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

COMMENTS OF THE UNITED STATES ON GUATEMALA'S SUPPLEMENTARY WRITTEN SUBMISSION AND REPLIES TO THE PANEL'S QUESTIONS

July 1, 2015

Introduction

1. In this submission, the United States comments on Guatemala's Supplementary Written Submission and Replies to the Panel's Questions of June 17, 2015. The U.S. comments below focus on new arguments raised by Guatemala and additional points that the Panel may find useful.

Question 1: How does subparagraph (b) of Article 16.2.1 relate to the Parties' respective burdens? In particular, is it the burden of the United States to establish that Guatemala's conduct does not have the qualities described in the last sentence of subparagraph (b)? Or is it the burden of Guatemala to establish that its conduct does have those qualities in order to rebut a prima facie showing by the United States that Guatemala is not in compliance with subparagraph (a)?

2. In response to Question 1, Guatemala advances three points; each reflects an incorrect interpretation of Article 16.2.1. First, Guatemala argues that "a panel examining a claim under Article 16.2.1(a) must examine the challenged conduct against Article 16.2.l(b) before arriving at a definitive conclusion as to whether a Party is in violation of the former."[1] However, this statement is not accurate. A panel would only need to conduct an examination under Article 16.2.1(b) if it were asserted that "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."[2]

3. That question, in turn, revolves around the language in Article 16.2.1(b) that each Party "retains the right to exercise discretion . . . and to make decisions." The threshold issue under subparagraph (b) is whether the responding Party has decided to exercise that right. As the United States previously explained,[3] only the responding Party knows whether it has exercised that right and wishes to invoke the exercise of that right in the context of defending a particular course of action or inaction. Accordingly, as reflected by the ordinary meaning of Article 16.2.1, once the complaining Party has established that the responding Party has breached its obligations under Article 16.2.1(a), it is up to the responding Party to decide whether to raise and establish a defense under Article 16.2.1(b).

4. Therefore, Guatemala's argument with respect to what a panel would need to examine actually supports that Article 16.2.1(b) is an affirmative defense for which the responding Party bears the burden of proof, pursuant to Rule 66 of the Rules of Procedure for Chapter Twenty of the Dominican Republic – Central America – United States Free Trade Agreement ("Rules of Procedure").

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[1] Guatemala's Supplementary Written Submission and Replies to the Panel's Questions ("Guatemala's Supplementary Submission") (June 17, 2015), para. 3.

[2] CAFTA-DR, Art. 16.2.1(b).

[3] Responses of the United States to the Panel's Questions Following the Hearing ("U.S. Responses to Questions") (June 17, 2015), paras. 4-7.

5. Second, Guatemala argues that the complaining Party has the burden, pursuant to Rule 65 of the Rules of Procedure, "to establish that the exercise of discretion has been unreasonable or that a decision regarding the allocation of resources is improper," and that nothing in the plain language of Article 16.2.1(b) "indicates a modification of the usual rules on the burden of proof."[4]

6. This argument, however, is circular since it assumes its own conclusion. The reliance on Rule 65 is based on the assumption that Article 16.2.1(b) is part of the burden of the complaining Party rather than being an affirmative defense. As a result, the argument does not help answer the Panel's question.

7. Furthermore, the argument is premised on the existence of an exercise of discretion or decision regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Again, however, the responding Party is the one to know whether it chooses to assert that there has been such an exercise of discretion or decision such that the course of action or inaction that has been identified under Article 16.2.1(a) is nonetheless justified by operation of Article 16.2.1(b).

8. Third, Guatemala argues that Article 16.2.1(b) was intended to limit the scope of Article 16.2.1(a) and not to operate as an exception or defense.[5] In this respect, Guatemala argues that the "conduct" of Article 16.2.1(b) "is not of the type that is contrary to Article 16.2.1(a)."[6]

9. This view, however, ignores the fact that Article 16.2.1 clearly reflects that subparagraph (a) sets forth the Parties' obligations regarding the enforcement of labor laws, while subparagraph (b) affords the responding Party a justification – *i.e.*, an affirmative defense – for why it has failed to carry out the obligations imposed by subparagraph (a). The phrase "course of action or inaction" appears in both provisions of Article 16.2.1. Article 16.2.1(a) requires that a Party to the CAFTA-DR "not fail to effectively enforce its labor laws, through a sustained or recurring *course of action or inaction*."[7]

