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

Comments of Guatemala to the United States' Supplementary Written Submission and Responses to the Panel's Questions

1 July 2015

I. Introduction

1. The United States has attempted in its supplementary submission to present an overall picture of its case and yet what emerges is a house of cards that comes tumbling down at the slightest scrutiny.

2. The United States knew that its case was shaky from the outset. To overcome this, the United States has resorted to litigation tactics that have no place within the rules-based dispute settlement system that CAFTA-DR Parties sought to create. These litigation tactics also represents an unfortunate step backwards in terms of the practices that have been developed over the year to amicably settle disputes between sovereign States. The United States' case is essentially built on secret witness testimony, a practice that has been abandoned in the vast majority of domestic and international rules-based systems of adjudication because of its inherent unreliability and unfairness.

3. Now the United States attempts to rescue its case by suggesting that a large number of unreliable documents create a more reliable case. The opposite is true. Two unreliable documents are more unreliable than one. The fact that in this case the United States has submitted a large number of unreliable documents does not diminish their unreliability, but rather augments it and exponentially so. The distortion is further augmented here because the United States frequently attempts to buttress the credibility of an unreliable document by referring to another unreliable document. However, pointing to the second unreliable document does not give credibility to the first.

4. The picture before the Panel is distorted because that is precisely how the United States wanted it to be. The United States chose to withhold information from Guatemala and the Panel. The United States chose to deny Guatemala and the Panel access to its witnesses. It did so deliberately in order to obstruct Guatemala's ability to defend itself and to prevent the Panel from obtaining an accurate picture of the facts. If the United States had concerns about the confidentiality of the information, it could have, and should have, attempted to use the procedures foreseen in the Model Rules of Procedure ("MRP") to protect confidential information. If it had concerns about the adequacy of those procedures, it could have agreed to additional procedures with Guatemala or it could have requested the Panel to address such concerns in consultation with the Parties The United States, however, is not allowed to decide for itself, as it did in this case, that the MRP do not provide appropriate procedures or that appropriate procedures could not have been agreed between the Parties.

5. In the light of the distorted record, the Panel cannot reliably determine whether the facts alleged by the United States are true and the probability of error is significant. In such a situation, the MRP require the Panel to rule against the United States because it failed to present sufficient evidence and argumentation to make a *prima facie* case of violation. The measures and, in general, the conduct of a State is presumed to be consistent with its international obligations unless demonstrated otherwise. Not the contrary.

6. The United States has not only distorted the facts. It has also distorted the provisions of Chapter 16 of the CAFTA-DR. For the United States, Article 16.2.1(a) has but a single clause: "The Parties shall not fail to effectively enforce".

7. For the United States, other terms and even entire clauses of Article 16.2.1(a) have been magically stricken from the treaty. Under the United States' reading, the term "a course of" in the second clause of Article 16.2.1(a) is redundant, adding nothing to the other words in the clause; there must simply be an action or inaction that is sustained or recurring.

8. The third clause—"in a manner affecting trade between the Parties"—is to be conveniently ignored. The United States expects this Panel rule in its favor despite not having submitted any evidence of trade effects.

9. Similarly, Article 16.2.1(b), and the Parties' understanding of Article 16.2.1(a) contained in it, also disappears as if it never existed. The definition of "statutes or regulations" is conveniently re-written with respect to Guatemala, but conveniently remains unmodified for the United States. In the process, the United States not only re-writes Chapter 16 of the CAFTA-DR, it manages to re-write the customary rules of treaty interpretation. Under the United States' preferred rule, the treaty text is to be ignored, rather than given effect.

10. Looking back, perhaps the most unfortunate thing about this case—more so than the United States' political motivations or its total disrespect for Guatemala's due process rights—is that the United States has chosen to personally attack those in Guatemala who are on the front-lines working in favor of employees' rights. The United States indiscriminately attacks Guatemala's labor inspectors and judges, tarnishing their reputations with unsubstantiated statements to which, given the secret nature of the testimony, they cannot respond. These inspectors and judges are the very people that the United States should seek to support. The true spirit of Chapter 16 of the CAFTA-DR is cooperation. In the particular circumstances of this case, the approach taken by the United States could not have been more inconsistent with the spirit of Chapter 16 of the CAFTA-DR.

11. While the United States built its house of cards and rushed to score some political points, it forgot that its labor enforcement record is less than stellar. The United States Department of Labor would certainly not fare well in a CAFTA-DR proceeding, particularly if the strict liability standard advocated by the United States were applied. For example, the U.S. Department of Labor'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 just 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.[1] The delays of an average of 20 days for the registration of unions or 48 hours for the conduct of an inspection that

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

underlie the United States' complaint are negligible in comparison.[2] And, in the future, the United States would do better by refraining from leveling unsubstantiated accusations of political violence against Guatemala when the world's newspapers are replete with coverage of unfortunate acts of racial violence that are happening regularly in the United States, many of which involve actions by its law enforcement agencies.

12. In this submission, Guatemala provides comments on the United States' supplementary written submission and on the United States' responses to the Panel's questions following the oral hearing.[3] Section II addresses issues related to the use of secret witnesses, redacted documents and the violation of Guatemala's due process rights. Section III deals with arguments regarding the issue of "trade effects". Section IV refers to the United States' argument relating to a "sustained or recurring course of...inaction". Section V addresses the failure of the United States to establish inaction by Guatemala's Labor Courts or the Public Ministry. Section VI discusses the United States' failure to make a prima facie case of violation with respect to the conduct of inspections and imposition of penalties. Section VII deals with the United States' failure to establish inaction with respect to the registration of unions or the establishment of conciliation tribunals. Section VIII addresses Guatemala's procedural objections to the U.S. panel request. And finally, Section IX contains the conclusions.

II. The United States' Case is Based on Secret Witness Testimony and Redacted Documents that are Inherently Unreliable and the Panel Would Violate Guatemala's Due Process Rights If It Relied on Them

13. The secret witness testimony and redacted documents on which the United States based its case are inherently unreliable. None of the arguments provided by the United States in its supplementary written submission provides a valid basis for the use of such documents in these proceedings.

14. In its supplementary submission, the United States asserts that it is "not obliged to rely on the confidentiality procedures of the Rules".[4] This is an astonishing statement that reflects the utter lack of respect that the United States has for MRP and for Guatemala's due process rights. Indeed, this statement encapsulates the United States' behavior in these proceedings.

15. The MRP were agreed upon by all CAFTA-DR Parties, including the United States. The MRP "shall apply to dispute settlement proceedings" under Chapter Twenty of the CAFTA-DR unless the disputing Parties otherwise agree. These proceedings are being conducted under the

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[2] See Guatemala's Rebuttal Submission, para. 15 for more examples.

[3] Guatemala does not intend to repeat the arguments that it has made in previous submissions and at the oral hearing. The fact that Guatemala does not repeat an argument in this submission should not be understood as an abandonment of that argument. Nor can Guatemala comment on every point raised by the United States in its supplementary submission and responses to the Panel's questions. The fact that Guatemala does not address a point raised by the United States should not be understood as a concession. Guatemala also notes that many of issues raised by the United States in its supplementary written submission and its responses to the Panel's questions have been already addressed by Guatemala in its supplementary written submission and responses to the Panel's Questions

[4] U.S. Supplementary Written Submission, para. 14.

dispute settlement procedures of Chapter Twenty and the disputing Parties have not agreed to set aside the MRP. Therefore, the United States is bound to comply with the MRP, including with respect to confidentiality. It is rather ironic that the United States so brazenly admits to flaunting its own international commitments while supposedly trying to hold Guatemala to its international obligations. This is one of many examples of the double standards that the United States has exhibited in these proceedings.

16. The United States claims that it did provide a valid justification for relying on secret witness and for redacting key identifying information from the vast majority of documents that it submitted in these proceedings.[5] This is not accurate. The reality is that the United States unilaterally decided to provide secret witness testimony and redact the other documentary evidence. It was only after Guatemala objected to the secret witness testimony and the redacted exhibits that the United States claimed unilaterally that it was justified.

17. In its supplementary submission, the United States asserts that the workers' concerns are "well-founded".[6] First, this is an unsubstantiated assertion by the United States, just like the United States' statement that it is "bound"[7] by its commitment to the workers. The United States has not provided any evidence of its binding commitment to these workers. Secondly, whether or not the concerns were "well-founded" was not a determination that the United States could unilaterally make. If indeed the United States considered that the workers' concerns were well-founded, it could have raised the issue with the Panel and Guatemala and it could have explored with the Panel and Guatemala mechanisms that could mitigate those concerns. But it never even tried to do so.

18. If one were to adopt the logic of the United States' argument, Guatemala would equally be entitled to unilaterally determine that the U.S. panel request does not conform to the CAFTA-DR requirements and simply decide not to engage in dispute settlement proceedings because the Panel lacks jurisdiction. This raises the question: why is the United States entitled to arrogate for itself the determination on the adequacy of the protection of confidential information, while Guatemala cannot unilaterally determine the adequacy of the United States' panel request?

19. Furthermore, the United States' argument is premised on the proposition that the wishes of persons supplying information to one of the disputing Parties prevail over the CAFTA-DR, the MRP, and the due process rights of the other disputing Party.[8] There is absolutely no basis for this proposition. The United States is not entitled to undermine the CAFTA-DR, the MRP, the fairness of these proceedings, and the due process rights of Guatemala because of some arrangement into which it entered with persons who supplied it with information. The United States should bear the consequences of any limitations in the arrangement that it negotiated with its sources, not Guatemala which was not even privy to that arrangement.

[5] U.S. Supplementary Written Submission, para. 14.

[6] U.S. Supplementary Written Submission, para. 14.

[7] U.S. Supplementary Written Submission, para. 14.

[8] U.S. Supplementary Written Submission, para. 14.

20. The United States further asserts that Guatemala is in a position to have and produce evidence to show that Guatemala has enforced its labor laws. This allegation brutally mischaracterizes the burden of proof and long-held principles of public international law. According to Rule 65, the burden of proving that Guatemala is not complying with Article 16.2.1(a) is squarely on the United States. This burden included the burden of production. Guatemala was not required, as the United States suggests, to adduce evidence to establish that it is in compliance with Article 16.2.1(a). Moreover, it is a long-standing principle of public international law that States, including Guatemala, must be presumed to be complying with their international obligations unless proven otherwise.[9]

21. In addition to being wrong as a matter of law, the United States' assertion reveals the double standards that have characterized the United States' positions in this case. The United States is criticizing Guatemala for failing to find alternative evidence, when the United States itself never even attempted to obtain evidence that would not require it to use the witness statements or the court documents. Why does Guatemala have to be diligent in seeking alternative evidence, but the United States does not?

22. The United States next submits that Guatemala's objection to the use of secret testimony and redacted exhibits "is a diversion from the central issue of these proceedings".[10] Even if it were a "diversion", which it is not, it was introduced into these proceedings by the United States which is the Party that unilaterally decided to heavily rely on secret witness testimony and redact documents to make it harder for Guatemala to find them. Furthermore, far from being a diversion, the use of secret testimony and redacted exhibit is a central issue in these proceedings. The United States submitted 77 secret witness statements (of which 66 are initial statements and 11 subsequent statements) and 110 redacted documents. That amounts to almost 80% of the total exhibits submitted by the United States.

23. Indeed, the United States contradicts its own argument. While trying to minimize the importance of the secret testimony and redacted exhibits, the United States argues that each of these exhibits "establishes a factual foundation for the instances in which Guatemala failed to effectively enforce its labor laws".[11] The United States thus acknowledges that the factual foundation of its claims *depends* on the secret witness testimony and redacted exhibits. How then can it argue that the issue is a "diversion from the central issue of these proceedings"? If anything, the United States' assertion highlights why it was so important for Guatemala to have access to the secret witnesses and un-redacted version of the documents in order to rebut the "factual foundation" of the United States' case. Thus, the use of secret testimony is indeed a central issue in these proceedings and it has tainted the entire proceeding.

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[9] See, for example, Appellate Body Report, *Canada – Dairy (Article 21.5 – US)*, WT/DS113/AB/RW, paras. 66, 68. Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, WT/DS207/AB/RW, para. 143.

[10] U.S. Supplementary Written Submission, para. 16.

[11] U.S. Supplementary Written Submission, para. 17.

24. The United States also submits that Guatemala had "sufficient information to evaluate the U.S. claims and to present its defense".[12] The United States adds that "Guatemala has been able consistently to present evidence regarding incidents described in the U.S. submissions".[13] Again, the United States takes upon itself to unilaterally determine the adequacy of something which it is not entitled to determine for itself. How convenient for the United States to say now that the information that Guatemala had was sufficient. The United States is using Guatemala's own diligence to justify withholding information from the Panel and from Guatemala. The fact that Guatemala cooperated with the Panel in good faith in these proceedings cannot be used to justify the United States' refusal to cooperate. The incentives that this would create in future cases would be perverse. Should the Panel accept the United States' proposed approach, there would be no incentive for the respondents to cooperate with panels. Respondents would have to remain idle because any diligence on their part would be used to legitimize the lack of cooperation by the complaining party and its failure to meet its burden of proof.

25. In any event, the fact is that the United States' decision to submit secret witness testimonies and redact key identifying information from its exhibits has impeded Guatemala's ability to *fully* defend itself. First, Guatemala has not had access to the secret witnesses. Thus, Guatemala has been unable to evaluate their credibility or to seek clarification of their statements. Second, as regards the redacted documents, there are still court files that Guatemala has been unable to locate. Also, Guatemala is still having difficulties matching the information it has obtained to the precise proceedings that underlie the United States' claims. The United States has also questioned the relevance of certain documents based on the information that it has in its possession and that it has refused to disclose to Guatemala and to the Panel.[14] Guatemala cannot respond to those questions because it simply does not have the information available. The history of the proceedings also shows that the United States has deliberately sought to provide an incomplete picture of the domestic proceedings. Rather than submit the entire case files at the outset, the United States withheld the documents pertaining to proceedings subsequent to the reinstatement orders. This adds another layer of uncertainty about the completeness of the record.

