers and the employer to find mutually agreed solutions prevailed.[198] The Minister of Labor who was accompanied by the Vice-Minister chaired some of these meetings.[199] The United States contends that Guatemala submitted only one meeting report. The United States ignores, however, that it is the United States that has the burden of demonstrating its assertion: i.e., that the employer did not appeared to seven conciliation meetings. Not Guatemala.

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[195] Exhibit USA-182, p. 2.
[196] US Rebuttal Submission, para. 207.
[197] US Initial Written Submission, para. 176.
[198] Exhibit GTM-30. Inspector's report. February 11, 2013.
[199] Ibid.

340. Furthermore, the United States misstates Guatemala's arguments in the Initial Written Submission. Guatemala did not state that the employer and workers *reached* mutually agreed solutions.[200] And there is no reason to make an argument regarding "a worker's decisions to agree to a lesser payment than what he or she is owed" as excuse to enforcing the law. The United States does not explain why this is relevant for the present case. In particular, because the United States claim is, essentially, the alleged failure of the employer to appear to conciliation meetings.

341. The United States also claims that the Ministry did not take action to penalize the employer for its absence in the meetings. The Ministry has not taken any action to penalize the employer because 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.[201] Therefore, there was no basis to penalize the employer.

342. Therefore, the United States' claims regarding Serigrafia Seok Hwa are unfounded and it failed to make a *prima facie* case of violation.

I. THE UNITED STATES HAS FAILED TO ESTABLISH THAT THE ALLEGED LACK OF INSPECTIONS OR IMPOSITION OF PENALTIES CONSTITUTE A FAILURE TO EFFECTIVELY ENFORCE LABOR LAWS THROUGH A "SUSTAINED OR RECURRING COURSE OF INACTION"

343. The United States complains of alleged lack of inspections (or insufficient inspections) and not imposition of penalties on several companies.

344. While the United States speaks about 80 work sites,[202] the truth is that it only addressed alleged failures with respect to 11 companies (Las Delicias, Koa Modas, Mackditex, Tiki Industries, REPSA, NAISA, Fribo, Alianza, FEFLOSA and Serigrafía Seok Hwa).

345. In its Initial and Rebuttal Submissions, Guatemala demonstrated that the United States failed to make a *prima facie* case of failure to effectively enforce labor laws with respect to these companies. In all cases, the United States did not put forward pertinent evidence. The vast majority of the evidence submitted by the United States was in the form of anonymous statements that do not have probative value or redacted documents that do not prove the facts that the United States intended to prove (e.g., inspectors' reports that are not a pertinent legal instrument to prove inaction regarding the imposition of penalties).

346. Guatemala also demonstrated, in those cases in which it was able to obtain information, that the claims of alleged inactions were unwarranted. For example, because Guatemala took action or because the companies were in full compliance with its labor laws obligations.

347. In other words, the United States failed to demonstrate inaction with respect to *all companies* targeted in its submissions. On that basis alone, the United States also fails to demonstrate that the alleged lack of inspections (or insufficient inspections) or the alleged lack of imposition of penalties constitute a failure to effectively enforce labor laws through a "sustained or recurring course of … inaction".

348. Even if the Panel were to disagree with Guatemala and finds that there were lack of inspections (or sufficient inspections) and lack of imposition of penalties, the United States anyway has failed to establish a sustained or recurring course of inaction.

349. There are 94,874 commercial entities (sociedades anónimas) as well as 731,529 enterprises registered and functioning in Guatemala.[203] The statistics of the Judiciary give account of 12,697 new

[200] US Rebuttal Submission, paras. 208, 209.
[201] The United States submitted no evidence of failure of the employer to appear at the 7 meetings.
[202] US Rebuttal Submission, para. 211.
[203] Exhibit GTM-57. Letter from the General-Secretary of the Commercial Registry of Guatemala.

labor cases initiated in 213 and 17,414 cases initiated in 2014.[204]

350. The fact that the United States identified alleged failures to effectively enforce labor laws with respect to only 11 companies in a period of 8 years is clearly insufficient to demonstrate a "sustained or recurring course of … inaction".

351. These 11 companies are not a representative sample of either the situation with respect to all commercial entities and enterprises registered or with respect to labor cases initiated. Regarding the latter, the 11 companies would account for 0.09% and 0.06%, respectively, of the figures available for 2013 and 2014.

352. In view of the above, to succeed in demonstrating a sustained or recurring course of inaction, the Panel would have to dismiss strong evidence submitted by Guatemala showing action by the authorities and/or full compliance by the implicated companies; would have to give weight to anonymous statements of witnesses that do not have probative value and that will remain unexamined; would have to disregard the legal standard in Article 16.2.1(a) to consider that individual and isolated cases constitute "sustained or recurring course of inaction"; and would have to ignore that 11 cases is less than 0.10% of the labor cases initiated before the labor courts.

353. Furthermore, the Panel must consider that the United States has failed to demonstrate the existence of a deliberate policy of non-inspection or non-imposition of penalties.

354. Guatemala has constantly been improving its legal procedures, making them more efficient, aiming at 100% of success in all cases. An example of this is the implementation of the Action Plan agreed between Guatemala and the United States. This action plan was described by the Deputy U.S. Trade Representative as a "landmark agreement" that reflected "Guatemala's commitment to constructive engagement to meet its labor obligations under our trade agreement and the United States' commitment to working with our trade agreement partners to help ensure respect for labor rights".[205]

355. As part of a policy to improve inspections, Guatemala hired 100 new inspectors in 2012. The evolution of the number of inspections and the amounts determined to be owned and finally paid to the workers are reflected in the table below:

[204] See http://www.oj.gob.gt/estadisticaj/.
[205] [cite press release]

Sección	AÑO 2010	AÑO 2011	AÑO 2012	AÑO 2013
Casos de Visitaduria	5,611	8,112	10,044	36,884
Casos Conciliaciones	13,867	14,373	15,152	18,105
TOTALES	19,478	22,485	25,196	54,989

Planes Operativos	AÑO 2010	AÑO 2011	AÑO 2012	AÑO 2013
Casos atendidos	2,392	2,764	7,808	25,416
Monto Salario Minimo	Q 9,284,854.59	Q 68,682,029.20	Q 15,210,140.65	Q 748,360,693.83
Monto Aguinaldo	Q 7,702,135.68	Q 30,103,410.76	Q 136,623,762.46	Q 241,473,921.16
Monto Bono 14	Q 48,812,935.86	Q 87,033,277.08	Q 177,228,299.77	Q 280,810,382.81
TOTALES	Q 65,799,926.13	Q 185,818,717.04	Q 329,062,202.88	Q 1,270,644,997.80
Monto Salario Minimo	$ 1,171,023.07	$ 8,662,304.85	$ 1,918,331.14	$ 94,384,638.08
Monto Aguinaldo	$ 971,407.63	$ 3,796,697.97	$ 17,231,242.21	$ 30,455,138.60
Monto Bono 14	$ 6,156,377.96	$ 10,976,798.26	$ 22,352,361.73	$ 35,416,326.07
TOTALES	$ 8,298,808.67	$ 23,435,801.08	$ 41,501,935.07	$ 160,256,102.76

Source: GLI's statistics.