10. The phrase is again repeated in Article 16.2.1(b): "a Party is in compliance with subparagraph (a) where a *course of action or inaction* reflects a reasonable exercise of discretion, or results from a *bona fide* decision regarding the allocation of resources."[8] The reference to a course of action or inaction in subparagraph (b) is best understood as referring back to a course of action or inaction identified under subparagraph (a). In both provisions, therefore, the phrase represents the manner in which a Party is in breach of Article 16.2.1(a). This being the case,

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[4] Guatemala's Supplementary Written Submission and Replies to the Panel's Questions ("Guatemala's Supplementary Submission") (June 17, 2015), para. 4.

[5] Guatemala's Supplementary Submission, para. 5.

[6] Guatemala's Supplementary Submission, para. 5.

[7] CAFTA-DR, Art. 16.2.1(a), emphasis added.

[8] CAFTA-DR, Art. 16.2.1(b), emphasis added.

Article 16.2.1(b) provides the responding Party a means to justify its "course of action or inaction," "*where* a course of action or inaction" satisfies certain conditions.[9] Therefore, Article 16.2.1(b) operates as an affirmative defense and is the responding Party's burden to prove.

Question 3: If the Panel were to determine that it is the burden of Guatemala to demonstrate that the conduct of which the United States complains has the qualities described in paragraph (b) of Article 16.2.1, identify any evidence in the record that would support such a showing.

11. In response to Question 3, Guatemala attempts to justify its course of inaction by identifying portions of the record that allegedly support a showing under Article 16.2.1(b). However, nothing Guatemala identifies demonstrates that Guatemala exercised discretion in effecting the course of inaction or that the course of inaction resulted from a *bona fide* decision regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities.

12. When applied to public functionaries, to exercise "discretion" means to exercise the "power or right conferred upon [that official] by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others."[10] A "bona fide" decision is one "made in good faith without fraud or deceit."[11] Consequently, for purposes of Article 16.2.1(b), the responding Party must demonstrate – through reference to facts on the record – that its course of action or inaction reflects an exercise of legally conferred discretion involving "investigatory, prosecutorial, regulatory, and compliance matters," and that the exercise of discretion was reasonable. As the United States has shown, nothing in the enforcement failures demonstrated by the United States reflect such an exercise of discretion. Regarding the allocation of resources for the enforcement of "labor matters," the responding Party must demonstrate that a decision was taken regarding the allocation of resources, that the decision was made in good faith and reflects a prioritization among labor enforcement matters, and that the course of inaction demonstrated resulted from the resource allocation decision taken.

13. With respect to the first group of failures, Guatemala again places the blame for the non-execution of the court orders on the workers. Guatemala argues in part that either the workers failed to appear for the reinstatement or court proceedings, voluntarily terminated the

[9] In responding to Questions 1 and 3, Guatemala attempts to justify individual instances of delay or inaction by invoking Article 16.2.1(b). However, Article 16.2.1(b) applies to a "course of action or inaction." Accordingly, in discussing the elements of Article 16.2.1(b), Guatemala must show how "a course of action or inaction" reflects a reasonable exercise of discretion, or results from a *bona fide* decision regarding the allocation of resources, rather than individual instances of delay or inaction.

[10] Black's Law Dictionary, definition of "discretion."

[11] Webster's Third New Int'l Dictionary, Unabridged (2003), definition of "bona fide."

proceedings, or reached a voluntary settlement.[12] Guatemala then concludes, without further explanation, that "giving more priority to cases where employees are cooperating with the labor courts or in which employees have been unable to reach a voluntary settlement is consistent with a reasonable exercise of discretion or a *bona fide* decision regarding the allocation of resources."[13]

14. This cursory conclusion is not sufficient to demonstrate the requirements of Article 16.2.1(b). First, as discussed in the prior U.S. submissions, Guatemala's obligation to compel compliance with court orders is not discretionary and Guatemala's claims regarding the non-appearance of workers or purported voluntary settlement agreements are legally flawed.[14] The record clearly reflects that the workers did not abandon their claims for reinstatement, and the non-appearance of a worker on one occasion for reinstatement does not terminate the court order or otherwise relieve the government of its obligation to enforce the law.[15] Further, regarding the purported voluntary settlements, the United States established that the partial payment to the workers does not constitute a valid settlement of the workers' claims, and therefore the labor court must continue to take steps to compel compliance with its orders.[16]