26. According to the United States, "it is difficult to reconcile Guatemala's claim that, when it locates a particular government record, Guatemala cannot know with certainty that the record is in fact relevant to the U.S. claim".[15] The United States' statement is contradicted by the United States' own actions in this case. The Panel may recall that Guatemala submitted certain court records relating to Avandia that it believed correspond to proceedings underlying the United States' complaint. At the oral hearing, the United States challenged the relevance of those court documents, arguing that "the courts are different, the case numbers are different".[16] The United States reiterates its challenge in its Supplementary Submission.[17] It is clearly contradictory for the United States to call into question that "Guatemala cannot know with certainty that the record

[12] U.S. Supplementary Written Submission, para. 19.

[13] U.S. Supplementary Written Submission, para. 20.

[14] For example, see Oral Statement by the United States, para. 90; and U.S. Rebuttal Submission, para. 263.

[15] U.S. Supplementary Submission, para. 23.

[16] United States' opening statement at the oral hearing, para. 90 (referring to Exhibit GTM-56).

[17] U.S. Supplementary Written Submission, para. 96.

is in fact relevant to the U.S. claim" when the United States itself has called into question the relevance of court documents located by Guatemala.

27. The United States asserts that "in most cases the redacted workers' statements are not the only evidence establishing the facts underlying the U.S. claim".[18] Thus, by the United States' own admission, in some cases the secret witness statements are the only evidence establishing the facts underlying the U.S. claim. Because these are secret witnesses, Guatemala and the Panel are unable to assess the reliability of their statements and, as consequence, the veracity of the facts that they allege. In these circumstances, the use of the secret witness statements poses a serious risk to the integrity of these proceedings and clearly violates Guatemala's due process rights.

28. Guatemala further notes that the witness statements are not simply "redacted" as the United States characterizes them. The witnesses are secret. Neither Guatemala nor the Panel has been given an opportunity to pose questions to the witnesses or to ask them for clarifications of their statements. The witnesses and their statements could be fabricated. However, because they are secret, neither the Panel nor Guatemala are in a position to independently confirm that the witness and their statements are real. The Panel and Guatemala are not even in a position to confirm whether the individuals providing statements are really who they say they are.

29. The United States refers to the statement of secret witness S as "useful example"[19] of "how the Panel can look at the record as a whole to determine the reliability and credibility of the U.S. evidence".[20] The statement of S is indeed a "useful example" of the risks of relying on secret witness statements. The United States begins its example by stating that "Worker S is a stevedore worker formerly employed by RTM".[21] However, the statement of S is the only "evidence" that S exists and that he/she was employed by RTM. Without knowing the identity of S, Guatemala cannot independently confirm S's existence or that he/she was, in fact, employed by RTM.

30. The United States asserts that the labor court found that S had been improperly dismissed and ordered that worker S be reinstated back wages.[22] The United States adds that worker S states that he/she had not been reinstated or paid the wages owed. The United States then lists five documents that it alleges "demonstrate this claim of S".[23] The documents comprise a complaint, a court order, a proof of service, an appellate decision, and a secret witness statement. The problem, as the Panel may recall, is that the United States has not disclosed the identity of S to Guatemala or the Panel. As it happens, the United States also redacted the name of the employees from the five documents that allegedly corroborate S's statement. Consequently, it is not possible for Guatemala or the Panel to verify that S is, in fact, the employee who filed the complaint and that is the subject of the court documents. Even if Guatemala were able to obtain

[18] U.S. Supplementary Written Submission, para. 24.

[19] U.S. Supplementary Written Submission, para. 27.

[20] U.S. Supplementary Written Submission, para. 26.

[21] U.S. Supplementary Written Submission, para. 27.

[22] U.S. Supplementary Written Submission, para. 27.

[23] U.S. Supplementary Written Submission, para. 28.

an un-redacted version of the complaint and court documents, Guatemala would be unable to match it to S because Guatemala does not know who S is or whether he/she, in fact, exists. Nor could Guatemala ensure that the United States has provided the entire record of the court proceedings or independently verified that he/she has not be reinstated or paid back wages. Unfortunately, in the course of these proceedings, it has been demonstrated that the United States has not submitted the full record of the domestic proceedings and that it has deliberately withheld information about developments subsequent to the issuance of the court orders, for example. Thus, there is no basis to presume that the information provided by the United States represents the complete record of the domestic proceedings.

31. The United States also refers to a report prepared by a local legal counsel apparently retained by the U.S. Government. This report, however, suffers from the same flaws. The case numbers have been redacted and thus it is not possible for Guatemala or for the Panel to independently confirm that the proceedings addressed in the report correspond to the proceedings involving S.[24] In fact, from the face of the report, there are strong indications that it does not correspond to the case of S.[25] The Panel will note that the title of the report is "Review of Reinstallation Proceedings of Case H". The reference to case H is repeated in the introduction where the author identifies the scope of his analysis. H does not correspond to S in the secret nomenclature used by the United States in this case. Thus, it would appear from the face of the report that it is not related to the Case of S.

32. In sum, there is no basis for the United States' allegation that "each document confirms and corroborates the facts and circumstances of the related document".[26] The United States' claim that all of the documents "derive from the same nexus of facts" is a fiction.[27] Because of the redaction of identifying information it is not possible to match the documents and independently confirm that they, in fact, relate to the same proceedings involving S. In other words, there is no corroboration. Rather, each document adds to the distortion. Regretfully, this situation was avoidable if the United States had raised the issue with Guatemala and the Panel at the outset and had allowed for an opportunity to explore mechanisms to address its confidentiality concerns. The United States, however, did not even try.

33. In paragraphs 34-43 of its Supplementary Submission, the United States discusses how the secret witness statements were allegedly "memorialized" in a belated attempt to give these statements credibility. First, Guatemala notes that, other than providing internet links to the public submission filed by the AFL-CIO and the statements of some of the secret witness themselves, the United States does not provide any evidence that independently substantiates its

[24] In footnote 35 of the U.S. Supplementary Written Submission, the United States alleges that Guatemala "misconstrued" the report when the opposite is true. In paragraph 70 of its Initial Written Submission, the United States asserted that "[t]he labor court failed to refer the violations for criminal sanctions or to increase the fines for noncompliance with its orders" and, in a footnote 78, it then refers specifically to the report by Mr. Argueta as the only support for this statement. However, the report clearly indicates that there was no legal basis to impose additional fines or pursue criminal penalties against RTM, a fact that the United States does not deny in its Supplementary Submission..

[25] The report is Exhibit USA-63.

[26] U.S. Supplementary Written Submission, para. 30.

[27] U.S. Supplementary Written Submission, para. 30.

allegations as to how it collected and memorialized the testimony. These are all assertions of fact that the United States must substantiate under Rule 65 of the MRP. The United States has failed to do so.

34. Secondly, the United States' description does nothing to address the problems of unreliability and due process raised by Guatemala. Nowhere in the description does the United States indicate that it sought to independently verify the statements made by the secret witnesses. Thus, even the United States cannot be certain that the statements made by the secret witness are accurate. Moreover, irrespective of the approach taken by the United States to memorializing the statements, the fact remains that Guatemala has not had an opportunity to question the secret witnesses or to ask them for clarifications of their statements. Nor has Guatemala been able to ask the secret witnesses whether they received any inducements to provide the statements. Therefore, Guatemala did not have an opportunity to adequately test the veracity of the statements and the credibility of the secret witnesses. This has severely limited Guatemala's ability to defend itself and thus is a violation of Guatemala's due process rights.

35. There are other flaws in the United States' arguments. The United States asserts that involvement of the workers in these proceedings was "voluntary"[28] and that the statements were "spontaneous". For the voluntary nature of the involvement, the United States refers to the public submission filed in 2008 with the U.S. Department of Labor. Yet, as the United States acknowledges, only "[w]orkers from Avandia and Fribo were among the petitioners".[29] Therefore, the United States' argument is inapplicable with respect to workers in all of the other companies that the United States targeted in its complaint.

36. Furthermore, in many of the secret witness statements submitted by the United States, two or more workers have the exact same recollection of events occurring several years earlier.[30] This strongly indicates that the statements were prepared and undermines the claim that they were spontaneous.

37. Moreover, the report of the legal counsel apparently retained by the United States indicates that he did not have power of attorney when he was researching the court files. At the end of his report[31], he expresses concern that he may not be allowed to consult the court files because the files did not indicate that he could act on behalf of the relevant worker. Had the workers' involvement been voluntary, they would have provided Mr. Argueta with the documents or with a power of attorney to retrieve them, and he would have had no concerns about his ability to consult the files. Thus, Mr. Argueta's report indicates that he was not acting on behalf of the workers.

38. At the hearing, the United States delegation was asked whether it would be prepared to vouch for the veracity of the secret witness testimony. The United States delegation refused to

[28] U.S. Supplementary Written Submission, para. 36.

[29] U.S. Supplementary Written Submission, para. 36.

[30] See, for example, Exhibits USA-11, USA-12, USA-13, USA-14, and USA-24.

[31] Exhibit USA-63, p. 6.

do so. This suggests that the United States delegates themselves have doubts about the reliability of the statements.

39. For the reasons discussed above, the Panel must not accord any probative value to the secret witness testimony and redacted exhibits submitted by the United States in these proceedings. Reliance on the secret witness testimonies or the redacted exhibits would violate Guatemala's due process rights.

III. The United States Has Failed to Sustain its Allegations of Trade Effects

A. The United States' Interpretation of the Trade Effects Requirements is not Consistent with the Text of Article 16.2.1(a) of the CAFTA-DR

40. 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.[32]

41. The United States argues that the third clause of Article 16.2.1(a) requires the complaining Party to "present evidence demonstrating: 1) that there is trade between the Parties; and 2) that based on the responding Party's failure to effectively enforce its laws, there has been a modification to the conditions of competition".[33] Guatemala disagrees with this interpretation. However, before explaining why the United States' interpretation is not consistent with the text of Article 16.2.1(a), Guatemala would like to make two preliminary comments.

42. The first preliminary comment is that the United States accepts that the existence of trade is a necessary, but insufficient, condition to make a showing under Article 16.2.1(a). As Guatemala explains in the subsection below, the data submitted by the United States indicate that there is no trade for a number of companies targeted by the United States' complaint and, therefore, the United States' allegations with respect to these companies does not even meet the standard articulated by the United States.

43. The other preliminary comment is that, in articulating its standard, the United States recognizes that proof of actual trade effects is required ("there has been a modification") and that arguments about hypothetical or potential effects are insufficient to meet the standard in Article 16.2.1(a). Guatemala demonstrates in the next subsection that the United States has failed to provide any evidence that there have been trade effects, not even in relation to its own incorrect "modification of the conditions of competition" standard.

44. The United States' proposed "modification of the conditions of competition" standard is incorrect because it is nowhere to be found in the text of Article 16.2.1(a). The actual language of Article 16.2.1(a) is "in a manner affecting trade between the Parties". Thus, the text of Article

[32] Guatemala's Initial Written Submission, para. 136.

[33] US. Response to Panel Question 4, para. 23.

16.2.1(a) specifically requires a showing of trade effects and a causal link between those effects and the failure "to effectively enforce its labor laws, through a sustained or recurring course of action or inaction". This means that the "failure to effectively enforce its labor laws, through a sustained or recurring course of action or inaction" must have had consequences that were manifested in the trade between the parties. It also means that the Party alleging a violation of Article 16.2.1(a) is required to establish that such trade effects, in fact, occurred and were caused by the "failure to effectively enforce its labor laws, through a sustained or recurring course of action or inaction".

45. Rather than giving effect to the text of Article 16.2.1(a), the United States attempts to improperly import interpretations of by other international dispute settlement tribunals that, if accepted, would effectively deprive the third clause of Article 16.2.1(a) of meaning. In the view of the United States, "[t]hese tribunals have found occasion to interpret 'affecting trade' such that it may encompass any measures having a bearing on conditions of competition".[34] In that regard, the United States submits that this Panel may find guidance in GATT and WTO jurisprudence regarding the interpretation of Article III:4 of the GATT and Article 1.1 of the General Agreement on Trade in Services ("GATS").

46. WTO case law on Article III:4 of the GATT 1994 and Article I.1 of the GATS is not relevant and, in any case, cannot prevail over the text of Article 16.2.1(a) of the CAFTA-DR or its context.[35] These WTO provisions utilize the term "affecting" in contexts that differ significantly from Article 16.2.1(a) of the CAFTA-DR.

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

48. By contrast, while the labor commitments in Chapter 16 are important, they were carefully negotiated and the Parties agreed on their limited scope, in recognition of the fact that the CAFTA-DR is not a labor agreement, but rather a trade agreement. Article 16.2.1(a) provides a cause of action that is subject to strict requirements, as reflected in its various clauses containing cumulative conditions that must be met by the complaining party. There is no basis for an expansive interpretation of the terms "affecting trade" in Article 16.2.1(a).

49. On the contrary, as Guatemala has explained, Article 16.2.1(a) is intended to establish a high threshold requiring an unambiguous showing that the challenged *conduct* has had an *effect*

[34] U.S. Initial Written Submission, para. 99.

[35] Guatemala discussed the relevant contextual guidance provided by Article 20.17 extensively in its Supplementary Written Submission and Responses to the Panel's Questions.

on trade between the Parties. In the absence of such a showing, there is no justification to use the CAFTA-DR as a mechanism to enforce a Party's domestic labor laws.