356. The numbers speak for themselves. There is no deliberate policy of inaction. The United States should be applauding these efforts. Inspections increased in 247% at the national level; Operative plans also increased in 225%. More importantly, the amount verified with respect to minimum wages increased 4,886% and beneficiaries of these actions increased in more than 200%.

357. With respect to cases initiated before the court, the following table also presents incredible results:

		Año 2010	Año 2011	Año 2012		Año 2013
INCIDENTES PRESENTADOS	ASESORIA JURIDICA	1,848	1,807	1,715	PROCESOS JUDICIALES*	3,611
SENTENCIAS OBTENIDAS		762	740	785		1,521
MONTO DE LAS MULTAS EN SENTENCIAS OBTENIDAS		Q 2,378,761.63	Q 2,897,110.85	Q 6,593,123.15		Q 5,401,263.07
APELACIONES		393	430	349		336
REGLAMENTOS REVISADOS		453	523	1,306	Reglamentos	1,053
REGLAMENTOS APROBADOS		291	199	337		482

* LOS DATOS DE PROCESOS JUDICIALES SE ENCUENTRAN SON A NIVEL NACIONAL

Source: GLI's statistics.

358. As shown in the table above, the number of labor proceedings for the imposition of penalties also increased in 110% and the amount of penalties also increased exponentially.

359. Guatemala recalls that Article 16.2.1(b) provides that "a Party is in compliance with subparagraph (a) where a course of action or inaction results from a *bona fide* decision regarding the allocation of resources."

360. Guatemala also recalls that the United States did not prove any lack of inspection, sufficient inspection or imposition of penalties in all cases. However, should the Panel be convinced otherwise, the situation regarding the 11 companies would simply reflect the practical difficulties and resource constraints that administrative authorities and labor courts face in all countries. The United States has failed to provide any evidence that the alleged lack of inspection or imposition of penalties were not the result of *bona fide* decisions regarding the allocation of resources. The statistics above, indeed, confirm that this is not the case.

361. In the light of the above, the Panel must conclude that the United States has failed to establish that Guatemala has failed to effectively enforce its labor laws through a sustained or recurring course of action or inaction in relation to inspections and imposition of penalties.

J. THE UNITED STATES HAS FAILED TO ESTABLISH THAT THE ALLEGED LACK OF INSPECTIONS OR IMPOSITION OF PENALTIES AFFECTED TRADE BETWEEN THE PARTIES

362. Guatemala has demonstrated that the United States failed to make a prima facie case of violation with respect to all companies implicated. In the circumstances, there are no trade effects for this Panel to examine.

363. Nonetheless, in the event the Panel were to disagree with Guatemala, it should note that the United States seeks to support its allegation that the alleged failure to perform inspections and impose penalties affected trade between the Parties by providing aggregate export figures for the period 2006-2014.[206]

364. Even if the consideration of these figures were pertinent to determine whether the alleged delays affected trade between the Parties, Guatemala reiterates that Article 16.2.1(a) requires an effect on trade between all CAFTA-DR Parties. The figures submitted by the United States cover only bilateral trade between Guatemala and the United States and therefore are insufficient.

365. In addition, Guatemala observes that the United States presents export figures for some (not all) of the companies implicated in an aggregated manner for a nine-year period. The evidence submitted by the United States does not specifically indicate that these companies exported to the United States when the alleged failure to perform inspections or impose penalties occurred. In the absence of such evidence, it would be improper for the Panel to assume that the identified companies exported to the United States during the relevant periods.

366. Moreover, even assuming for the sake of argument that few companies did export to the United States in the relevant years, the data in itself does not show a trade effects. There is no basis for the United States to claim that all of the exports of these companies were the effect of the alleged failure to establish a conciliation tribunal.

367. In order to fulfill the requirements of Article 16.2.1(a), the United States has to establish a specific link between the alleged inaction (the alleged failure to establish a conciliation tribunal) and the trade effect. If the United States intends to claim that the effect was felt in exports to the United States, it must establish such effect. It cannot simply assume there is an effect because exports were taking place. Instead, the United States has to show that the level of each company's exports (whether in volume or in price) was different in the relevant year than it otherwise would have been, had the conciliation tribunal been established. It would also have to duly account for other factors that could have affected the exports. The United States has failed to provide any evidence specifically linking the alleged failure to perform inspections or impose penalties with the level of exports of the implicated companies. Consequently, the United States has failed to meet the requirements of Article 16.2.1(a).

368. The United States additionally argues that Guatemala imported apparel from the United States between 2006 and 2014.[207] This assertion is also clearly insufficient under Article 16.2.1(a). The United States does not provide any evidence that the apparel imported from the United States competed against the apparel manufactured by Koa Modas, Mackditex, Fribo, Alianza or Serigrafía Seok Hwa. Any claim of effects must necessarily be based on the existence of competition between the imported products and the products manufactured by these companies. This would include proof that such companies were producing for the domestic Guatemalan market. Nor does the United States provide any analysis of how the level of imports of apparel from the United States was different than it would otherwise have been if the inspections had been performed and penalties imposed in the case of these companies. In the absence of such evidence, it would be improper for the Panel to assume that any of the alleged failures claimed by the United States had an effect on apparel imports from the United States.

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369. In sum, the United States failed to demonstrate that any alleged failure to perform inspections or impose penalties constituted a sustained or recurring course of inaction that affected trade between the Parties. Consequently, the Panel must reject the United States' allegations in their entirety.

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[206] US Rebuttal Submission, para. 220.
[207] U.S. Rebuttal Submission, para. 227.

VI. THE UNITED STATES' CLAIM RELATING TO UNION REGISTRATION AND ESTABLISHMENT OF CONCILIATION TRIBUNALS

A. UNION REGISTRATION

1. The United States has Failed to Establish that the Alleged Brief Delays in the Registration of Three Unions Constitutes a Failure to Effectively Enforce Labor Laws Through a "Sustained or Recurring Course of … Inaction"

370. The United States complains of alleged administrative delays in the registration of unions at three companies: Mackditex, Koa Modas and Serigrafia. In each case, the United States acknowledges that the unions were registered.

371. In its Initial Written Submission, Guatemala provided evidence that demonstrated that the vast majority of delays were attributable to inaction on the part of the employees and not the Guatemalan Ministry of Labor.[208] In its Rebuttal Submission, the United States does not rebut the evidence put forward by Guatemala, and instead acknowledges that to a large extent the delays were attributable to actions or inaction of the workers requesting registration than of the Guatemalan Ministry of Labor.

372. Ultimately, the United States' allegation comes down to alleged delays of 59 days in the case of Koa Modas, 3 months in the case of Mackditex, and 34 days in the case of Serigrafia.[209] If we adjust for the 10 day period that the United States contemplated in the law, the delays would have been as follows[210]:

373. The delays alleged by the United States are as follows:

Company	Year	Alleged Delay (in days)
Koa Modas	2011	47
Mackditex	2012	78
Serigrafia	2012	22

374. Even if the United States were to establish that the delays occurred, such short administrative delays cannot, on any reasonable basis, constitute a failure to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties. Under the United States' overly aggressive interpretation, any delays in an administrative process—no matter how short or how unrealistic the statutory timelines—would result in a violation of Article 16.2.1(a). This is not the standard reflected under Article 16.2.1(a).