15. Second, even ignoring these flaws, Guatemala's arguments are not responsive to the elements of Article 16.2.1(b). Guatemala does not identify anything within the record that reflects the exercise of discretion or a decision regarding the allocation of resources involving the enforcement of court orders, let alone discuss whether these were reasonable or *bona fide*. Accordingly, Guatemala's arguments fail to address Article 16.2.1(b).

16. The same is true for the second group of failures identified by the United States. Guatemala states that it has directed significant resources to enforcement activities, and that in 2012, it hired 100 new inspectors and increased inspections. However, Guatemala does not explain whether the course of inaction demonstrated by the United States in the area of inspections reflects an exercise of discretion involving "investigatory, prosecutorial, regulatory, and compliance matters", and if so, how this exercise of discretion was reasonable or reflected good judgment. Further, Guatemala does not discuss how any decision regarding the allocation of resources resulted in its course of inaction or why the decision was made in good faith and reflects a prioritization amongst labor enforcement matters. In fact, Guatemala's reference to hiring new inspectors and increasing inspections would indicate the opposite – it would indicate

[12] Guatemala's Supplementary Submission, para. 15.

[13] Guatemala's Supplementary Submission, para. 15.

[14] U.S. Responses to Questions, paras. 79-80, 96-99.

[15] U.S. Supplementary Submission (June 17, 2015), para. 51.

[16] U.S. Responses to Questions, paras. 96-99.

that Guatemala has given inspections a high priority for the allocation of labor enforcement resources.[17]

17. Guatemala also claims, by way of statistics, that it increased the number of penalties imposed on noncompliant employers. But again, Guatemala's statistical presentation says nothing about whether it was exercising discretion or that previously it had allocated resources to a higher priority labor enforcement matter.[18]

18. Finally, for delays in registering unions and establishing conciliation tribunals, Guatemala does not appear to invoke Article 16.2.1(b), but instead argues that the delays identified in the record do not constitute a sustained or recurring course of inaction when viewed on a broad scale. In particular, Guatemala notes that the record identifies three instances of delay in union registration between 2011 and 2012 and four instances of delay in establishing conciliation tribunals between 2006 and 2012. Guatemala argues that these numbers are "insignificant" compared to the total number of unions registered and the total number of cases initiated in the labor courts.[19]

19. This explanation does not identify any exercise of discretion or decision regarding the allocation of resources that would have caused delay in those seven instances, much less explain how these were reasonable or *bona fide*. To the contrary, as seen in the submissions of both the United States and Guatemala, Guatemala appears to have allocated sufficient resources to these applications and petitions to review and respond to the applicants on multiple occasions, asking them to make small changes or to rephrase text in a different way in their proposed by-laws. And as the United States has explained, the laws relating to the establishment of conciliation tribunals and union registration do not provide authorities with the discretion to ignore statutory deadlines or otherwise enforce the relevant laws.

20. Accordingly, Guatemala has failed to demonstrate that the failures identified by the United States have been justified under Article 16.2.1(b).

Question 4: What must the evidence show in order to demonstrate that a failure to effectively enforce labor laws is "in a manner affecting trade between the Parties?"

21. In response to Question 4, Guatemala reiterates its view that the phrase "in a manner affecting trade" in Article 16.2.1(a) requires a demonstration that the responding Party has implemented "a deliberate government policy," the "intended consequence" of which is to affect

[17] However, a high priority in terms of the allocation of resources does not equate to effective enforcement. Those resources have to be put to use in a way that secures compliance with the law. Unfortunately, that did not occur here.

[18] The United States has addressed Guatemala's misplaced arguments regarding the first group of failures involving noncompliance of court orders in response to Question 2.