50. Guatemala further notes that Article III:4 of the GATT 1994 does not use the terms "affecting" in relation to trade effects. It does not even mention trade effects and thus it is unsurprising that the case law has not required a showing of trade effects. The assessment under Article III:4 of the GATT 1994 involves making a *comparison between the treatments* accorded to the imported product and the like domestic product. It is in this comparative exercise that the modifications of the conditions of competition as between the imported and domestic products are relevant. No such comparative exercise is needed nor required under Article 16.2.1(a) of the CAFTA-DR, and thus an assessment of the modification of conditions of competition is simply not pertinent. Thus, there is no basis to import the WTO concept of "modification to the conditions of competition" to the CAFTA-DR. The text, object and purpose of the CAFTA-DR would not support the incorporation of that concept.

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

52. The United States argues that "the plain meaning of the term 'manner' is a 'way of doing something,' or a form of conduct".[36] The United States improperly reads the term "manner" in isolation. The third clause of Article 16.2.1(a) is linked back to the preceding clauses through the terms "in a manner". Thus, 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. Moreover, 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 describe the conduct that is covered by Article 16.2.1(a), whereas the third clause describes the consequences of that conduct. By making the third clause about the "form of conduct", the United States is effectively emptying the third clause of meaning.

53. In its responses to the Panel's questions, the United States further argues that "Article 16.2.1(a) of the CAFTA-DR requires only that there be *an* effect on trade between the Parties and does not specify that the failure have any particular kind of effect on trade, such as providing less favourable treatment to the products of the complaining Party".[37] It also contends that "it makes little sense for Guatemala to argue that the standard under the CAFTA-DR requires more of a showing than under the GATT 1994 and the GATS – where it is necessary to show a specific kind of effect, i.e., less favourable treatment".[38] In other words, the United States is arguing that

[36] U.S. Rebuttal Submission, para. 58.

[37] U.S. Responses to the Panel's Questions, para. 26.

[38] Ibid.

it makes little sense that CAFTA-DR requires "more of a showing" than under the GATT and the GATS and this, in its view, would be the justification to deprive the phrase "in a manner affecting trade" of meaning. Guatemala has no knowledge of any legal principle that would allow a complaining Party to compare provisions among different international agreements and decide to adopt the one that would be easiest to meet. The applicable provision in this case is Article 16.2.1(a) of the CAFTA-DR and not Article III:4 of the GATT 1994 and Article I of the GATS.

54. Guatemala also notes that the United States complains about the difficulties that demonstrating trade effects pose.[39] These concerns are unwarranted. The United States did not need to have "access to the internal books and records of Guatemalan companies" to produce evidence of trade effects.[40] As discussed below, the United States had many other possible lines of enquiry that it could have pursued, including using import values reported to customs.

55. Ultimately, the United States is seeking to deprive the third clause of meaning. This comes out clearly in the United States' response to the Panel Question 4. According to the United States, the phrase "in a manner affecting trade" serves "to delineate the scope of the types of failures that fall within the purview of the effective enforcement obligation".[41] This is completely circular. Moreover, defining the scope of the obligation does not even remotely reflect the text of the third clause of Article 16.2.1(a).

56. 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.[42] 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.

B. The United States Did Not Submit Evidence of Trade Effects

57. Article 16.2.1(a) of the CAFTA-DR expressly and specifically requires that the failure to enforce a Party's labor laws be "in a manner affecting trade between the Parties". Having had the opportunity to make three written submissions, an oral statement and a rebuttal at the hearing, and to respond to the Panel's oral and written questions, the United States has failed to provide evidence of trade effects.

[39] U.S. Responses to the Panel's Questions, para. 29.

[40] U.S. Responses to the Panel's Questions, para. 29.

[41] U.S. Responses to the Panel's Questions, para. 32.

[42] U.S. Rebuttal Submission, para. 68.

58. In its written questions, the Panel asked the United States to identify the evidence that it had submitted to demonstrate trade effects. The United States' response does not identify any evidence of trade effects confirming that it did not submit such evidence.[43]

59. The documentation to which the United States refers in its response concerns the factual circumstances that the United States alleges give rise to the failure to enforce the law. None of the documents address, much less establish, the trade effects that resulted from such conduct.

60. The flaw in the United States' case can be illustrated with a few examples. In paragraph 35 of its responses to the Panel's questions, the United States asserts that that it has submitted court orders reinstating workers and statements of workers attesting that the relevant employer did not comply with the court orders. Neither the court orders nor the statement of the workers provide evidence of trade effects.

61. The United States then refers to the alleged financial implications for the company concerned. Yet, the United States' statements are all speculative and unsubstantiated. The United States provides absolutely no evidence of the cost savings allegedly incurred by the companies concerned. Nor does the United States provide any evidence of how these speculative and unsubstantiated cost-savings translated into an effect on trade.

62. Further confirmation that the United States failed to submit evidence on trade effects can be seen by looking at the footnotes to the United States' response to Panel Question 5. In that question, the Panel specifically asked the United States to identify the evidence that the United States had adduced of trade effects. Guatemala encourages the Panel to look at those footnotes closely. The footnotes refer to the secret witness statements of alleged workers, complaints allegedly filed before the Guatemalan courts by workers, and to reinstatement orders allegedly issued by Guatemalan labor courts. None of these documents addresses trade effects or claims to address trade effects. None of the sources of these documents would be qualified to speak to trade effects in this case.

63. The United States tries to circumvent its obligation to demonstrate trade effects by reiterating a theory on the "conditions of competition" that finds no support in the text of Article 16.2.1(a) of the CAFTA-DR. Article 16.2.1(a) expressly and specifically requires a showing of trade effects.

64. In any event, even if the United States' "conditions of competition" theory were applicable under Article 16.2.1(a), the fact remains that the United States has not provided any evidence that the alleged failure to enforce labor laws has led to a modification of the conditions of competition. The United States has put forward a theory, albeit an incorrect one, but has not provided any proof of the application of the theory in the present case. The case is completely theoretical. The United States could have sought to introduce into evidence economic studies that support its theory or it could have otherwise sought to provide evidence illustrating how its theory applied in the particular circumstances of this case. The United States, however, simply chose to do nothing.

[43] U.S. Responses to the Panel's Questions, Question 5.

65. This is yet another example of the United States seeking to read out terms from Article 16.2.1(a). The United States seems to think that the requirement in the third clause of Article 16.2.1(a) is automatically met when a party makes an allegation of failure to enforce the law.[44] However, the requirement to establish trade effects is a separate and independent requirement of Article 16.2.1(a). In accordance with Rule 65 of the MRP, the complaining party has the burden of proof on each element of its claim. This includes the burden of proving that the condition in the third clause has been satisfied.[45] The United States therefore has the burden of establishing trade effects through positive evidence. Speculation and unsubstantiated assertion are insufficient to satisfy the United States' burden of proof. Nor is there a basis in Article 16.2.1(a) to presume trade effects. It is an independent requirement that must be established separately.

66. In its response to the Panel's questions, the United States argues that a showing of trade effects would have required it to obtain confidential commercial information from the companies concerned and that the CAFTA-DR does not provide the mechanisms for obtaining the necessary data which are contained in certain WTO agreements and, in particular, the Anti-Dumping Agreement and the SCM Agreement.[46] Obtaining confidential commercial information was not the only option that the United States had to establish an effect on prices. The United States could have sought to demonstrate the effect on prices based on the import value data collected by U.S. customs.[47] Thus, the United States could have tried to show that the price of the merchandise from the relevant companies was lower than the price of imports from other companies or from average import prices. Alternatively, the United States could have requested information from the U.S. companies that purchased the goods from the relevant Guatemalan companies. The United States could have asked the Guatemalan companies themselves for the information. The United States, however, has not shown that it undertook any effort to collect information. It simply never went to the trouble of trying to show trade effects. The alleged difficulties raised by the United States are all ex-post rationalizations.

67. The United States submits that, in anti-dumping and countervailing duty investigations, the investigating authority is allowed to draw an adverse inference when a company refuses to provide it with information. In the current CAFTA-DR proceedings, the Party that has consistently and repeatedly refused to provide information to the Panel is the United States. The Panel should note the United States' invitation to draw adverse inference with respect to the United States' refusal to provide information to the Panel in these proceedings.

68. The United States also refers to the so-called Annex V procedures in the SCM Agreement and notes their absence from the CAFTA-DR. The reality is that, at the WTO, the United States has been completely uncooperative when another Member has sought to use Annex V procedures

[44] This is illustrated, for instance, in the United States' assertion that "[i]n each of these scenarios, it is evident from the nature of the labor laws in question that not enforcing them would result in an alteration of the conditions of competition…" (U.S. Responses to the Panel's Questions, para. 28)

[45] The United States acknowledges that it has the burden of presenting evidence sufficient to satisfy the third clause of Article 16.2.1(a). (U.S. Responses to the Panel's Questions, para. 23)

[46] U.S. Responses to the Panel's Questions, paras. 29 and 30.

[47] The table provided in paragraph 24 of the U.S. Responses to the Panel's Questions confirms that the United States had available data on the value of imports for each company. The United States, however, simply chose to reproduce the data without undertaking any analysis of it.

in a dispute against the United States. In the *US — Large Civil Aircraft (2nd complaint)* dispute, commonly referred to as the "Boeing" case, the European Union requested the initiation of Annex V procedures on five different occasions, and on each occasion the United States blocked the request.[48] Annex V procedures were never utilized in that case because of the United States' refusal to allow them to go forward. Brazil made four attempts to initiate Annex V procedures in the *US – Upland Cotton* dispute and each time it was blocked by the United States.[49] As in *US — Large Civil Aircraft (2nd complaint)*, Annex V procedures were never fully utilized in *US – Upland Cotton* because of US opposition. That the United States now seeks to use the absence of Annex V procedures in the CAFTA-DR to justify its own failure to make a necessary showing of trade effects after it has consistently undermined the use of Annex V procedures at the WTO is yet another astounding instance of double standards.

69. In its submission on the alleged delays in the registration of unions, the United States faults Guatemala for arguing on the basis of hypothesis and failing to substation its assertions. In particular, the United States complains that "[a]n assertion hypothesizing the cause of the delay without more is insufficient to support a defense".[50] The United States' statement highlights the flaws in its own argumentation on trade effects. Hypotheses without more are the only thing that the United States has offered to try to meet the trade effects requirement of Article 16.2.1(a). As the United States itself acknowledges in the quoted statement, this is insufficient to sustain a claim under Article 16.2.1(a).

70. The conditions in the various clauses of Article 16.2.1(a) are cumulative, as the United States has acknowledged.[51] A complaining Party's failure to establish each of the conditions established in the various clauses of Article 16.2.1(a) must necessarily result in the dismissal of that Party's claims. As Guatemala demonstrated above, in this case, the United States has failed to provide arguments and evidence sufficient to establish the condition in the third clause of Article 16.2.1(a). Accordingly, this Panel must reject the United States' claims.

IV. The United States Failed to Articulate and Substantiate a Claim of the There is a "Sustained or Recurring Course of ... Inaction"

71. The second clause of Article 16.2.1(a) that requires "a sustained or recurring course of action or inaction" is connected to the first clause by the term "through", which means "[b]y means of".[52] The term "through" indicates that the second clause is qualifying or clarifying the meaning of the preceding clause.

72. The ordinary meaning of "sustained" is "[c]ontinuing for an extended period or without interruption"[53]; or "[t]hat has been sustained; esp. maintained continuously or without flagging

[48] See Appellate Body Report, *US — Large Civil Aircraft (2nd complaint)*, para. 483.

[49] WT/DSB/M/145, WT/DSB/M/146, WT/DSB/M/147, and WT/DSB/M/150.

[50] U.S. Supplementary Written Submission, para. 90.

[51] U.S. Initial Written Submission, para. 20..

[52] Oxford Online Dictionary.

[53] Oxford Online Dictionary.

over a long period".[54] The term "recur" means "[o]ccur or appear again, periodically, or repeatedly".[55]

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

74. Accordingly, Article 16.2.1(a) provides for a composite obligation that concerns some aggregate of conduct and not individual acts as such. In other words, the focus of Article 16.2.1(a) is on a consistent series of acts defined in aggregate as wrongful. Only after a series of acts take place consistently, will the aggregate of conduct defined as wrongful be *revealed*, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.[56]

75. Guatemala notes that the second clause of Article 16.2.1(a) does not simply refer to "action or inaction", but rather refers to "a course of action or inaction". Relevant dictionary definitions of the term "course" include "[h]abitual or regular manner of procedure; custom, practice…[a] line of conduct, a person's method of proceeding"[57] and "[a] procedure adopted to deal with a situation", "[t]he route or direction followed by a ship, aircraft, road, or river" and "[t]he way in which something progresses or develops".[58] The insertion of the words "course of" before "action or inaction" reinforces the notions of repetition and consistency that are conveyed by the terms "sustained" and "recurring". Yet, the terms "course of" must be given their own meaning independent of the meaning of "sustained" and "recurring."[59]

76. In Guatemala's view, the terms "course of" are intended to convey that the sustained or recurring action or inaction reflects a *procedure* or *direction adopted* by the relevant Party. In

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[54] Shorter Oxford English Dictionary on Historical Principles, Oxford University Press, Sixth Edition, 2007, p. 3126.

[55] Shorter Oxford English Dictionary on Historical Principles, Oxford University Press, Sixth Edition, 2007, p. 2495.

[56] Relevant guidance can be found in Article 15 of the Draft Articles on State Responsibility.

[57] Shorter Oxford English Dictionary on Historical Principles, Oxford University Press, Sixth Edition, 2007, p. 542.

[58] Oxford Online Dictionary.