375. Even if true, these delays are far from unreasonable under any perspective. At most the

[208] See Guatemala's Initial Written Submission, paras. 411 - 423.
[209] U.S. Rebuttal Submisisn, paras. 241, 244 and 346.
[210] Because the 10 days are working days, a weekend is being included in the adjustment.

United States may have identified three isolated instances in which the 10-day period foreseen proved to be challenging in the light of the internal procedures that the Ministry had to fulfill and the resources that were available. It is important to keep in mind that at the time these delays allegedly took place, the Guatemalan Labor Ministry was not fully digitalized. All of the documentation had to be transcribed manually, including the articles of incorporation of the union.

376. The United States has sought to cover a period of over 8 years in its complaint and over this period has at most identified three instances of possible delay in the union registration process. During the six year period between 2008 and 2014, a total of 415 unions were registered in Guatemala. Thus, the three instances identified by the United States constitute less than 1% of the total number of unions registered during this seven-year period. Moreover, as the table below indicates, the years 2011 and 2012, when the delays identified by the United States allegedly occurred, saw a peak in union registrations putting additional strains on the resources of the Ministry of Labor.

Year	**Unions Registered in Guatemala**
2008	53
2009	72
2010	29
2011	141
2012	84
2013	17
2014	19
Total	415

Source: Guatemalan Ministry of Labor

377. The number of unions registered in 2011 increased almost fivefold compared to the previous year. The number of unions registered in 2012 was also significantly above the average in the years prior to 2011. Given the significant increase in union registration activity, there is nothing unreasonable about the fact that union registration may have suffered short delays in three cases in 2011 and 2012.

378. If anything, when one contrasts the allegations made by the United States against the overall data, what emerges is a very positive picture. In 2011, the Ministry of Labor registered close to five times more unions than in 2010 and yet managed to do so without delays except in a single case. This represents a 99% success rate. The data for 2012 is similarly impressive with a success rate of 98%. The United States should be applauding these results. That the United States is unfairly attacking the Guatemalan Ministry of Labor despite the diligence with which it has handled union registration is simply incomprehensible.

379. Guatemala has explained that Article 16.2.1(a) does not establish a strict liability standard. Article 16.2.1(a) was never intended to give rise to liability each instance that a government agency misses a statutory deadline. No government can claim to have a perfect record. All governments face constrains that come from limited resources.

380. Article 16.2.1(a) expressly recognizes the above considerations and thus requires the

complaining Party to establish that the other Party 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. Even if the three delays identified by the United States were to qualify as "inaction", they would not constitute a "course of … inaction" under any reasonable interpretation of those terms, much less a "course of … inaction" that is "sustained or recurring".

381. The three instances of delay alleged in this case by the United States also fall squarely within Article 16.2.1(b). The delays would have been the result of limitations in resources during two years of peak activity. Even under the record that the United States portrays, the Ministry of Labor performed rather impressively with success rates of 99% and 98% in 2011 and 2012.

382. Pursuant to Article 16.2.1(b), the Government of Guatemala retained the right to make decisions regarding the allocation of resources to other labor matters to have higher priorities. The United States has not provided any evidence to suggest that, even if the three isolated delays were to constitute a "course of inaction", such course of inaction has not resulted from a *bona fide* decision regarding the allocation of resources. Thus, by application of Article 16.2.1(b), the three isolated and brief delays alleged by the United States cannot give rise to a violation of Article 16.2.1(a).

2. The United States has Failed to Establish that the Alleged Brief Delays in the Registration of Three Unions Affected Trade Between the Parties

383. According to the United States, a delay of 22 days in the registration of a union affected trade between the Parties within the meaning of Article 16.2.1(a). This is how implausible the United States' case is. Under the theory being put forward by the United States, each instance a government agency misses a statutory deadline, even if it is just by a few days and no matter the justifications, will give rise to international responsibility under the CAFTA-DR and other free trade agreements that contain language similar to Article 16.2.1(a).

384. The United States' trade effects case is not only implausible, it is completely speculative. The United States seeks to support its flawed case by providing aggregate export figures for the period 2006-2014.[211] These figures do not establish that the alleged delays affected trade between the Parties within the meaning of Article 16.2.1(a). Even if the consideration of these figures were pertinent to determine whether the alleged delays affected trade between the Parties, the Panel should note:

385. First, as Guatemala explained earlier, Article 16.2.1(a) requires an effect on trade between all CAFTA-DR Parties. The figures submitted by the United States cover only bilateral trade between Guatemala and the United States and therefore are insufficient.

386. Second, the United States does not provide any export figures for Serigrafia. Thus, there is no evidence to support the United States' assertion that the alleged delay in the registration of the Serigrafia union affected Guatemalan exports to the United States.

387. Third, while the United States presents export figures for Koa Modas and Mackditex, these are aggregate figures covering a nine-year period. The evidence submitted by the United States does not specifically indicate that Koa Modas and Mackditex exported to the United States in 2011 and 2012, respectively, the years in which the alleged delays in union registration occurred. In the absence of such evidence, it would be improper for the Panel to assume that Koa Modas and Mackditex exported to the United States during the relevant periods.

388. Fourth, even assuming for the sake of argument that Koa Modas and Mackditex did export to the United States in 2011 and 2012, respectively, the data in itself does not show a trade effect. The United States cannot seriously be claiming that all of the exports of Koa Modas and Mackditex were the effect of a 47 and 78 day delay in union registration.

[211] Exhibit USA-198.

389. In order to fulfill the requirements of Article 16.2.1(a), the United States has to establish a specific link between the alleged inaction (the delays in union registration) and the trade effect. If the United States intends to claim that the effect was felt in exports to the United States, it must establish such effect. It cannot simply assume there is an effect because exports were taking place. Instead, the United States has to show that the level of each company's exports (whether in volume or in price) was different in 2011 or 2012 than it otherwise would have been had the delays in union registration not taken place. It would also have to duly account for other factors that could have affected the exports. The United States has failed to provide any evidence specifically linking the delays with the level of exports of Koa Modas and Mackditex. Consequently, the United States has failed to meet the requirements of Article 16.2.1(a).

390. Finally, the United States argues that Guatemala imported apparel from the United States between 2006 and 2014.[212] This assertion is also clearly insufficient under Article 16.2.1(a). The United States does not provide any evidence that the apparel imported from the United States competed against the apparel manufactured by Koa Modas and Mackditex. Any claim of effects must necessarily be based on the existence of competition between the imported products and the products manufactured by Koa Modas and Mackditex. This would include proof that Koa Modas and Mackditex were producing for the domestic Guatemalan market. Nor does the United States provide any analysis of how the level of imports of apparel from the United States was different than it would otherwise have been had the delays in the registration of Koa Modas and Mackditex not occurred. In the absence of such evidence, it would be improper for the Panel to assume that the delays in the registration of the unions at Koa Modas and Mackditex had an effect on apparel imports from the United States.

391. In sum, the United States has failed to demonstrate that the alleged delays in union registration constituted a sustained or recurring course of inaction that affected trade between the Parties. Consequently, the Panel must reject the United States' allegations relating to union registration.

B. CONCILIATION TRIBUNALS

1. Action or Inaction by the Labor Courts With Respect to the Establishment of Conciliation Tribunals Falls Outside the Scope of Article 16.2.1(a)

392. Guatemala explained in detail in section III.A of this Submission why Article 16.2.1(a) does not cover the actions or inactions of the Guatemalan labor courts because they do not belong to Guatemala's Executive Branch. Guatemala also addressed, in section III.A, the flawed arguments put forward by the United States in its Rebuttal Submission. For the sake of brevity, Guatemala will not repeat the arguments again in this section.

393. Guatemala believes that the United States' allegations concerning the alleged failure by the labor courts to establish conciliation tribunals falls outside the scope of Article 16.2.1(a) and requests the Panel to reject the United States' allegation on that basis. The sections that follow proceed on the *arguendo* assumption that the Panel disagrees with Guatemala's interpretation of Article 16.2.1(a).

2. The United States' Claim is Based on an Erroneous Interpretation of Guatemalan Law

394. The United States' claim of inaction relating to the conciliation tribunals is premised on an incorrect interpretation of Guatemalan law. According to the United States, "if the workers' list of grievances does not fulfill the legal requirements under GLC Article 381 the court is obligated to

[212] U.S. Rebuttal Submission, para. 286.

correct it *sua sponte* and make a record of that fact".[213] The United States' interpretation of Article 381 is incorrect. Article 381 does not authorize nor require the court to correct the list of grievances *sua sponte*.

395. Article 381 of the Guatemalan Labor Code provides as follows:

> Contenido del pliego
>
> Artículo 381. El pliego de peticiones ha de exponer claramente en qué consisten éstas, y a quién o quienes se dirigen, cuáles son las quejas, el número de patronos o de trabajadores que las apoyan, la situación exacta de los lugares de trabajo en donde ha surgido la controversia, la cantidad de trabajadores que en éstos prestan sus servicios y el nombre y apellidos de los delegados y la fecha.
>
> La solicitud debe contener: el juez al que se dirige, los nombres, apellidos y demás generales de los delegados, lugar para recibir notificaciones, que debe establecerse en la población en donde tenga su asiento el juzgado, el nombre de la parte emplazada, dirección en donde deba ser notificada ésta, la indicación de que se adjunta por duplicado el pliego de peticiones y la petición de trámite conforme a las reglas de los artículos que preceden.
>
> Si la solicitud presentada no llena los requisitos legales, el tribunal, de oficio, la corregirá mediante acta. Inmediatamente, dará trámite a la solicitud.

396. Article 381 refers to two different documents. The first paragraph refers to the list of grievances ("pliego de peticiones") and describes the requirements that such list of grievances must meet. These requirements are: a clear exposition of the grievances, the identification of the person against whom the grievances are directed, a listing of the grievances, the number of workers that support the movement, exact location of the workplace where the dispute arose, the number of workers employed at the workplace, first and last names of the delegates, and date.

397. The second paragraph of Article 381 refers to a separate document, which is the petition to the court. The requirements for the petition are: name of the judge to whom the request is directed, first and last names of the workers, notification address for the workers, identification of the employer, notification address for the employer, an indication that the list of grievances is attached, and the petition to accept the request ("petición de trámite").

398. The third paragraph provides that "[i]f the *petition* does not meet the legal requirement, the court shall, on its own motion, correct it" and note this fact.

399. As is evident from the text of Article 381, the court is only authorized to correct the "petition" ("solicitud") on its own motion. The petition is a document that is separate from the list of the grievances. Article 381 in no way authorizes the court to correct the list of grievances. Indeed, for the court to modify the list of grievances would be to interfere with the employees' rights.

400. Accordingly, the United States errs when it alleges that the court on its own motion is required to correct any deficiencies in the list of grievances. Such interpretation of Article 381 is not supported by the text of the provision and the United States provides no other evidence to support its interpretation.

[213] U.S. Rebuttal Submission, para. 272.

3. The United States Has Not Established that Any Delays in the Establishment of the Conciliation Tribunals Were Attributable to the Guatemalan Courts

401. In order to show inaction by the Guatemalan courts, the United States must first establish that the workers filed a request for conciliation and that the request met all of the requirements established under Guatemalan law. As discussed below, the United States has failed to meet these requirements.

a) Las Delicias

402. Contrary to the United States' assertion[214], Guatemala does dispute the facts presented by the United States. Indeed, Guatemala contests the United States' assertion that workers of Las Delicias requested a conciliation tribunal.

403. The United States claims that Exhibit USA-227 contains the request for conciliation for Las Delicias. However, nowhere in Exhibits USA-227 is Las Delicias mentioned. The alleged request for conciliation that is allegedly included in Exhibit USA-227 could correspond to workers of any company. There is nothing in Exhibit-227 that indicates that the request was made by workers of Las Delicias.

404. The only other "evidence" submitted by the United States is a joint statement provided anonymously by five individuals. As Guatemala already explained in its Initial Written Submission, this statement has no probative value and, if used by the Panel would violate Guatemala's due process rights.[215] Given that the identities of the individuals have been redacted, neither Guatemala nor the Panel can confirm that the individuals were workers of Las Delicias. Moreover, since the United States has not submitted the request for conciliation, there is nothing to substantiate the individual's assertion that they filed the request. Anonymous statements are inherently lacking in probative value and credibility. The statement's lack of credibility is further exacerbated in this particular case considering that in the statement five individuals purport to have the same exact recollection of events occurring 13 years earlier.

405. In conclusion, the United States has failed to establish that a request for conciliation was made by the workers of Las Delicias. Therefore, the United States has failed to establish that the labor courts had an obligation to take action and, consequently, the United States' allegations with respect to Las Delicias do not provide a basis for a claim of inaction under Article 16.2.1(a).

b) Ternium

406. As the United States acknowledges and as confirmed in Exhibit USA-138, the labor court found, on March 6, 2012, that the workers of Ternium had failed to comply with two of the express requirements set out in Article 381 for the list of grievances, namely, they had failed to indicate the number of employees supporting the grievances and the number of persons employed at the workplace where the dispute arose. The court's decision was subsequently confirmed on March 27, 2012.[216] Thus, the deficiencies in this case concerned the list of grievances. Contrary to the United States' allegation, the labor court was neither required nor authorized to correct the flaws in the list of grievances under the third paragraph of Article 381. Hence, the United States has failed to demonstrate that there was inaction on the part of Guatemala's labor courts in establishing a conciliation tribunal in the case of Ternium.

407. The United States asserts that the workers provided the labor court with supplemental information on March 14, 2012 and thus argues that the court erred in its ruling of March 27, 2012. If indeed there was legal error in the labor court's ruling, the employees could have appealed it. It is,

[214] U.S. Rebuttal Submission, para. 256.
[215] Guatemala's Initial Written Submission, para. 426.
[216] Exhibit USA-230.

however, not appropriate for the United States to challenge the labor court's decision under the pretext of a claim under Article 16.2.1(a). The labor court took action. The action may have been legally wrong, but it is still constitutes action. More importantly, Article 16.3.8 makes it absolutely clear 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 this Chapter". Consequently, the United States may not seek to reopen the court's decisions in these proceedings.