[59] This principle is known as the principle of effectiveness ("*ut res magis valeat quam pereat*"). The WTO Appellate Body has explained, in this regard, that "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty." (Appellate Body Report, *US – Gasoline*, p. 21 (citing to *Corfu Channel Case (1949)* I.C.J. Reports, p.24 (International Court of Justice); Territorial Dispute Case (*Libyan Arab Jamahiriya v. Chad*) (1994) I.C.J. Reports, p. 23 (International Court of Justice); 1966 Yearbook of the International Law Commission, Vol. II at 219; Oppenheim's International Law (9th ed., Jennings and Watts eds., 1992), Volume 1, 1280-1281; P. Dallier and A. Pellet, Droit International Public, 5è ed. (1994) para. 17.2); D. Carreau, Droit International, (1994) para. 369).

other words, Article 16.2.1(a) is intended to capture a *deliberate policy* of action or inaction adopted by the relevant Party. The United States' interpretation, by contrast, reduces the terms "course of" to nullity. The United States' interpretation therefore is unsustainable under the customary rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties.

77. Notwithstanding the above, the United States contends that "[n]othing in the ordinary meaning of the word "course" or in the context of Article 16.2.1(a) invites [an interpretation that the term 'course' implies a 'deliberate policy action or inaction'], which would read into the provision a requirement of bad faith and would be contrary to the customary rules of treaty interpretation".[60] The United States confuses a constitutive requirement of the obligation with general principles of treaty interpretation. One thing is to interpret the treaty in good faith; another completely different is to apply the constitutive elements of a legal standard. A panel assessing a claim under Article 16.2.1(a) does not need to determine whether or not the respondent Party has acted in bad faith. The Panel is required to determine objectively whether the complaining Party adduced sufficient evidence of the existence of a deliberate policy of action or inaction to give meaning to the expression "sustained or recurring course of action or inaction".

78. The United States has not provided any evidence that the Government of Guatemala has engaged in a deliberate policy of inaction with respect to any of its claims. Nor has the United States otherwise provided any evidence that Guatemala has engaged in "a course of" inaction. The arguments and documentation submitted by the United States concern the alleged repetition or duration of the inaction. Repetition and duration relate to the "sustained" and "recurring" elements of the second clause of Article 16.2.1(a). These arguments and documentation, however, are insufficient to establish a "course of" of inaction. To find otherwise would be to deprive the terms "course of" of any meaning and this would be contrary to the customary rules of treaty interpretation. Therefore, this Panel must reject the United States' claims.

V. The United States Has Failed to Establish Inaction by Guatemala's Labor Courts or the Public Ministry, Much Less a "Sustained or Recurrent Course of ... Inaction"

79. The United States has not established a *prima facie* case of violation of Article 16.2.1(a) in relation to the alleged failure by the Guatemalan labor courts to impose additional fines and by the Guatemalan Public Ministry to pursue criminal penalties with respect to the reinstatement of workers.

80. First, Guatemala reiterates that the actions or inactions of the labor courts and Public Ministry do not fall within the scope of Article 16.2.1(a) of the CAFTA-DR. Guatemala addresses this issue at length in its other submissions and thus will not repeat its arguments here.[61]

[60] U.S. Responses to the Panel's questions, para. 46.

[61] Guatemala's Initial Written Submission, paras. 180 – 192; Guatemala's Rebuttal Submission, Section III.A and paras. 129 – 131.

81. In its Responses to the Panel's Questions, the United States acknowledges that Article 16.8 imposes limitations in terms of the statutes that fall within the scope of Article 16.2.1(a). The United States expressly recognizes that "a statute or regulation that is enforceable by action of the executive body would not be a labor law even if met the other conditions in the definitions."[62] The United States further recognizes that "a statute or regulation that was enforceable by a court but not by action of the executive body would be excluded from the definition, even where that statute or regulation was directly related to one of the enumerated internationally recognized labor rights".[63]

82. Guatemala recalls that the United States' first claim involves the alleged lack of enforcement action by the labor courts in imposing additional fines pursuant to Article 272(a) of the Labor Code or by the Public Ministry in failing to pursue criminal penalties under Article 364 of the Labor Code.[64] These statutory provisions do not involve enforcement action by Guatemala's Executive. In fact, neither statutory provision mentions the Executive. Thus, under the United States' own understanding of the qualification in Article 16.8, these statutory provisions are not labor laws for purposes of Article 16.2.1(a) of the CAFTA-DR. And, as the United States also recognizes, the fact that these statutory provisions may be "directly related to one of the enumerated internationally recognized labor rights" is not sufficient to bring them within the scope of Article 16.2.1(a).[65]

83. In the light of the United States' acknowledgements, it is not clear on what basis it considers that the alleged lack of enforcement action by Guatemala's labor courts or Public Ministry fall within the scope of Article 16.2.1(a). If it is because these provisions are part of the Guatemalan Labor Code, this would not provide a valid basis for extending the scope of the statutes or regulations falling under Articles 16.8 and 16.2.1(a). In the United States, federal labor laws are codified in the United States Code. If inclusion of a statutory provision under a Code were a valid basis to bring it within the scope of Article 16.2.1(a), then the enforcement of all United States laws would be subject to scrutiny.

84. Guatemala further notes that, if the Panel were to find that the actions or inactions of Guatemala's labor courts and Public Ministry fall within the scope of Article 16.2.1(a), so too would the actions or inactions of the administrative and judicial entities of the sub-federal states of the United States. The definitions in Article 16.8 must be interpreted coherently. If the express language "enforceable by action of the executive body" in the definition of "statutes or regulations" provided for Guatemala in Article 16.8 has no limiting effect, then neither can the language "enforceable by action of the federal government" in the definition provided for the United States and the Panel must say this clearly in its Final Report.

85. The United States' case suffers from various other flaws. First, the United States recognizes that employees had effective access to the Guatemalan labor courts and that the labor courts took action to safeguard the rights of these employees. Yet, having recognized the actions

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[62] U.S. Responses to the Panel's Questions, para. 71.

[63] U.S. Response to the Panel's Question, para. 71.

[64] United States' Intial Written Submission, paras. 51, 55, 57, 60, 66, 70, 73, 76, and 83.

[65] U.S. Response to the Panel's Question, para. 71.

of the labor courts, the United States suddenly turns around and accuses them of having engaged in "a sustained or recurring course of … inaction". In other words, the entity that provided the remedy is, at the same time, accused of failing to provide the remedy. The lack of coherence in this argument is striking.

86. Second, there is a high degree of uncertainty around the facts underlying the United States' claim as a result of the litigation tactics that the United States has employed since the beginning of this case. In its Initial Written Submission, the United States deliberately provided a partial portrayal of the facts. It deliberately withheld from the Panel documentation in its possession about appeals filed in the cases to which it was referring and other subsequent actions that undermined its claims of inaction. Not only did the United States withhold this information, the United States also deliberately failed to identify the witness providing the secret testimony and redacted key identifying information from the documents that it presented so as to prevent Guatemala from obtaining the full record of the proceedings.

87. In spite of the unfortunate litigation tactics that the United States employed, Guatemala was able to obtain some, albeit not all, of the documentation that the United States deliberately failed to disclose to the Panel. The documentation obtained by Guatemala shows that the facts on the ground are much more complex and nuanced than the United States initially made them out to be. In its first written submission, the United States sought to portray the situation as one in which nothing had happened after the reinstatement orders were issued and sought to place the blame for the situation entirely on Guatemala's labor courts and Public Ministry. The documentation obtained by Guatemala shows that in many cases the reinstatement orders were subject to appeal and these appeals resulted in a suspension of the reinstatement orders.[66] The record also shows that many of the employees did not cooperate in the execution of the reinforcement orders and either failed to appear before the court or failed to appear for the reinstatement.[67] Moreover, the record shows that, in some cases, the employees accepted a voluntary settlement and did not pursue their reinstatements further.[68]

88. In its Supplementary Written Submission, the United States seeks to undermine the evidence presented by Guatemala with respect to ITM and NEPORSA. The United States first makes the remarkable argument that "Guatemala provides only two exhibits", even though it then goes on to acknowledge that each exhibit contains notices for at least 33 workers.[69] The United States seems to believe that there is less persuasive value in the fact that Guatemala chose to consolidate the documents into two exhibits instead of providing each document as a separate exhibit. That does not make any sense.

89. The United States next suggests that there are "several evidentiary problems with Guatemala's argument".[70] Yet, neither of the arguments that the United States then makes actually contests the evidentiary value of the documents. The United States does not, for

[66] See, for example, exhibits GTM-4 and GTM-53.

[67] See, for example, exhibits GTM-52 and GTM-54.

[68] See discussion in Guatemala's Rebuttal Submission, paras. 149 and 159-160.

[69] U.S. Supplementary Submission, para. 48. (referring to GTM-52 and GTM-54)

[70] U.S. Supplementary Submission, para. 49.

example, contest the authenticity of the notices or that they correspond to the proceedings underlying the United States' claim. The United States merely takes issue with the number of notices[71], while having acknowledged earlier that the two exhibits contain notices for at least 33 workers.[72]

90. The United States goes on to assert that "for those workers not covered by the exhibits, Guatemala's argument lacks any support".[73] This is a rather convenient argument for the United States to make given that it has refused to disclose the names of the employees addressed in its complaint. The United States' failure to disclose has significantly hampered Guatemala's ability to identify and locate the court files. Any missing information is the direct result of these difficulties. The fact that the United States can make this argument based on information that it has deliberately failed to disclose, while Guatemala is unable to respond to it and the Panel is not able to independently verify its veracity, is a violation of Guatemala's due process rights. Moreover, the evidence that Guatemala was able to obtain for itself further calls into question the veracity and accuracy of the United States' allegations: it demonstrated that such allegations are unfounded.

91. The second argument raised by the United States concerns the "significance" of the evidence. The United States alleges that "none of the documents put forward in GTM-52 support, or even suggests, that any worker 'voluntarily withdrew the reinstatement request' or that the incorrect address of the workplace was the fault of the worker".[74] The United States, however, does not contest that the documentation in GTM-52 and GTM-54 establishes that the employees that allegedly underlie the United States' arguments relating to ITM and NEPORSA could not be reinstated because they did not show up for the reinstatement or failed to appear in court. In other words, the United States concedes that the alleged employees of ITM and NEPORSA failed to cooperate with the labor courts in executing the reinstatements. By force of logic, this also means that the non-cooperation of the employees is an intervening event that influenced the outcome of the proceedings. In the circumstances, there was no legal basis for the labor courts to impose additional fines on the employers or for the Public Ministry to pursue criminal penalties.[75] Thus, the United States allegations of inaction are unsounded.

92. In commenting on the United States' assertions in its Supplementary Submission with respect to Odivesa, it is useful to again go back to the United States' Initial Written Submission. Guatemala invites the Panel to review the United States' summary of the facts surrounding Odivesa on paragraphs 58 to 60 of the United States' Initial Written Submission. There is absolutely no mention of any appellate proceedings. The United States deliberately chose to omit the fact that the reinstatement orders were appealed from its description of the facts, and it deliberately withheld the court documents relating to the appeal. The impression of inaction that the United States created was false.

[71] U.S. Supplementary Written Submission, para. 49.

[72] U.S. Supplementary Written Submission, para. 48.

[73] U.S. Supplementary Written Submission, para. 49.

[74] U.S. Supplementary Written Submission, para. 49.

[75] Guatemala discussed this in more detail in its Supplementary Submission and Responses to the Panel's Questions.

93. Only after Guatemala managed to locate some of the files, did the United States suddenly acknowledged that the reinstatement orders were appealed and that, as a result, the reinstatement orders were suspended.[76]

94. At the oral hearing, the United States submitted Exhibits USA 237-239 allegedly containing court decisions that it claims confirm the orders for 8 of the 11 workers noted in the U.S. Initial Written Submission.[77] During the hearing, and in a subsequent communication to the Panel[78], Guatemala has requested that the Panel reject these Exhibits because their submission by the United States was untimely. Guatemala explained that the Exhibits concern key elements in the United States' *prima facie* case and therefore should have been included with its Initial Written Submission. The Exhibits date back to 2010 and were in the possession of the United States or its secret sources. This is confirmed by Exhibit USA-56, which identifies the appeal of the Odivesa reinstatement orders. Guatemala raised the issue of appeals in its Initial Written Submission. The United States thus had the opportunity to include Exhibits USA-237-239 in its rebuttal submission. The United States has offered no justification for its delay in submitting the Exhibits. In the circumstances, Guatemala reiterates its request that the Panel find Exhibits USA-237-239 to have been untimely submitted and therefore to be inadmissible.

95. In the event the Panel declines Guatemala's request, Guatemala would have to be provided with an opportunity to submit rebuttal evidence. Since the oral hearing, Guatemala has made good faith efforts to follow-up on the proceedings that appear to be involved in Exhibits USA-237-239. The United States' decision to redact the case number and other identifying information from Exhibits-237-239 has made Guatemala's task more difficult and time-consuming. As a result, Guatemala was unable to obtain the documentation in time to include it in its Supplementary Submission.

96. Guatemala believes that it has obtained records pertaining to three of the employees allegedly covered by the decisions in Exhibits-237-239. These documents, which Guatemala submits as Exhibits GTM-59, indicate that one of the employees withdrew his request to be reinstated and the other two failed to appear in court.

97. The United States described the court decisions in Exhibits USA-237-239 as confirming the reinstatement orders of 8 of the 11 employees noted in the U.S. Initial Written Submission.[79] The United States concedes that the appellate decisions quashing the reinstatement orders of at least 3 employees were not reversed by the Constitutional Court. Of the 8 allegedly covered by Exhibits USA-237-239, one withdrew his request for reinstatement and 2 others failed to appear in court to execute their reinstatement. This leaves 5 employees.

[76] U.S. Supplementary Written Submission, para. 56. In yet another instance of double standards, and after having itself provided incomplete versions of most of the documents that it has submitted in these proceedings, and arguing that this is perfectly legitimate, the United States remarkably criticizes Guatemala for providing the relevant excerpts of the court decisions in GTM-53. (U.S. Supplementary Written Submission, para. 55)

[77] U.S. Supplementary Written Submission, para. 56.

[78] Letter of Guatemala to the Panel dated 11 June 2015, p. 3.