408. In any event, there are serious questions about the reliability of Exhibit USA-229. The document purports to respond to a ruling of March 6, 2012. Yet, the document contained in Exhibit USA-229 is dated February 14, 2012, that is, *20 days earlier than the court ruling*. This is yet another reminder of the grave risks of relying on redacted documents whose authenticity cannot be verified.

409. Hence, the United States has failed to demonstrate that there was inaction on the part of Guatemala's labor courts in establishing a conciliation tribunal in the case of Ternium and, consequently, there is no basis for the United States' claim under Article 16.2.1(a).

c) Avandia

410. The United States alleges that the Guatemalan labor courts failed to establish conciliation tribunals in response to three petitions filed by employees of Avandia on three occasions, namely, November 13, 2006, August 29, 2007, and September 4, 2009.[217] The United States' allegations are unfounded.

411. As regards the first request, the labor court found that the list of grievances did not fulfill the requirements set out in Article 381.[218] Consequently, the labor court was legally precluded from establishing the conciliation tribunal.

412. With respect to the request of August 29, 2007, Exhibit GTM-44 explains that the labor court initially determined that the list of grievances did not meet the requirements set out in Article 381.[219] GTM-44 then explains that the employer subsequently challenged the designation of the employees' representatives and later appealed the court's ruling. GTM-44 further indicates that the employer refused to designate its representatives for the conciliation tribunal. It then explains that, in the light of employer's refusal to designate its representatives, the court authorized the employees to designate the representatives on behalf of the employer. Thus, GTM-44 shows that the labor court took a proactive stance in favor of the employees' interests and that there is no basis for the United States' allegation of inaction.

413. Finally, with respect to the third petition, Guatemala explained in its Initial Written Submission 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 the conciliation tribunal was constituted by the labor court. The conciliation tribunal resulted in a collective agreement that was signed between Avandia and its employees.[220]

414. In its Rebuttal Submission, the United States now claims that Guatemala's exhibit does not have the same case number as the proceeding to which the United States alludes.[221] The Panel will recall that the United States has redacted the case numbers and has asserted that redacted information

[217] U.S. Rebuttal Submission, para. 257.
[218] Exhibit GTM-56.
[219] Guatemala's Initial Written Submission incorrectly described the contents of GTM-44.
[220] Exhibit GTM-33. Tribunal resolution approving the collective agreement between Avandia and its employees.
[221] U.S. Rebuttal Submission, para. 263.

is not evidence that is before this Panel. Thus, the United States' allegation that Guatemala mistook the September 4, 2009 proceeding has no support in the record. It is an unsubstantiated allegation that cannot be verified until the United States submits an un-redacted copy of its exhibit.[222] The United States cannot have it both ways. It cannot claim that certain information is not in evidence, but then seek to rely on precisely that information. The United States' approach is grossly unfair to Guatemala.

d) Fribo

415. The United States acknowledges that the labor court found that the workers' request for a conciliation tribunal did not meet the requirements of Article 381 of the Guatemalan Labor Code.[223] Nonetheless, the United States complains that the labor court "did not advance the constitution of the tribunal despite the any missing information from the workers".[224]

416. Although the United States claims not to be second-guessing the labor court's decision, it is in fact doing so. The labor court ruled that the workers' request did not fulfill the conditions required by law and that, consequently, the court could not proceed with the establishment of the conciliation tribunal. In other words, the court—correctly or incorrectly—considered that it was legally precluded from proceeding with the establishment of the conciliation tribunal. The United States' allegation thus goes to the merits of the court's ruling. And, while the court's decision could have been wrong, it was not an instance of inaction by the labor court.

417. Guatemala recalls that labor court decisions may not be reviewed under Article 16.2.1(a), as the negotiators made clear in Article 16.3.8:

> For 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.

418. Article 16.2.1(a) was never intended to provide for international review of domestic court decisions. This Panel must refuse the United States' attempt to have it second-guess the decision of the Guatemalan labor court.

4. Even If There Had Been Delays, The United States Has Failed to Establish that Such Delays Constitute a Sustained or Recurrent Course of Inaction

419. As discussed in the preceding section, the United States has failed to establish that the workers of Las Delicias filed a list of grievances or otherwise requested the establishment of a conciliation tribunal. The United States has also failed to establish that, in the case of Ternium, the labor courts were required or even permitted by Guatemalan law to correct, *sua sponte*, the legally deficient list of grievances filed by the workers. Therefore, there is simply no indication of inaction by the Guatemalan labor courts with respect to Las Delicias and Ternium.

420. This leaves only the allegations with respect to Avandia and Fribo. The facts before the Panel on Avandia and Fribo are highly contested between the Parties. Moreover, there are uncertainties surrounding the court proceedings with respect to both companies because of the United States' refusal to provide the relevant identifying information. To the extent there are uncertainties as to the existence of an obligation to act or of inaction by the Guatemalan labor courts, the Panel must rule against the United States in accordance with the rules on the burden of proof set out in Rule 65 of the

[222] Guatemala recalls that, under Rule 65 of the MRP, the United States has the burden of proving the facts that it alleges as well as the overall burden.
[223] U.S. Rebuttal Submission, para. 266.
[224] U.S. Rebuttal Submission, para. 266.

MRP.

421. Furthermore, even if the United States were to establish inaction in relation to Avandia and/or Fribo, it has not established that such inaction is part of a "sustained or recurrent course of … inaction". At most, it would have established two isolated instances in which the constitution of a conciliation tribunal was delayed. There is no connection between the situations relating to Avandia and Fribo, nor has the United States established one. Two disconnected events can hardly be described as a "series".[225] Nor are they sufficient to show that there has been a failure on a "consistent and repeated basis" as the United States attempts to allege.[226] Thus, the allegations made by the United States fail to establish a "sustained or recurrent course of … inaction" even under the United States' own interpretation of the legal standard. As regards the interpretation put forward by Guatemala, the United States has not provided any evidence of a deliberate policy to delay the establishment of conciliation of tribunals. Thus, the United States' allegation would also fail.

422. Guatemala recalls that Article 16.2.1(b) provides that "a Party is in compliance with subparagraph (a) where a course of action or inaction results from a *bona fide* decision regarding the allocation of resources." The delays in the establishment of the conciliation tribunals at Avandia and Fribo, if they in fact occurred, would simply reflect of the practical difficulties and resource constraints that labor courts face in all countries. The United States has failed to provide any evidence that the delays were not the result of *bona fide* decisions regarding the allocation of resources.

423. In the light of the above, the Panel must conclude that the United States has failed to establish that Guatemala has failed to effectively enforce its labor laws through a sustained or recurring course of action or inaction in relation to the constitution of conciliation tribunals.

5. The United States has Failed to Establish that the Alleged Failure to Establish Conciliation Tribunals at Fribo and Avandia Affected Trade Between the Parties

424. The United States seeks to support its allegation that the failure to establish conciliation tribunals at Fribo and Avandia affected trade between the Parties by providing aggregate export figures for the period 2006-2014.[227] These figures do not establish that the alleged failure to establish conciliation tribunals at these two companies affected trade between the Parties within the meaning of Article 16.2.1(a).