[79] U.S. Supplementary Written Submission, para. 56.

98. The Panel will recall that, in its Initial Written Submission, the United States acknowledged that 5 of the employees had been reinstated.[80] So, effectively, all of the alleged employees of Odivesa who wished to be reinstated were, in fact, reinstated. Consequently, there is no basis for the United States' allegation of inaction with respect to Odivesa.

99. Turning to Fribo, Mackditex, and Alianza, the United States argues that "because the payments made to the workers of Fribo, Mackditex, and Alianza were less than that which the court ordered and was required by law, the purported agreements between the workers and these companies would not constitute legal settlement agreements".[81] From this, the United States argues that "[a]s a result, the partial payments do not alter the obligation of the Government of Guatemala to enforce the law or ensure an employer's full compliance with the law".[82]

100. Guatemala draws the Panel's attention, first, to the fact that the United States does not contest that the workers of Fribo, Mackditex, and Alianza received and voluntarily accepted payments related to the claims that are addressed in the United States' complaint.[83] The United States, however, argues that the payments were for "less than that which the court ordered and was required by law". This is an assertion of fact that the United States has the burden of proving under Rule 65 of the MRP. Despite having the burden of establishing this fact, the United States has not provided an accounting of the amount received by the employees and the amount they should have received according to the court order or that was required by law. The only support that the United States offers for its assertions is secret witness testimony. These secret witness statements do not provide an accounting of the payments received or the amounts owed; they too are unsubstantiated assertions. In any event, these secret witness statements are unreliable for the reasons discussed by Guatemala in Section II. These secret witnesses have an incentive to provide false information because condemnation of Guatemala in these proceedings could indirectly give rise to additional payments to the workers. Additionally, because the workers have not been identified and have not provided statements before a public notary, they could not be prosecuted for perjury. Nor has Guatemala or the Panel been given an opportunity to test the credibility of the secret witnesses. Thus, there are no checks on the incentives to provide false testimony. The unreliability of the secret witness testimony, in turn, means that this testimony should have no probative value and, consequently, the United States has not satisfied its burden of proof.

101. The insufficiency of the payments is also a necessary premise of the United States' legal argument. In that respect, the burden of proof is also on the United States and the United States has failed to satisfy it.

102. The United States is not only unsubstantiated, it is also premised on an incorrect interpretation and application of Article 106 of Guatemala's Constitution and Article 12 of the

[80] U.S. Initial Written Submission, footnote 61 to para. 59. See also Guatemala's Initial Written Submission, para. 223.

[81] U.S. Supplementary Written Submission, para. 60.

[82] U.S. Supplementary Written Submission, para. 60.

[83] Indeed, the payments are mentioned by some of the United States' secret witnesses.

Guatemala's Labor Code. In its Supplementary Written Submission, the United States quotes Article 106 of Guatemala's Constitution as follows:

> Collective or individual contracts with terms involving the waiver, reduction, distortion or restriction of the rights recognized in favor of the workers as set out in the Constitution, law, international treaties ratified by Guatemala, the regulations or other labor provisions are void ipso jure and not will be enforceable against the workers.

103. The above provision is intended to prevent individuals from entering into a working relationship that does not meet the minimum standards provided under Guatemalan law. A labor contract may be declared void if it is shown that it has "terms involving the waiver, reduction, distortion or restriction of the rights recognized in favor of the workers as set out in the Constitution, law, international treaties ratified by Guatemala, the regulations or other labor provisions." Yet, the labor contract is not declared void upon the unilateral declaration of one of the parties. There must be a demonstration that the contract has "terms involving the waiver, reduction, distortion or restriction of the rights recognized in favor of the workers as set out in the Constitution, law, international treaties ratified by Guatemala, the regulations or other labor provisions".

104. The United States suggests in its Supplementary Submission that the settlements involving employees of Fribo, Mackditex and Alianza are void by operation of Article 106 of the Constitution or Article 12 of the Labor Code. However, the settlements would only be void if it had been established that the "terms involving the waiver, reduction, distortion or restriction of the rights recognized in favor of the workers as set out in the Constitution, law, international treaties ratified by Guatemala, the regulations or other labor provisions." Articles 106 of the Constitution and Article 12 of the Labor Code do not operate to invalidate the settlement simply because an employee unilaterally declares the settlements to have been insufficient. The United States has not established that the settlements were invalid under Article 106 of the Constitution or Article 12 of the Labor Code.

105. The United States' Supplementary Submission also refers to the GLI's obligations under Article 375 of the Labor Code.[84] It is interesting that, while the United States argues that the payments were not settlements, it choose to cite to a provision of the Labor Code that applies in the context of settlements. Once again the United States is trying to have it both ways. The reference also seeks to confuse the issue. The United States' first claim concerns exclusively the alleged inaction of Guatemala's labor courts and Public Ministry and does not concern the GLI.[85] Hence, the reference to Article 375 and the GLI is irrelevant for purposes of the issue at hand.

106. The United States next takes issue with the characterization of the payments to Fribo's workers as settlements.[86] The United States again does not contest that Fribo's workers received

[84] U.S. Supplementary Written Submission, para. 59.

[85] U.S. Initial Written Submission, paras. 55, 57, 60, 63, 65, 70, 73, 76, 79 and 83.

[86] By contrast, the United States concedes that the payments to the alleged workers of Alianza constituted a "settlement". See U.S. Responses to the Panel's Questions, para. 19.

a payment. Neither does the United States contest that Fribo went out of business.[87] As Guatemala explained in its Responses to the Panel's Questions, under Article 85 of the Guatemalan Labor Code, employer liabilities may survive bankruptcy or closure, although the liabilities may be reduced in the light of the economic situation of the company concerned. However, recovery of these liabilities does not proceed through the labor courts. Rather, as with other creditors of the company, employees must proactively pursue their claims in the bankruptcy proceedings. These proceedings are regulated under Articles 371(b) and 393 of Guatemala's Procedural and Commercial Code. Hence, in such situations, an alleged failure of the employees to recover back wages cannot be attributed to inaction by the labor courts. Furthermore, in this particular case, the United States has not provided any evidence that the employees sought to recover any liabilities owed by Fribo through the Article 371(b) and 393 proceedings.

107. As regards Mackditex, the United States again accepts that employees accepted a payment. It then repeats its argument about the source of the payment. However, the United States fails to explain why the source of the payment is relevant. What matters is that the employees voluntarily accepted the payment and abandoned their claims.

108. In sum, the record, imperfect as it is because of the United States' refusal to provide the key identifying information of the relevant court proceedings, reveals a picture that contrasts sharply from the picture that the United States sought to portray in its Initial Written Submission. Rather than the inaction by the Guatemalan labor courts and Public Ministry, the record indicates that many workers failed to pursue their reinstatements by failing to appear in court or at their reinstatement, some workers withdrew their requests for reinstatements, some reinstatements were quashed on appeal, many workers accepted payments in exchange for not pursuing their reinstatements, and one company went out of business making reinstatements impossible, as the United States belatedly concedes.[88] Therefore, the factual record does not support the United States' allegation that there has been inaction by the Guatemalan labor courts or Public Ministry, much less that there has been "a sustained or recurring course of inaction" which is what the United States must establish to succeed in its claim under Article 16.2.1(a).

109. Guatemala also contends that the record, different as it is from how the United States portrayed it in its Initial Written Submission, remains problematic in many respects. It is mostly made up of unreliable evidence in the form of secret witness testimony. It is incomplete because the United States deliberately refused to provide case numbers and other identifying information for the court records. The record remains a matter of much contestation between the Parties. In the circumstances, the Panel must find that the record lacks the degree of certainty that is required for the United States to meet its burden of proof under Rule 65 of the MRP to make a *prima facie* case of violation of Article 16.2.1(a).

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[87] Guatemala notes that, as regards Avandia, in its responses to the Panel's questions, the United States argues that the company did not close, but rather reorganized under a different name and location. The United States, however, does not provide any evidence to substantiate this factual assertion. The only thing the United States refers to is a secret witness statement, which is itself unsubstantiated. (U.S. Reponses to the Panel's Questions, para. 93)

[88] U.S. Response to the Panel's Questions, para. 89.

110. Furthermore, as indicated earlier in Guatemala's previous submissions, a panel examining a claim under Article 16.2.1(a) must examine the challenged conduct against Article 16.2.1(b) before arriving at a definitive conclusion as to whether a Party is in violation of the former. This is because, in accordance with the second sentence of Article 16.2.1(b), a reasonable exercise of discretion or bona fide allocation of resources cannot be found to be inconsistent with Article 16.2.1(a). In the present circumstances, the United States failed to present any evidence that Guatemala's conduct was in violation of Article 16.2.1(b)

VI. The United States Failed To Make A Prima Facie Case Of Violation With Respect To Effective Enforcement Of Labor Laws Directly Related To Acceptable Conditions Of Work Or By Not Conducting Inspections As Required By Not Imposing Obligatory Penalties

A. The majority of the U.S. claims in the second group of alleged failures are outside the terms of reference of the Panel

111. As formulated by the United States in its initial written submission, its claims were essentially about *lack or insufficient investigation* and *the lack of imposition of penalties*. Throughout this proceeding, the United States appeared to believe that the demonstration of the lack of investigation or the lack of imposition of penalties *automatically lead to the conclusion* that there were *violations of labor laws* directly related to acceptable conditions of work.[89] Guatemala explained why one couldn't draw a legal presumption that there was a violation of labor laws relating to working conditions based on the premise that there was an alleged lack of, or an insufficient, investigation or an alleged lack of imposition of penalties.[90]

112. The United States later agreed with Guatemala that 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.[91]

113. Therefore, even if the United States had been successful in demonstrating lack of or insufficient inspection, which it was not, that demonstration would not constitute proof of a failure to effectively enforce labor laws related to acceptable working conditions.

114. An additional problem is that, in order to sustain the United States' claim, the Panel would have to exercise competences that correspond exclusively to domestic courts. That, however, would be outside of the Panel's authority. This Panel is not vested with authority to determine whether individuals (i.e., the employers), who are not even parties to this dispute, 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.

[89] U.S. Initial Written Submission, paras. 135, 137, 139.

[90] Guatemala's Rebuttal Submission, para. 200-203.

[91] U.S. Rebuttal Submission, para. 146.

115. In view of the foregoing, all claims related to alleged failures to effectively enforce labor laws related to acceptable working conditions are outside the scope of this dispute. Even if they were within the scope of the Panel's terms of reference, the Panel should note that the United States did not provide any evidence, thus failing to make a *prima facie* case of violation.

116. Furthermore, if the Panel were to accept that the U.S. panel request conforms to the CAFTA-DR requirements, the Panel then must consider that the "sufficiency" and "adequacy" of the inspections were not identified in such a request. The panel request indicates that the United States "has identified a number of significant failures" and described the "*failure* of Guatemala's Ministry of Labor to *investigate* alleged labor law violations" (emphasis added).[92] A claim of failure to investigate is very different to a claim of insufficiency or inadequacy of investigations. Therefore, claims relating to insufficiency or inadequacy of investigations are outside the terms of reference of the Panel.

117. Finally, in response to a Panel's question during the hearing, Guatemala indicated that the Panel has the authority to determine its own jurisdiction, by its own motion. This is consistent with the general principle of law known as *compétence de la compétence* by which anybody with jurisdictional power has the authority to determine the extent of its jurisdiction.[93] At the hearing, the Panel inquired about the temporal aspects of the different claims. Guatemala, in this regard, brings to the attention of the Panel that, within the second group of alleged failures, there are a number of claims that are outside of the terms of reference of the Panel because the issues arose *after* the date of the filing of the panel request. These claims are with respect to: Las Delicias,[94] African palm oil plantations (Tiki Industries, Naisa, Repsa, Ixcan Palms),[95] Alianza,[96] Mackditex,[97] Koa Modas,[98] Santa Elena,[99] and Serigrafía.[100]

B. There is no evidence of failure to effectively enforce labor laws

118. 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.

119. The complaining Party cannot establish the existence of facts based on simple assertions, conjecture, assumptions or remote possibilities[101] and, precisely, this is what the United States has tried to do in this case. The alleged evidence submitted by the United States in support of its

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[92] U.S. panel request, exhibit GTM-2.

[93] See *Interpretation of the Greco-Turkish Agreement of December 1st, 1926* (Advisory Opinion) [1928] PCIJ (ser B) No 31, 5, 20.

[94] U.S. Initial Written Submission, para. 143.

[95] U.S. Initial Written Submission, paras. 146, 149, 151, 154.

[96] U.S. Initial Written Submission, para. 162.

[97] U.S. Initial Written Submission, para. 164.

[98] U.S. Initial Written Submission, para. 166.

[99] U.S. Initial Written Submission, para. 173.

[100] U.S. Initial Written Submission, para. 175.

[101] Final Arbitral Panel Report, *Costa Rica v. El Salvador – Tariff Treatment*, para. 4.145.

claims is based exclusively on anonymous statements.[102] For the many reasons explained in Guatemala's submissions,[103] anonymous statements do not have probative value.

120. Furthermore, the use of anonymous statements was unnecessary in this case. The United States had available many other probative options. For example, the United States could have provided *certifications/attestations* from the labor courts and the administrative offices to demonstrate the latest status of each case and whether there was or not pending actions.[104] The United States had also available the possibility to provide a full photocopy of each administrative and judicial file of the cases at issue.[105]

121. Instead, the United States unilaterally decided to resort to anonymous statements. It also voluntarily accepted the alleged "conditions" imposed by the individuals providing these statements;[106] conditions that clearly violate Guatemala's due process rights and render the statements invalid.

122. Moreover, the United States decided not to use the protection to confidential information provided by the MRP and never asked the Panel and Guatemala for special procedures to protect such information if the MRP were proven to be insufficient.

123. Additionally, following the alleged "conditions" imposed on the United States, it also decided to submit official documents with key information redacted. The redaction of identifying information in official documents 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.