425. Even if the consideration of these figures were pertinent to determine whether the alleged delays affected trade between the Parties, Guatemala reiterates that Article 16.2.1(a) requires an effect on trade between all CAFTA-DR Parties. The figures submitted by the United States cover only bilateral trade between Guatemala and the United States and therefore are insufficient.

426. In addition, while the United States presents export figures for Fribo and Avandia, these are aggregate figures covering a nine-year period. The evidence submitted by the United States does not specifically indicate that Fribo and Avandia exported to the United States when the alleged failure to establish a conciliation tribunal occurred. In the absence of such evidence, it would be improper for the Panel to assume that Avandia and Fribo exported to the United States during the relevant periods.

427. Moreover, even assuming for the sake of argument that Fribo and Avandia did export to the United States in the relevant years, the data in itself does not show a trade effect. There is no basis for the United States to claim that all of the exports of Fribo and Avandia were the effect of the alleged failure to establish a conciliation tribunal.

428. In order to fulfill the requirements of Article 16.2.1(a), the United States has to establish a

[225] U.S. Rebuttal Submission, para. 277.
[226] U.S. Rebuttal Submission, para. 277.
[227] Exhibit USA-198.

specific link between the alleged inaction (the alleged failure to establish a conciliation tribunal) and the trade effect. If the United States intends to claim that the effect was felt in exports to the United States, it must establish such effect. It cannot simply assume there is an effect because exports were taking place. Instead, the United States has to show that the level of each company's exports (whether in volume or in price) was different in the relevant year than it otherwise would have been, had the conciliation tribunal been established. It would also have to duly account for other factors that could have affected the exports. The United States has failed to provide any evidence specifically linking the alleged failure to establish the conciliation tribunals with the level of exports of Avandia or Fribo. Consequently, the United States has failed to meet the requirements of Article 16.2.1(a).

429. The United States additionally argues that Guatemala imported apparel from the United States between 2006 and 2014.[228] This assertion is also clearly insufficient under Article 16.2.1(a). The United States does not provide any evidence that the apparel imported from the United States competed against the apparel manufactured by Avandia or Fribo. Any claim of effects must necessarily be based on the existence of competition between the imported products and the products manufactured by Avandia and Fribo. This would include proof that Avandia and Fribo were producing for the domestic Guatemalan market. Nor does the United States provide any analysis of how the level of imports of apparel from the United States was different than it would otherwise have been if the conciliation tribunals had been established in the case of Fribo and Avandia. In the absence of such evidence, it would be improper for the Panel to assume that any failure to establish a conciliation tribunal at Fribo or Avandia had an effect on apparel imports from the United States.

430. Guatemala has demonstrated that there was no legal basis for the labor courts to establish conciliation tribunals at Las Delicias or Ternium. In the circumstances, there are no trade effects for this Panel to examine. In the event the Panel were to disagree with Guatemala, the same arguments outlined above with respect to Fribo and Avandia would apply to Las Delicias and Ternium. Furthermore, Guatemala notes that Exhibit USA-198 does not register any exports to the United States either by Las Delicias or Ternium. Moreover, the United States does not submit any evidence that Guatemala imported coffee from the United States.

431. In sum, the United States has failed to demonstrate that any failure to establish conciliation tribunals constituted a sustained or recurring course of inaction that affected trade between the Parties. Consequently, the Panel must reject the United States' allegations relating to the establishment of conciliation tribunals.

VII. THE U.S. PANEL REQUEST DOES NOT CONFORMS TO THE CAFTA-DR REQUIREMENTS

432. The United States does not seem to dispute that its panel request is broad. Rather, the United States proposes an implausible legal interpretation of the CAFTA-DR through which, essentially, by merely paraphrasing Article 16.2.1(a), a complaining Party would comply with the requirements of Article 20.6.1 of the CAFTA-DR. That interpretation is incorrect and renders inutile the requests for establishment of a panel, as it would not notify the respondent and third parties of the nature of the measure and the gist of what is at issue.[229] It would not serve the purpose of defining the Panel's terms of reference pursuant to Article 20.10.4 of the CAFTA-DR either.

433. According to the United States, it identified the "measure or other matter at issue" (which now it considers to be a single concept).[230] In the United States view, the measure is "Guatemala's failure, through a sustained or recurring course of action or inaction, to effectively enforce its labor

[228] U.S. Rebuttal Submission, para. 286.
[229] Guatemala's Preliminary Ruling Request, paras. 48 – 49, citing the Appellate Body Report, US – Continued Zeroing, paras. 168-69.
[230] US Rebuttal Submission, para. 295.

laws related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work".[231] This is, essentially, the text of Article 16.2.1(a) and three of the five internationally recognized labor rights provided for in Article 16.8. No more, no less.

434. The United States also believes that it has indicated the "legal basis for the complaint" because Article 16.2.1(a) was referenced in its panel request.[232] In its rebuttal submission, the United States further argues that Article 16.2.1(a) contains "one legal obligation, not multiple and/or distinct obligations".[233] This extremely narrow interpretation of Article 16.2.1(a) unsuccessfully seeks to avoid the necessary conclusion that simply listing the legal provisions claimed to have been infringed would not be sufficient to present the problem clearly.

435. Regarding the "examples of failures that it included in its panel request", the United States argues that the issue of an "open-ended list of failures" is a "question of the evidence involved rather than the identification of the measure or other matter at issue".[234] Guatemala understands this argument as the United States conceding that the examples it provided in its panel request are not intended to identify the measure at issue.

436. The mere description of the United States' arguments reflects the fragility of its position. Its panel request cannot withstand scrutiny and the Panel should find that this dispute is not properly before it, and, therefore, find that it does not have the authority nor the jurisdiction to consider the complaint of the United States.

437. Before addressing each of the United States' arguments in detail, it is important to note that the United States does not dispute that:

a. the sufficiency of a panel request must be evaluated on its face and as a whole;[235] and

b. the respondent's ability to defend itself has no bearing in the sufficiency of the panel request;[236]

438. Guatemala concurs. Therefore, the Panel must assess the US panel requests "on its face and as a whole" regardless of the ability of Guatemala to defend itself.

439. Guatemala also notes that the United States has not refuted, in any of its communications, that its panel request conflates the concepts of "matter at issue" and the "legal basis for the complaint".[237] Therefore, the Panel should consider this contradiction in the Panel request as undisputed fact.

440. The United States neither clarified, on the basis of the text of its panel request, whether it was accusing Guatemala of "action" or "inaction" pursuant to Article 16.2.1(a) of the CAFTA-DR.[238] In the absence of the United States' refutation to Guatemala's arguments on this point, the Panel should conclude that the panel request is unclear on this issue.

441. The United States also confirmed that the labor laws in its panel request are "identifiable".[239] The Panel, therefore, should find that the labor laws, which are "identifiable", by the own admission of the United States, were therefore not "identified" in the Panel request.

442. Now, Guatemala addresses the United States' arguments of its Rebuttal Submission in turn.

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[231] US Rebuttal Submission, para. 289.
[232] US Rebuttal Submission, para. 289.
[233] US Rebuttal Submission, para. 308.
[234] US Rebuttal Submission, para. 303.
[235] US Rebuttal Submission, para 315.
[236] US Rebuttal Submission, para. 312.
[237] Guatemala's Request for a Preliminary Procedural Ruling, para. 80; and Guatemala's Initial Written Submission, paras. 33, 34.
[238] Guatemala's Request for a Preliminary Procedural Ruling, paras. 111-113.
[239] Guatemala's Initial Written Submission, paras. 35, 36; US Initial Written Submission, para 271.