124. As demonstrated in its submissions, the 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. The anonymous statements and other documents were misleading, inaccurate or lacked veracity. In some instances, for example, the cases that the United States

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[102] 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.

[103] Guatemala's Initial Written Submission, Section VII.A; Guatemala's Rebuttal Submission, Section II.

[104] Guatemala's Rebuttal Submission, paras. 41-42. 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. Article 174 of the same legal instrument requires inclusion of an indication, in all certifications, of whether or not there are pending actions. 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.

[105] Guatemala's Rebuttal Submission, para. 44.

[106] U.S. Rebuttal Submission, para. 14. U.S. Letter of 25 November 2014.

argued were pending resolution, based on anonymous statements, were found to have been finalized to the satisfaction of the workers.[107]

125. Consequently, providing anonymous statements with no probative value and redacted documents that normally make reference to the initial stages of domestic procedures to induce compliance do not make a *prima facie* case of failure to effectively enforce labor laws. An international adjudicator like this Panel cannot rely on them without a high risk of error and unfairness.

126. From a more practical perspective, there is one administrative and judicial file for each worker implicated in the U.S. claims. According to the United States, its claims refer to "thousands of workers from over a dozen companies".[108] For each worker, an administrative and judicial file can comprise more than a hundred of pages.

127. Additionally, Guatemala also notes that the United States seems to believe that there is a presumption of failure to effectively enforce labor laws and that it is the burden of Guatemala to show the contrary. Again, this goes against the rules of burden of proof internationally and widely recognized in all rules-based systems of adjudication, enshrined in Rule 65 of the MRP.

128. For example, the Appellate Body in *Canada – Dairy*, a dispute in which the United States was the complaining Party, concluded that "under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary. We will not readily find that the usual rules on burden of proof do not apply, as they reflect a "canon of evidence" accepted and applied in international proceedings".[109]

129. In the same vein, the Appellate Body, in *Chile – Price Band System (Article 21.5 – Argentina)* expressed "...reservations regarding certain statements made by the Panel. For example, at the outset of its analysis, ... the Panel immediately stated that the "main issue for the Panel to decide ... is whether [Chile's] amendments ... are such as to make the measure [at issue] consistent with Article 4.2" of the *Agreement on Agriculture*. Given that the Panel did not specifically articulate its allocation of the burden of proof, such a statement, read in isolation, could be construed to imply that the Panel might have proceeded to consider whether Chile had proven the WTO-consistency of the measure at issue without analyzing whether Argentina had established a *prima facie* case of inconsistency. In [the view of the Appellate Body], the Panel could have made it more discernable, in its reasoning, that it was mindful of the burden on Argentina".[110]

130. In sum, like in the WTO where the measures at issue are considered to be WTO-consistent until sufficient evidence is presented to prove the contrary, here, the Panel should

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[107] See for example Guatemala's Initial Written Submission, para. 230.

[108] U.S. Supplementary Written Submission, para. 1.

[109] Appellate Body Report, *Canada – Dairy (Article 21.5 – US)*, WT/DS113/AB/RW, paras. 66, 68.

[110] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, WT/DS207/AB/RW, para. 143.

consider that Guatemala has acted in a manner consistent with its obligations until sufficient evidence is presented to prove the contrary.

131. Because the United States has not submitted sufficient nor pertinent evidence, the burden of proof has never shifted to Guatemala.[111] It does not matter whether Guatemala is in possession of official documents. The burden of producing the evidence rests on the United States.

132. Guatemala does not have access to any of the individuals providing anonymous statements to test their veracity and credibility. The Panel cannot give any weight to evidence that remains unexamined. On this basis alone, the Panel must reject the United States' claims in their entirety.

C. The United States failed to make a prima facie case of failure to effective enforce labor laws with respect to all companies targeted in its complaint

133. The vast majority of the documents submitted by the United States in support of its case were anonymous statements that do not have probative value or redacted documents that do not prove the facts that the United Stats intended to prove (e.g., inspectors' reports that are not a pertinent legal instrument to prove inaction regarding the imposition of penalties).

134. Additionally, the majority of the claims of alleged inactions were unwarranted because the authorities indeed took action that lead to enforcement or because the companies were in full compliance with their labor laws obligations.

135. In this submission, Guatemala will address some of the issues raised in the U.S. Supplementary Written Submission and will summarize its arguments with respect to each of the U.S. claims:

Las Delicias and 69 other Coffee Farms:

136. As evidence for the alleged failures in 70 coffee farms (for which the United States asserted the existence of 80 complaints), the United States submitted two collective complaints and several anonymous statements. A collective complaint does not prove: a) that there were labor law violations; or b) that other 80 labor complaints mentioned by the United States existed.[112]

137. Guatemala demonstrated, through Exhibit GTM-5, GTM-6 and GTM-7 that inspections took place and that the companies targeted by the collective complaints were in compliance with the law.[113]

[111] U.S. Supplementary Written Submission, para. 66.

[112] Guatemala's Rebuttal Submission, paras. 210 – 213.

[113] Guatemala's Initial Written Submission, paras. 293 – 294. Guatemala's Rebuttal Submission, paras. 214 – 220.

138. Notwithstanding clear evidence of compliance, the United States argued 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".[114]

139. The United States failed to demonstrate any failure of effective enforcement; Guatemala showed compliance of the companies with labor laws; and, nevertheless, the United States still considers that there is a presumption of non-compliance of labor laws leading to a presumption of non-compliance with the CAFTA-DR obligations for which Guatemala would have constantly and continuously the obligation to demonstrate the contrary. This is unreasonable and constitutes an improper reversal of the burden of proof.

140. Besides the two collective complaints, the United States submitted no evidence at all for 69 coffee farms. In its supplementary written submission, the United States appears to have abandoned its claims with respect to the unproven allegations relating to these companies as it mentions generally alleged vulnerabilities of workers from "over a dozen companies".[115]

141. With respect to Las Delicias, again, the United States provided no pertinent evidence and also misunderstands Guatemala's legal proceedings.[116] Based on this, the Panel would be required to find that Guatemala failed to effectively enforce its labor laws because it correctly applied its own domestic procedures and respected the due process rights of the disputing parties. There is simply no basis to claim that Guatemala failed to enforce labor laws with respect to Las Delicias.

Koa Modas:

142. This is a case that the United States supported with anonymous statements of five individuals and redacted copies of some inspectors' reports.[117]

143. 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.[118] 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.

144. Guatemala also pointed out to contradictions between the inspectors' reports submitted by the United States in exhibits USA-118, USA-119 and USA-121 and the anonymous statements[119] that cast further doubts about the credibility of the anonymous witnesses.

[114] U.S. Rebuttal Submission, para. 157.

[115] U.S. Supplementary Written Submission, para. 1.

[116] Guatemala's Rebuttal Submission, paras. 223, 232, 233, 236 – 241.

[117] Guatemala's Rebuttal Submission, para. 244.

[118] Guatemala's Initial Written Submission, para. 312.

[119] Guatemala's Rebuttal Submission, para. 248.

145. Finally, Guatemala explained why an alleged union leader of Koa Modas did not have knowledge of any sanction proceeding through the courts. It was because 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.[120]

146. In its Supplementary Written Submission, the United States takes issue with how Guatemalan domestic procedures work and improperly attempts to shift the burden of proof to Guatemala. It asserts that Guatemala being a disputing Party "would be in possession of any evidence regarding imposition of penalties but has not produced such evidence". Following that statement, it then asserts that "a logical inference to be drawn is that no such sanction has been imposed".[121] The United States completely misses the point. Guatemala has provided throughout these proceedings the numerous ways in which the United States could have demonstrated any lack of action including the imposition of penalties, which it did not.[122] The United States cannot expect Guatemala to produce evidence on facts just because five unidentified individuals asserted something on which they clearly, by operation of the law, do not have direct knowledge.

Mackditex:

147. In this particular case, the United States argued that the inspections conducted in Mackditex were insufficient because: a) inspectors allegedly met only with employees chosen by the employer;[123] and b) the inspectors did not follow-up on known violations to ensure compliance.[124] Apparently, in the view of the United States, by demonstrating these alleged insufficiencies, it automatically would have demonstrated Guatemala's failure to effectively enforce its labor laws. This is incorrect because one thing is to demonstrate the failure to undertake inspections and another, completely different thing, is to demonstrate the existence of substantive labor law violations. In any event, Guatemala demonstrated that the two allegations were unfounded. Inspectors met with union leaders and they indeed followed-up and conducted inspections rigorously.[125]

African Palm Oil Companies

148. The United States refers to four companies (Tiki Industries, NAISA, REPSA and Ixcan Palms).[126] However, the United States only made allegations with respect to Tiki Industries, NAISA and REPSA.

149. The situation with respect to these three companies is the same. The majority of the documents submitted by the United States in support of its allegations consist of anonymous

[120] Guatemala's Rebuttal Submission, para. 254.

[121] U.S. Supplementary Written Submission, para. 66.

[122] Guatemala's Rebuttal Submission, paras. 41 – 45.

[123] US initial written submission, para. 138.

[124] US initial written submission, para. 165.

[125] Guatemala's Rebuttal Submission, paras. 257 – 267.

[126] U.S. Initial Written Submission, paras. 146, 147.

statements, emails from anonymous individuals and official redacted documents that attest the existence of complaints by workers (e.g., some inspectors' reports and written complaints to the Ministry of Labor).[127] Again, anonymous statements and emails from anonymous individuals lack probative value.

150. Additionally, the United States submitted some alleged "studies". These studies either do not relate to the subject matter at issue or are irrelevant for purposes of demonstrating failure to effectively enforce labor laws of these companies; they are out-of-date; and/or their objectivity is highly questionable.

151. Furthermore, Guatemala has demonstrated that the GLI has continuously conducted inspections in these companies either by its own initiative or at the request of the workers.[128] The evidence submitted by Guatemala shows that these companies are in full compliance with its legal obligations under Guatemalan labor laws.[129]

152. The United States contends, however, that Guatemala has not "shown that the actions it took compelled compliance" and that Guatemala "mistakes the taking of certain ineffective actions for 'effective enforcement'".[130] The logic of the United States is flawed: where there is *compliance* with the law no further action for *enforcement* is required.

153. Additionally, in its Supplementary Written Submission, the United States takes issue with Guatemala's objections to the Verité's Report. The United States indicates that "[w]hile certainly it would not be unusual for a government agency to contract a private organization to carry out an objective study, here that was in fact not the case" and then it concludes that "[t]here is no reason to doubt the veracity of the study carried by Verité".[131] This is unpersuasive and insufficient to address the concerns of lack of objectivity of the report. The fact that all researchers have or have had direct links with the U.S. Department of Labor speaks for itself. The fact that Verité has been commissioned by the U.S. Department of Labor to do different "studies" on labor and that Verité depends on the financial resources of the United States confirms Guatemala's suspicions. It is not hard to find evidence on the Internet to discover that Verité's objectivity is highly questionable.[132]

154. The United States also argues that Verité is not the only organization to identify concerns with labor law enforcement in Guatemalan African palm oil sector and cites, again, the United Nations High Commissioner for Human Rights (that it previously cited with respect to the alleged situation in the coffee farms)[133]. Guatemala addressed this report in its rebuttal submission. It does not refer to enforcement issues and relies on outdated information.[134]

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[127] U.S. Initial Written Submission, paras. 146 – 156.

[128] Guatemala's Initial Written Submission, paras. 331 – 336, 342 – 348, 351 – 356.

[129] *Ibidem.*

[130] U.S. Supplementary Submission, para. 73.

[131] U.S. Supplementary Submission, para. 68.

[132] See, for example, https://curate.nd.edu/concern/etds/8910js9767w.

[133] U.S. Rebuttal Submission, para. 159.

[134] Guatemala's Rebuttal Submission, paras. 226 – 229.

Additionally, the Panel should have noted that the report refers to issues unrelated to the African palm oil companies targeted in the U.S. complaint and does not rebut hard evidence submitted by Guatemala demonstrating full compliance with domestic labor laws.

155. Therefore, allegations with respect to African palm oil companies are unfounded and must be rejected.

Fribo, Alianza and Serigrafía:

156. The United States claims "inaction" by Guatemalan authorities with respect to Fribo, Alianza and Serigrafía. For the first two companies, the United States submitted only anonymous statements and redacted copies of some inspectors' reports in support of its allegations. For Serigrafía, the United States only provided anonymous statements.

157. Anonymous statements lack any probative value. 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*, for example. One thing is to demonstrate the existence of labor law violations and another, completely different thing is to demonstrate that the authorities did not take action regarding those labor law violations.

158. In any event, 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. On the contrary, such reports show that inspectors conducted themselves with professionalism and complied with their duties rigorously.

159. In the U.S. Supplementary Written Submission, the United States takes issue, again, with the inspectors' reports regarding inspections at Fribo.[135] The United States misreads the inspectors' reports and Guatemala respectfully refers the Panel to its arguments in its rebuttal submission, paras. 309 to 314.

160. Likewise, in the case of Alianza, the U.S. exhibits show action by the authorities and there is no basis to find that Guatemala failed to effectively enforce its labor laws. For example, the statement of BB and CC indicates that penalties were imposed on Alianza.[136] That means that actions were taken. The two individuals, however, claimed 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.

161. Moreover, Guatemala penalized Alianza in several respects; not only for failing to appear 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

[135] U.S. Supplementary Written Submission, para. 80.

[136] Exhibit USA-61, p. 2, 3.

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*).

162. Unfortunately, it has been recurrent in this proceeding that the United States provides documentation referring only to earlier stages of domestic proceedings to allege "inaction". That is misleading. As Guatemala has shown in the majority of the instances in which it has been able to locate de administrative and judicial files, authorities continued to take actions to enforce its decisions respecting, in all instances, the due process rights of all parties involved.