A. THE US PANEL REQUEST FAILS TO IDENTIFY THE MEASURE OR OTHER MATTER AT ISSUE

443. The Parties disagree as to what is the measure or other matter at issue that must be identified in accordance with Articles 20.6.1 and 16.2.1(a) of the CAFTA-DR. This is a threshold issue.

444. Contrary to the United States' misunderstanding, [240] Guatemala has not abandoned its earlier position that the measure at issue would be the labor laws that are not being enforced.

445. While Guatemala agrees that "behavior" might be the subject matter of a dispute under Article 20.6.1 of the CAFTA-DR, it also clarified that "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)".[241] In particular, Guatemala submits that a "complaining Party cannot simply identify 'a failure to effectively enforce labor laws' as 'a measure or other matter at issue'" because that identification "would be incomplete".[242] That identification would be, in fact, the "description of the prohibition contained in Article 16.2.1(a)".[243]

446. Guatemala has also stated that the "labor laws [that are claimed to have been breached]…must be clearly identified [in the panel request]".[244]

447. In contrast, the United States asserts that the "measure at issue" is simply a Party's failure to conform to its obligations under Article 16.2.1(a) with respect to the effective enforcement of labor laws".[245] The United States appears to consider unnecessary the identification of those labor laws as long as they are "identifiable".[246]

448. In view of the above, the issue before the Panel is whether the "measure or other matter at issue" requires the precise identification of the labor laws that are claimed to have been breached.

449. If the Panel were to agree with the United States that a precise identification of such labor laws is not required by Articles 20.6.1 and 16.2.1(a) of the CAFTA-DR, then the Panel would accept that a panel request only needs to paraphrase Article 16.2.1(a) to conform with the requirements of Article 20.6.1 of the CAFTA-DR. The following example, in the hypothetical (but not improbable) scenario that Guatemala brings a dispute against the United States for its failure to effectively enforce its labor laws, would meet the proposed legal standard of the United States:

> The measure at issue is the United States' failure to conform to its obligations under Article 16.2.1(a) with respect to the effective enforcement of the United States' labor laws within the meaning of Article 16.8 of the CAFTA-DR.

450. In the example above, even with its very limited number of labor rights, laws and regulations, the United States would have absolutely no idea what would be the measure at issue and the legal basis for the complaint. It would not be notified of the nature of the measure and the gist of what is at issue.[247] The Panel request neither would serve the purpose of defining the Panel's terms of reference pursuant to Article 20.10.4 of the CAFTA-DR.

451. Therefore, in that example (which is not different from what happens in the present dispute), the defendant would need to wait until receipt of the first written submission of the complaining Party to understand what the case is about. The Panel would have to determine its terms of reference of the

[240] US Rebuttal Submission, para. 298.
[241] Guatemala's Initial Written Submission, para. 32.
[242] Guatemala's Initial Written Submission, para. 32.
[243] Guatemala's Initial Written Submission, para. 32.
[244] Guatemala's request for a Preliminary Procedural Ruling, para. 63.
[245] US Initial Written Submission, para. 270.
[246] US Initial Written Submission, para 271.
[247] Guatemala's Preliminary Ruling Request, paras. 48 – 49, citing the Appellate Body Report, US – Continued Zeroing, paras. 168-69.

basis of the written submissions of the complaining Party, not the panel request. There also will be the risk that the complaining Party raises new claims after its first written submission. Given the breath and vagueness of the panel request, both the Panel and the defending Party would have to accept that the claims of the first written submission and the new claims made in subsequent submissions would be also under the Panel's jurisdiction.

452. The hypothetical situation described above is not very different to the situation occurring in this dispute and demonstrates that the need to identify with sufficient precision the labor laws that are claimed to have been breached as part of the "measure or other matter at issue" hardly requires more argumentation.

453. The requirement to identify the labor laws at issue stems from the text, object and purpose of the CAFTA-DR provisions. The fact that the definition of "measure" in Article 2.1 of the CAFTA-DR may include "behavior" or "conduct" by the Parties, that definition does not exempt the complaining Party from setting out "the reasons for the request". Furthermore, Article 16.2.1(a) can only be breached if a Party is found to be failing to effectively enforce *particular and precise* labor laws. A claim of breach of this provision cannot be made in abstract. Therefore, by the moment the complaining Party submits its panel request, it must know what are the labor laws it will claim to have been breached. The omission of this information in the Panel request raises serious doubts as to the real intentions of the complaining Party. In the absence of a better explanation, Guatemala can only think that the intention of the complaining Party is to put the defending Party in a serious disadvantage, preventing it from start preparing its defense; or that the complaining Party has not made its decision about its case and, therefore, that case was initiated frivolously.

454. Therefore, regarding the threshold issue, it is clear that the identification of the labor laws at issue must be part of the measure or other matter at issue.

455. With respect to the fact of the present case, the United States neither identified the labor laws at issue nor, more generally, the measure or other matter at issue. Guatemala will not repeat its arguments as reflected in its request for a Preliminary Procedural Ruling and its First Written Submission. Instead, Guatemala will address some of the most recent arguments of the United States which, in no way, changes the fact that the panel request is so broad and vague that fails to accord to the CAFTA-DR requirements.

e) The examples of "types of inaction" are irrelevant and do not define the measure or other matter at issue

456. The United States argues that Guatemala "fails to consider the U.S. panel request as a whole by ignoring the three examples of types of inaction". The United States then adds that "Guatemala's argument that the U.S. panel request includes an open-ended list of failures […] is a question of the evidence involved rather than the identification of the measure or other matter at issue".[248] Regardless the contradictions in these statements, mere examples of alleged "failures" do not accord to the CAFTA-DR requirements and do not define the measure at issue. As a matter of fact, a list of alleged failures would require undertaking legal research and exercise of judgment in order to establish the precise identity of the laws and regulations implicated by the panel request.[249] Moreover, it is noteworthy that the United States does not dispute that its examples are, in fact, an open-ended list. The United States also appears to acknowledge that such an open-ended list is "a question of the evidence involved rather than the identification of the measure or other matter at issue".[250]

457. In view of the above, the three examples provided by the United States in its panel request are irrelevant in the definition of the measure or other matter at issue.

[248] US Rebuttal Submission, paras. 301, 303.
[249] Guatemala's Preliminary Ruling Request, paras. 56-58.
[250] US Rebuttal Submission, para. 303.

f) The identification of "three specific areas" in which Guatemala allegedly fails to enforce its laws is insufficient to set out the reasons for the panel request

458. The United States claims that Guatemala assigns no significance to the fact that its panel request identifies three specific "areas" in which Guatemala allegedly fails to effectively enforce its laws.[251] The United States adds that the three "identified areas correspond with the definition of labor laws in Chapter 16 as laws related to five internationally recognized labor rights".[252] It also takes issue with Guatemala's description of its general legal framework in its initial written submission.[253] The United States wonders why "Guatemala finds it is able to identify the laws related to these rights in this section of its submission, while articulating that it cannot do so in the section regarding its request for a preliminary procedural ruling".[254]

459. These arguments hardly need refutation. Paragraph 84 of Guatemala's initial written submission contains a general statement that reads as follows:

460. 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.

461. This statement does not identify any of Guatemala's labor laws. For that reason alone, the United States' arguments are misplaced.

462. Nonetheless, and more importantly, neither of the five areas defined as "labor laws" in Article 16.8 would allow Guatemala to identify the specifics "labor laws" at issue in the present dispute.

463. Guatemala is mindful of the fact that the United States has poor labor standards and few labor laws protecting its workers. Probably, for the United States it may be easier to identify its labor laws by a mere reference to the "areas" referred to in Article 16.8. This is not the case of Guatemala, however.

464. Guatemala's labor standards are very high. Unlike the United States, Guatemala really cares about its workers. For that reason, Guatemala has ratified the majority of the ILO Conventions and developed a complex and modern domestic labor legislation composed of hundreds of laws, regulations, judicial and administrative decisions. Guatemala is constantly improving its internal proceedings and guarantees the effective enforcement of its labor laws. In its Request for a Preliminary Procedural Ruling Guatemala identified, as a way of example, no less than forty pieces of legislation that are "related to" the three areas identified by the United States in its panel request. There are many more. In this regard, the mere reference to any or all of the areas referred to in Article 16.8 does not say anything to Guatemala. That can be easily confirmed by contrasting the examples provided for Guatemala in its preliminary ruling request and the laws finally claimed to have been breached in the United States' submissions. There is a comparison between 40+ expected laws to be the subject of the dispute versus two labor laws that finally were invoked in the proceedings. A defending Party that is put in this situation simply cannot start a meaningful preparation of its defense until it receives the other Party's submissions in clear violation of its due process rights.

g) The arbitral award in *Costa Rica v. El Salvador* does not support the United States' arguments:

465. The United States also cites the arbitral panel in *Costa Rica v. El Salvador*, allegedly in

[251] US Rebuttal Submission, para. 300.
[252] US Rebuttal Submission, para. 300.
[253] The description in paragraph 84 of Guatemala's initial written submission.
[254] US Rebuttal Submission, para. 300.

support of its arguments. That case, however, does not add anything to the US position.

466. As acknowledged by the United States, that dispute did not concern Article 16.2.1(a). Therefore, to start, the United States is referring to a dispute that involves different facts and legal standards.

467. In *Costa Rica v. El Salvador*, the measure at issue was "the failure of El Salvador to apply the CAFTA-DR tariff elimination program". No domestic laws were involved in such a dispute. There was only one tariff elimination program for El Salvador under the CAFTA-DR, clearly identified. The Panel was asked to decide between two possible options: whether El Salvador was obliged (and failed) to grant or not preferential tariff concessions to other Central American countries. The questions before the Panel in Costa Rica v. El Salvador were, no doubt, very different to the questions before this Panel. There is not even a point of comparison.

468. Additionally, Guatemala does not dispute and, in fact agrees, that the panel request must be assessed as a whole. Precisely, as indicated in numerous occasions, by assessing the US panel request as a whole is that Guatemala concludes (and the Panel should conclude) that it does not conform to the CAFTA-DR requirements.

h) The fact that the labor laws are "identifiable" confirms that they were not identified in the panel request.

469. For the reasons explained above, the United States did not identify the measure or other matter at issue in its panel request. The undisputed fact that the measure or other matter at issue might be "identifiable" further confirms that such a measure or other matter at issue was not identified in the panel request.

B. THE US PANEL REQUEST FAILS TO INDICATE THE LEGAL BASIS FOR THE COMPLAINT

470. According to the United States, its panel request indicates the legal basis for the complaint because it mentioned Article 16.2.1(a).[255] In the view of the United States, that would be acceptable because it considers that Article 16.2.1(a) contains "one legal obligation". That interpretation is incorrect.

471. Article 16.2.1(a) contains multiple obligations. However, the question of whether it contains one or multiple legal obligations is irrelevant. A mere reference to the provision is insufficient to "set out the reasons for the request" and "present the problem clearly".

472. In this regard, Guatemala notes that the United States agrees that a panel request needs, on its face, to plainly connect the challenged measure to the legal basis for the complaint.[256] This is a requirement that the Appellate Body found necessary "in order to present the problem clearly".[257] Therefore, the Panel should find that the United States agrees that the panel request needs to "present the problem clearly".

473. Turning to the United States' narrow interpretation of Article 16.2.1(a), it clearly does not support the presentation of the problem "clearly". The United States suggests that the sole obligation in Article 16.2.1(a) is that a "Party shall not fail to effectively enforce its labor laws". If that were correct, *quad non*, a mere reference to Article 16.2.1(a) as the legal basis of the complaint would not present the problem clearly.

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[255] US Rebuttal Submission, para. 305.
[256] US Rebuttal Submission, para. 305.
[257] Guatemala's Preliminary Ruling Request, para. 55, citing the 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).

474. In contrast, Guatemala may discern at least four different legal obligations under the said provision:

a. A Party shall not fail to effectively enforce its labor laws through a *sustained* course of *action* in a manner affecting trade between the Parties;

b. A Party shall not fail to effectively enforce its labor laws through a *recurring* course of *action* in a manner affecting trade between the Parties;

c. A Party shall not fail to effectively enforce its labor laws through a *sustained* course of *inaction* in a manner affecting trade between the Parties;

d. A Party shall not fail to effectively enforce its labor laws through a *recurring* course of *inaction* in a manner affecting trade between the Parties.

475. In view of these four and distinct legal obligations, a panel request that just makes reference to Article 16.2.1(a) simply does not present the problem clearly. Neither that reference plainly connects the measure at issues to the legal basis for the complaint, in particular, because the said reference cannot be considered as the legal basis of the complaint and the United States also failed to identify the measure at issue.

476. The lack of clarity is further exacerbated by the undisputed fact that the US panel request conflates the concepts of "matter at issue" and the "legal basis for the complaint".[258]

477. For the reasons above, the Panel must conclude that the US panel request does not set out the legal basis of the complaint.

C. THE UNITED STATES ARGUMENTS WITH RESPECT TO THE ROLE OF DUE PROCESS AND PREJUDICE CONSIDERATIONS ARE MISPLACED

478. The United States contends that Guatemala "miscomprehends the role of due process and prejudice"[259] and denies what is clearly stated in its submissions.[260]

479. However, given the fact that the disputing Parties agree that the panel request must be evaluated on its face and as a whole, Guatemala considers unnecessary to address, in this submission, the United States' contentions regarding the role of due process and prejudice considerations. They are misplaced and Guatemala respectfully refers the Panel to its previous submissions in support of this view.

VIII. CONCLUSION

480. For the reasons discussed in Guatemala's Initial Written Submission and in the preceding sections of this Rebuttal Submission, Guatemala respectfully requests that the Panel reject the United States' claims in their entirety.

[258] Guatemala's Request for a Preliminary Procedural Ruling, para. 80; and Guatemala's Initial Written Submission, paras. 33, 34.
[259] US Rebuttal Submission, para. 82.
[260] US Rebuttal Submission, paras. 312, 315.