163. Finally, with respect to Serigrafía, there is no evidence at all that Guatemala failed to effectively enforce its labor laws. The burden of proof has never shifted to Guatemala. However, Guatemala demonstrated that there was no basis 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.[137] Guatemala's actions are in strict compliance with the Inspection Protocol, reviewed and adopted with the support of the United States Agency for International Development.[138]

164. In view of the foregoing, there is no basis to find that Guatemala failed to effectively enforce its labor laws with respect to these companies and the Panel must reject all U.S. claims in this regard.

Santa Elena & El Ferrol Farms:

165. The United States asserts that it provided evidence of inadequate inspections by Guatemalan labor inspectors.[139] It did not. The United States submitted anonymous statements of individuals declaring that inspections were deficient.[140] These anonymous statements do not have probative value and are directly contradicted by evidence put forward by Guatemala.

166. The United States also misrepresents 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.[141]

167. In response, the United States takes issue with conciliation processes when Guatemala's actions are in strict compliance with the Inspection Protocol, reviewed and adopted with the support of the United States Agency for International Development.[142]

[137] The United States submitted no evidence of failure of the employer to appear at the 7 meetings.

[138] Guatemala's Rebuttal Submission, paras. 239 – 241.

[139] US Rebuttal Submission, para. 198.

[140] Exhibit USA-41.

[141] Guatemala's Initial Written Submission, paras. 377 – 383.

[142] Guatemala's Rebuttal Submission, paras. 239 – 241.

168. In any event, the United States did not provide any evidence of Guatemala's failure to effectively enforce labor laws with respect to these farms and its allegations are based in a misunderstanding on the operation of Guatemalan laws and procedures.

VII. The United States Has Failed to Establish Inaction With Respect to the Registration of Unions or the Establishment of Conciliation Tribunals

A. The United States' Claim of Violation Involving Allegations of Short Delays in the Registration of 3 Unions, Out of a Total of 415 Registered, is Extremist, Falls Outside the Panel's Terms of Reference, and Represents an Incorrect Interpretation and Application of 16.2.1(a)

169. In its third claim, the United States seeks to hold Guatemala internationally responsible because of short delays in the registration of 3 unions during a period in which a total of 415 unions were registered. This claim reveals the extremes to which the United States has gone to try to fabricate a case against Guatemala and clearly illustrates how the United States seeks to improperly apply a strict liability standard under Article 16.2.1(a).

170. The United States' case is deficient on many levels. First, the United States' case concerns conduct that is not within the Panel's terms of reference. In all three cases, the union application was either filed or completed subsequent to the United States' request for establishment of the Panel, which is dated August 9, 2011. The panel request delimits the temporal scope of the measures and other matters at issue subject to the Panel's assessment. Article 20.6.6. provides that an "arbitral panel may not be established to review a proposed measure". Article 20.6.6 provides relevant context for the proposition that the CAFTA-DR Parties have not intended to allow an arbitral panel to review conduct that did not exist at the time the panel was requested.

171. Furthermore, pursuant to Article 20.10.4, the Panel's terms of reference are determined by the United States' panel request. Because the alleged delays in the union registrations post-date the United States' panel request, they cannot have been included in it. And, because the alleged delays in union registration are not included in the United States' panel request, they fall outside of the Panel's terms of reference under Article 20.10.14. Consequently, the Panel is precluded from making findings with respect to those alleged delays.

172. Secondly, the United States does not contest that the unions of Mackditex, Koa Modas and Serigrafia were registered. The United States alleges that any delay in meeting the 10-day deadline provided in Guatemala's labor law constitutes an enforcement failure. Equating a short delay in meeting a statutory deadline with an enforcement failure is extremist and fails to recognize the practical realities in which governments operate. Government agencies in most countries, including the United States Department of Labor, often struggle to meet statutory deadlines because of resource constraints. The drafters of Article 16.2.1(a) did not intend to expose the Parties to international responsibility and potential sanctions each time a government agency, be it of a Central American country or in the United States, fails to meet a statutory deadline. The United States' claim is incorrectly premised on a strict liability standard that is not reflected in Article 16.2.1(a) of the CAFTA-DR.

173. It is uncontested that during the period 2008-2014, a total of 415 unions were registered in Guatemala. Thus, the United States allegations concerns less than 1% of the union registered during the period. The United States has not contested this fact. To suggest that short delays in the registration of less than 1% of the unions registered in Guatemala during the period covered by the United States' complaint amounts to a "sustained or recurring course of .... inaction" within the meaning of Article 16.2.1(a) makes no sense legally or from a policy perspective.

174. Third, Article 16.2.1(b) expressly states 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". Hence, even if short delays in the registration of 3 unions, out of a total 415 unions registered during the period, could constitute a course of inaction, the circumstances would fall within the second sentence of Article 16.2.1(b). According to Rule 65 of the MRP, the burden of proof on Article 16.2.1(b) falls on the United States. However, even on the assumption that the burden of proof were to fall on the respondent party, Guatemala has provided evidence that establishes that the years 2011 and 2012, when the delays identified by the United States allegedly occurred, saw a peak in union registrations in Guatemala putting additional strains on the resources of the Ministry of Labor. 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. The United States has not disputed these figures, much less offered any evidence of its own to contradict them. Given the significant increase in union registration activity, short delays in the registration of 3 unions in 2011 and 2012 reflects a reasonable exercise of discretion or results from a *bona fide* decision regarding the allocation of resources, within the meaning of Article 16.2.1(b).

175. Confronted with the weakness of its case, the United States opts in its supplementary submission to simply repeat the unfounded allegations that it made in its Initial Written Communication. The United States tries to distort the record by improperly seeking to attribute to the Guatemalan authorities delays that occurred as a result of deficiencies in the application for union registration. Guatemala has already demonstrated in its Initial Written Submission and in its Rebuttal Submission that many of the delays alleged by the United States arose because of deficiencies in the application. Guatemala will not repeat its arguments here.

176. Not surprisingly, the United States' claim involving the registration of unions also reveals the double standards that underlie most of its case. The United States is seeking to hold Guatemala internationally responsible because the General Labor Directorate allegedly exceeded the 10-day statutory deadline for union registration. The United States insists that this deadline must be applied rigidly and inflexibly because it is statutory. Yet, when it comes to verifying whether the workers' application for union registration complied with the requirements of Guatemalan labor law, the United States expected the General Labor Directorate to simply ignore those requirements. Thus, the United States believes in the strict application of Guatemalan labor law only when it suits its case, but insists that Guatemalan law should be ignored when it does not. The United States cannot have it both ways.

B. The United States Mischaracterizes the Nature of Conciliation Proceedings, Misunderstands Guatemalan Labor Law, Improperly Seeks to Appeal the Guatemalan Labor Courts' Decisions and Otherwise Fails to Demonstrate a Violation of Article 16.2.1(a)

177. At the outset, Guatemala notes that there is simply no relationship between the alleged delays in the registration of trade unions and the alleged delays in the establishment of conciliation tribunals. The United States has artificially tried to craft these allegations together, despite the lack of any relationship between them.

178. The only similarity between the two claims is that the United States' argumentation with respect to both is equally flawed at various levels. The flaws in the United States' argumentation relating to the alleged delays in the establishment of conciliation tribunals with respect to 4 companies during a period of more than 8 years are discussed below.

179. First, the conciliation tribunals are not enforcement mechanisms. As a result, even if the United States' allegations of delay in the establishment of conciliation tribunals with respect to 4 companies were true, those delays would not constitute a "failure to effectively enforce" Guatemala's labor laws within the meaning of Article 16.2.1(a).

180. In its supplementary written submission, the United States argues that submitting a list of grievances and asking a court to set up a conciliation tribunal is one way through which workers exercise their right to bargain collectively. From this, the United States makes the logical leap that "by not setting up those tribunals, the court is failing to effectively enforce the provisions of the Guatemalan Labor Code directly related to that right, Articles 377 through 396".[143] Other than making this general statement, the United States provides no explanation as to how a delay in setting up a conciliation tribunal results in a failure to enforce Guatemala's labor laws.[144] The United States does not even identify a specific provision of Guatemala's Labor Code that allegedly is not being enforced. Rather, the United States refers broadly to 20 provisions of Guatemala's Labor Code. Thus, the United States provides no support for the logic leap that it is asking the Panel to make. The vagueness with which the United States articulates its claim—after three written submissions and an oral hearing—is symptomatic of the weakness of its claim.

181. The United States additionally argues that the "failures ... in this third group" also represent a failure to enforce laws related to acceptable conditions of work.[145] The United States again fails to provide an explanation about how a delay in establishing a conciliation tribunal constitutes a failure to enforce the law, nor does it identify the specific provisions of Guatemala's Labor Code that allegedly were not enforced. The United States simply provides an example that, rather than supporting the United States' argument, actually undermines it. According to the United States, the workers of Fribo "requested inspections to have the GLI enforce laws regarding the same conditions that they noted in their list of grievances", "the GLI failed to

[143] U.S. Supplementary Written Submission, para. 92.

[144] The Panel may wish to recall that the United States has argued that the term "enforce" means "to compel". (U.S. Initial Written Submission, para. 29)

[145] U.S. Supplementary Written Submission, para. 93.

compel Fribo's compliance" and thus the workers turned to the conciliation process "to try to realize their rights".[146] Even if we were to assume, for the sake of argument, that the facts described by the United States are correct, the alleged enforcement failure described in the example is by the GLI and not by the labor court. The United States is improperly seeking to attribute responsibility to the labor courts for the alleged enforcement failure by the GLI. It is also interesting to focus on the precise language used by the United States in its example. In the United States' own description, it is the GLI that "failed to compel Fribo's compliance". Conciliation tribunals do not have the authority to "compel compliance" and thus, as Guatemala has explained, they do not enforce Guatemalan labor law. The United States essentially recognizes this in its narrative when it describes the workers of Fribo turning to the conciliation process to "realize their rights", rather than to "compel compliance", which was the language it used in relation to the GLI.

182. Second, even if conciliation tribunals could be characterized as enforcement mechanisms, the actions or inactions of Guatemala's labor courts relating to the establishment of the conciliation tribunals fall outside the scope of Article 16.2.1(a). The statutory provisions that underlie the United States' claim of lack of enforcement action are Articles 377, 381, and 382 of the Guatemalan Labor Code.[147] None of these provisions makes reference to the Executive, much less describe any enforcement action to be taken by the Executive body. The United States' claim is therefore premised on an incorrect interpretation of Article 16.2.1(a) and 16.8 of the CAFTA-DR.

183. Third, even if the alleged actions or inactions of Guatemala's labor courts relating to the establishment of the conciliation tribunals were to be considered within the scope of Article 16.2.1(a), the United States' case concerns matters that are not within the Panel's terms of reference because they occurred after the date of the panel request on August 9, 2011 or before the entry into force of the CAFTA-DR. Concretely, allegations in respect of Las Delicias,[148] that occurred in 2001 and Ternium,[149] in 2012, are outside the terms of reference of the Panel.

184. Fourth, the United States also concedes in its supplementary submission that the labor court found that the request for establishment of the conciliation tribunals allegedly filed by the employees of Ternium and Fribo did not meet the requirements of Article 381 of Guatemala's Labor Code. The United States tries to overcome this fact with an interpretation of Article 381 that is incorrect. Article 381 does not authorize nor require the court to correct the list of grievances *sua sponte*.

[146] U.S. Supplementary Submission, para. 93.

[147] U.S. Initial Written Submission, para. 219.

[148] U.S. Initial Written Submission, para. 225.

[149] U.S. Initial Written Submission, para. 239.

185. 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.*

186. Article 381 refers to two different documents. The first paragraph refers to the list of grievances ("*pliego de peticiones*") and describes the requirements that the 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.

187. The second paragraph of Article 381 expressly refers to a petition ("*solicitud*") and then goes on to list the specific requirements that must be met by the petition: 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*").

188. 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.

189. 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 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.

190. In its supplementary submission, the United States argues that the petition ("*solicitud*") and the list of grievances ("*pliego de peticiones*") are "inseparable and should be treated the same way".[150] Such interpretation of Article 381 is not supported by the text of the provision. The list of grievances and the petition are clearly distinguished in Article 381 and are identified separately. Moreover, as explained above, the first paragraph of Article 381 sets out the requirements that the "*pliego de peticiones*" must meet. Then, in its second paragraph, Article

[150] U.S. Supplementary Written Submission, para. 106.

381 sets out the requirements that the "*solicitud*" must meet. These are separate and distinct requirements. By treating the list of grievances and the petition separately, and by setting out different requirements that each must meet, Article 381 is clearly indicating that the two are distinct. The United States' argument that the two are "inseparable" is irreconcilable with the text and structure of Article 381.

191. The United States further submits that "[t]o reject such a petition because it fails to note the correct number of workers involved in the collective conflict ... does not correspond to the text or design of the law". Article 381 expressly states that the list of grievances must clearly indicate the number of workers who support it. Thus, an indication of the number of workers supporting the list of grievances is an explicit requirement of Article 381. Failure to indicate the number of workers who support the list of grievances necessarily means that the list of grievances does not meet the requirements of Article 381. Guatemala fails to see how the United States can logically argue that the rejection of the list of grievances by a labor court judge "because it fails to note the correct number of workers involved in the collective conflict ... does not correspond to the text or design of the law", when the indication of the number of workers is expressly required by the text of Article 381. The United States' interest in the enforcement of laws in Guatemala would seem to extend only to some statutory provisions and not to others.

192. Guatemala recalls that the United States has the burden of proof under Rule 65 of the MRP. The United States' arguments with respect to the conciliation tribunals are premised on an interpretation of Article 381 of the Guatemalan Labor Code that is not supported by the text of that provision and that is contested by Guatemala. Consistent with Rule 65, the United States has the burden of establishing that Article 381 operates in the manner in which the United States suggests. The United States has not provided any evidence to meet its burden other than a citation to a general book on the civil law tradition written by a non-Guatemalan lawyer and that allegedly states that "the application of a statutory provision should reflect the plain meaning of the text", a rule of interpretation that the United States incredibly then goes on to misapply by ignoring the plain meaning of the text of Article 381. In any event, the United States did not submit a copy of the book or relevant excerpts. The United States could have sought to support its interpretation by submitting relevant court decisions. Alternatively, the United States could have submitted legal opinions of experts in Guatemalan labor law testifying as to the correct interpretation of Article 381. The United States failed to do so. In the circumstances, the United States has failed to meet its burden of proof under Rule 65 of the MRP and its allegations must be rejected. Indeed, the Guatemalan labor courts acting in the Fribo and Ternium matters must be presumed to have interpreted Article 381 correctly.

193. In any event, even if the United States had met its burden of proof on the interpretation of Article 381, its allegations do not constitute a violation of Article 16.2.1(a). The United States is essentially arguing that, in the case of Ternium and Fribo, the labor courts erred in their interpretation of Article 381 of Guatemala's Labor Code. This is not a situation of inaction, which is the allegation that the United States put forward in its complaint.[151] Rather, the labor courts took action, by rejecting the request for establishment of the conciliation tribunal, albeit based on an incorrect interpretation of the law. The remedy in these situations is to appeal the

[151] See U.S. Initial Written Submission, para. 224.

decision within the framework of Guatemala's legal system. The United States has not established that an appeal was pursued. Article 16.2.1(a) does provide a means of appealing domestic court decisions nor was it intended to serve that purpose. On the contrary, this Panel is precluded from second-guessing the labor courts' decisions in accordance with Article 16.3.8 of the CAFTA-DR. Should the Panel accept the United States' argument, it would convert Article 16.2.1(a) into a procedure for the supranational review of any domestic court decision of any Party, including the courts of the United States. This is clearly not what the drafters had in mind when they negotiated the text of Article 16.2.1(a) and when they specifically agreed, in Article 16.3.8 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".

194. The United States allegations with respect to Avandia are also unfounded. As regards the first request, Guatemala has explained that the labor court found that the list of grievances did not fulfill the requirements set out in Article 381.[152] Consequently, the labor court was legally precluded from establishing the conciliation tribunal.

195. With respect to the request of August 29, 2007, Guatemala has submitted Exhibit GTM-44 explaining that the labor court initially determined that the list of grievances did not meet the requirements set out in Article 381.[153] 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.

196. Finally, with respect to the third petition, Guatemala has explained the petition and the list of grievances were submitted on September 4, 2009 to the Peace Court ("*Juzgado de Paz*") and not to the labor court (see stamp on the bottom of page 4, including cover page). Therefore, the list of grievances was improperly filed. In such circumstances, the file is transferred to the appropriate tribunal by the Supreme Court. This would explain why the list of grievances was received by the labor court on September 9, 2009. Consequently, the delay is attributable to an error on the part of employees and not to the labor court. Guatemala further notes that a conciliation tribunal was constituted by the labor court. The conciliation tribunal resulted in a collective agreement that was signed between Avandia and its employees.[154]

197. In its Rebuttal Submission, the United States claimed that Guatemala's exhibit does not have the same case number as the proceeding to which the United States alludes.[155] The Panel will recall that the United States has redacted the case numbers and has asserted that redacted information is not evidence that is before this Panel. Thus, the United States' allegation that

[152] Exhibit GTM-56.

[153] Guatemala's Initial Written Submission incorrectly described the contents of GTM-44.

[154] Exhibit GTM-33.

[155] U.S. Rebuttal Submission, para. 263.

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.[156] 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 and represents yet another violation of Guatemala's due process rights.

198. The facts before the Panel on Avandia are highly contested between the Parties and there is considerable uncertainty surrounding the conciliation proceedings 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 MRP.

199. 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. These two instances could hardly be described as a "series".[157] 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.[158] 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.

VIII. The U.S. Panel Request Does not Comply with the CAFTA-DR's Requirements

200. The United States does not dispute that its panel request is broad. Nor has the United States refuted that the panel request is vague. Instead, the United States proposes an implausible legal interpretation of the CAFTA-DR according to which, 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.[159] That interpretation is incorrect and reduces to nullity the request for establishment of a panel.

201. First, a panel request not conforming to the CAFTA-DR requirements would not notify the respondent and third parties of the nature of the measure and the gist of what is at issue.[160]

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[156] 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.

[157] U.S. Rebuttal Submission, para. 277.

[158] U.S. Rebuttal Submission, para. 277.

[159] Guatemala's Initial Written Submission, paras. 25, 33, 39; Guatemala's Rebuttal Submission, paras. 432, 449.

[160] Guatemala's Preliminary Ruling Request, paras. 48 – 49, citing the Appellate Body Report, *US – Continued Zeroing*, paras. 168-69.

Second, a broad and vague panel request would not serve the purpose of defining the Panel's terms of reference pursuant to Article 20.10.4 of the CAFTA-DR.[161]

202. Article 20.6.1 is clear. It requires a Party to set out the reasons for the panel request, including identification of the measure or other matter at issue *and* an indication of the legal basis for the complaint. The United States failed to comply with these explicit requirements.

203. The U.S. panel request not only fails to describe with sufficient precision the elements provided for in Article 20.6.1 (i.e., the measure or other matter at issue and the legal basis for the complaint); it conflates the concepts of "matter at issue" and the "legal basis for the complaint".[162] During this proceeding, the United States has failed to address this fundamental deficiency. The U.S. panel request does not clearly identify the matter at issue *and* the legal basis for the complaint when Article 20.6.1 clearly frames the two as separate requirements.

204. Furthermore, the U.S. panel request referred vaguely to "action" or "inaction" without further specification. The plain reading of the U.S. panel request makes it impossible to determine whether the United States is claiming action *and/or* inaction.[163] The United States has not denied that its panel request provides for an open-ended list of potential claims.[164]

205. The United States has also acknowledged that the labor laws in its panel request are "identifiable".[165] Hence, by its own admission, the labor laws were not "identified" in the panel request. In the view of the United States, it identifies the failure to enforce labor laws concerning three particular labor rights, "which make up a limited realm of identifiable laws". Guatemala, however, has provided examples of no less than 40 different laws and regulations that could relate to the labor rights referenced by the United States in its panel request.[166] These examples are merely illustrative. Guatemala has hundreds of such laws and regulations. It is impossible, by the mere reference to particular labor rights, to identify the labor laws at issue in this dispute.

206. Guatemala will not repeat here all the arguments contained in its previous submissions and made during the oral hearing. Guatemala will simply reiterate that by looking only within the four corners of the U.S. panel request it is impossible to determine the scope of this dispute. The deficiencies of the U.S. panel request imply that the nature of the measure and the gist of what is at issue, as well as the terms of reference of the Panel, must be ascertained from the content of the U.S. written submissions. This is also incompatible with Article 20.10.4 of the CAFTA-DR.

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[161] Guatemala's Preliminary Ruling Request, para. 43, citing the Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7. Guatemala's Initial Written Submission, para. 39, 43. Guatemala's Rebuttal Submission, paras. 432, 450.

[162] Later in the proceeding, the United States also conflated the concept of "measure" and "other matter at issue" (See U.S. Rebuttal Submission, para 295; Guatemala's Rebuttal Submission, para. 433). Guatemala's Initial Written Submission, para. 33. Guatemala's Rebuttal Submission, paras. 439, 476.

[163] Guatemala's Preliminary Ruling Request, paras. 66, 73, 86-89, 111-113.

[164] Guatemala's Initial Written Submission, para. 37. Guatemala's Rebuttal Submission, para. 435.

[165] U.S. Initial Written Submission, para. 271; Guatemala's Initial Written Submission, paras. 25, 35, 36; Guatemala's Rebuttal Submission, paras. 441, 447, 469.

[166] Guatemala's Preliminary Ruling Request, paras. 92-97.

207. The U.S. panel request does not withstand scrutiny and the Panel should find that this dispute is not properly before it. Therefore, the Panel must find that it does not have the authority nor the jurisdiction to consider the complaint of the United States.

208. As demonstrated throughout this proceeding, the Panel has the necessary elements before it to easily reach that conclusion. Additionally, the disputing Parties agree about the application of certain principles that support such a finding.

209. For example, the United States does not dispute that a) the sufficiency of a panel request must be evaluated on its face and as a whole (i.e., the Panel cannot resort to other documents like the request for consultations or the parties' submissions);[167] and b) the respondent's ability to defend itself has no bearing in the sufficiency of the panel request.[168]

210. Additionally, Guatemala has argued that a panel request cannot be subsequently "cured".[169] This principle is extremely important because, otherwise, there would not be any predictability and legal certainty. A complaining Party could easily change the scope of the dispute and the terms of reference of the Panel at any moment, including when filing its written submissions. That may affect the defendant's ability to defend itself and would provide an unfair advantage to the complaining Party.

211. In this regard, consistent with the principle that a panel request must be assessed on its face and as a whole, there is no point to establishing whether the disputing Parties clarified the contents of the panel request in the course of the proceedings. Even if they had clarified its contents, that would not change the fact that the panel request is deficient and that the panel lacks jurisdiction.

212. At the oral hearing and in its response to question 12 of the Panel, the United States incorrectly sought to rely on WTO practice to suggest that Guatemala should have raised sooner its concerns with respect to the panel request. The United States also appears to suggest that not raising the issue sooner is not consistent with good faith principles. In support of its argument, the United States cited the Appellate Body in the *US-FSC* dispute.[170]

213. In *US-FSC*, the Appellate Body found that the United States did not comply with the good faith principles provided for in Article 3 of the DSU. The United States was the defending party in that dispute. Unlike this dispute, the United States did not raise in *US-FSC* a procedural objection to the *panel request*. It raised a procedural objection to the *request for consultations*.[171] It had over a period of five years to raise its objection and failed to do so. Instead, the United States developed this argument as a litigation technique.

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[167] U.S. Rebuttal Submission, para. 315; Guatemala's Rebuttal Submission, paras. 437 – 438.

[168] U.S. Rebuttal Submission, para. 312; Guatemala's Rebuttal Submission, para. 437.

[169] Guatemala's Preliminary Ruling Request, paras. 44 – 47, 127; Guatemala's Initial Written Submission, paras. 51-55.

[170] U.S response to question 12 of the Panel.

[171] Appellate Body Report, *US—Tax Treatment for "Foreign Sales Corporations"* [hereinafter "US—FSC "], WT/DS108/AB/R, adopted 20 March 2000, para. 164, 165.

214. Raising a procedural objection to the request for consultations so late in the proceeding is completely different from raising a procedural objection to the panel request before the initial written submission. The practice at the WTO is that procedural objections should be raised no later than the *first written submission* of the parties. This practice is so well-established that it is consistently reflected in the working procedures of WTO panels, including panels in which the United States is a disputing party.[172] Clearly, the United States is attempting, again, to mislead this Panel.

215. In any event, the United States has failed to identify a provision of the MRP that required Guatemala to have sought clarification of the request for establishment of the panel or take other action prior to Guatemala's request for a preliminary ruling.

216. In view of the foregoing, there is no question that the panel request, for numerous reasons, does not conform to the CAFTA-DR requirements and this Panel lacks jurisdiction with respect to all U.S. claims.

IX. Conclusion

217. In conclusion, the Panel must reject the United States' claims in their entirety. The Panel has no jurisdiction to make findings on the United States' complaint and, alternatively, Guatemala demonstrated that the United States failed to make a *prima facie* case of violation under Article 16.2.1(a). Among many other reasons:

a) The secret witness statements submitted by the United States lack probative value and reliance on them would violate Guatemala's due process rights.

b) Redacted official documents were unjustifiably submitted by the United States with a view to obstruct Guatemala's ability to locate such documents and defend itself.

c) The United States is improperly seeking to impose on Guatemala a presumption of non-compliance with its international obligations in a manner contrary to general principles of public international law.

d) The United States' interpretation of Article 16.2.1(a) is untenable. It improperly imposes a strict liability standard and deprives whole clauses of meaning.

e) The alleged failures by the Guatemala's labor courts to impose fines or establish conciliation tribunals, or by the Public Ministry to pursue criminal penalties, do not fall within the scope of Article 16.2.1(a).

f) In any event, the United States has failed to establish inaction by Guatemala's labor courts or Public Ministry.

[172] See Guatemala's response to question 12 of the Panel.

g) With respect to the alleged inaction to perform inspections or impose penalties, the United States also failed to make a *prima facie* case of violation because it did not put forward pertinent evidence and Guatemala demonstrated that, in the majority of the cases, the claims of alleged inactions were unfounded.

h) The United States' allegations involving the registration of unions are outside the Panel's terms of reference because the applications were either initiated or completed after the United States' panel request.

i) Furthermore, Guatemala demonstrated that the delays were mainly attributable to the failure of the applicants to comply with the requirements of Guatemala's Labor Code.

j) As regards the establishment of conciliation tribunals, Guatemala demonstrated that the United States' allegations are premised on an incorrect understanding of Guatemalan law, as these tribunals are not enforcement mechanisms.

k) More broadly, the United States is improperly asking the Panel to second-guess the decisions of the Guatemalan labor courts, contrary to 16.3.8 of the CAFTA-DR.

l) In any event, even if the United States had succeeded in demonstrating the failure to enforce labor laws in some of the cases underlying its complaint, *quad non*, those cases are still insufficient to demonstrate sustained or recurring inaction.

m) The United States also failed to submit any evidence with respect to the existence of "course of" inaction.

n) In addition, the United States failed to submit evidence and thus demonstrate any effect on trade between the CAFTA-DR Parties.

o) Finally, the United States has not established that the alleged course of inaction constitutes an unreasonable exercise of discretion or is not the result of a *bona fide* decision regarding the allocation of resources pursuant to Article 16.2.1(b);

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