[19] Guatemala's Supplementary Submission, para. 8.

trade.[20] Guatemala further argues that to make such a demonstration, the complaining Party must show that the failure to enforce allowed the identified firms to lower their costs, and that these lower costs gave them an advantage over their competitors.[21]

22. As the United States has explained in its prior submissions, the plain meaning of Article 16.2.1(a) does not include any "additional condition" of a deliberate government policy to affect trade between the Parties.[22] Such an interpretation would read into the provision a requirement of bad faith and would be contrary to the customary international law rules of treaty interpretation.

23. Furthermore, nothing in Article 16.2.1(a) requires a complaining Party to demonstrate a *quantified* trade effect, such as a specific decrease in an individual company's costs or an increase in a company's exports, as Guatemala suggests.[23] As the United States has indicated, Article 16.2.1(a) does not require a showing that any particular kind of effect on trade has occurred. Nor does it require the type of showing that might be expected in the context of a domestic trade remedies dispute, or a dispute under the WTO *Agreement on Subsidies and Countervailing Measures*, which provide mechanisms by which the complaining party has access to the relevant information required to make a particular, quantified showing. Instead, Article 16.2.1(a) requires a showing that the failure by Guatemala to enforce its labor laws has *an* effect on trade. The United States has made such a showing by demonstrating how Guatemala's failure to enforce its labor laws modified the conditions of competition within the sectors identified by reducing costs, and thereby affected trade between the Parties.

24. For example, the United States has demonstrated that where Guatemala failed to compel compliance with court orders for reinstatement, Guatemalan employers evaded the payment of back wages, economic benefits, and fines mandated by the labor courts. The amount of the fines and the time period for calculating back wages and benefits are reflected in the court orders. By way of illustration, in the orders included in U.S. Exhibits 55, 57, 59, the court imposed for each order a fine on the employers in the amount of approximately 14,550 quetzals (nearly $2,000 USD). Collectively, for U.S. Exhibits 55, 57, 59, the labor court imposed fines in the approximate amounts of 203,700 quetzals for ITM, 582,000 quetzals for NEPORSA, and 160,050 for ODIVESA.[24] These amounts reflect fines alone and do not account for the back wages and other benefits avoided by the relevant employers. Further, when the employers' violation of the orders persisted for more than seven days, pursuant to the court orders and the

[20] Guatemala's Supplementary Submission, para. 16.

[21] Guatemala's Supplementary Submission, para. 19.

[22] U.S. Rebuttal Submission, paras. 57-58.

[23] See U.S. Responses to Questions, paras. 25-33.

[24] See 14 Reinstatement Orders (February 19, 2008) (USA-55); 40 Reinstatement Orders (February 19, 2008) (USA-57); 11 Reinstatement Orders (June 24, 2008 and August 25, 2008) (USA-59).

Labor Code, the labor court should have increased the fines by 50 percent.[25] This is another cost the employers avoided as a result of Guatemala's failure to effectively enforce the law.

25. Guatemala is mistaken when it suggests that the evidence provided by the United States consists of mere "hypothetical examples" of the effects of Guatemala's failure to enforce its labor laws.[26] As the United States has explained, the focus of the analysis is on the measure, and whether it operates in a manner that affects trade.[27] The United States described in detail in its response to Question 5 how the measure at issue – i.e., Guatemala's failure to effectively enforce its labor laws – results in both direct and indirect cost savings to Guatemalan entities compared to the situation that would exist where Guatemala was effectively enforcing the relevant labor laws.

26. Contrary to Guatemala's contention that the "so-called 'conditions of competition" analysis presented by the United States is based on "hyperbole and speculation," this interpretation of the term "affecting" trade is supported by the findings of prior WTO dispute settlement panels and the Appellate Body.[28] The interpretation by those bodies is consistent with the customary international law rules of interpretation reflected in the Vienna Convention on the Law of Treaties; and as Members of the WTO, the Parties were aware of the longstanding interpretation of these terms developed in that forum.

Question 7: Explain what is meant by a "course" of action or inaction within the meaning of Article 16.2.1(a). In particular, what distinguishes a course from a group of actions or inactions that do not constitute a "course"?

27. In response to Question 7, Guatemala again repeats its misplaced argument that a "course" is intended to capture a "deliberate policy."[29] The United States has noted elsewhere that nothing in the ordinary meaning of the word "course" or in the context of Article 16.2.1(a) invites an interpretation that requires a showing of "deliberate policymaking."[30]

28. Guatemala is also wrong in its further assertion that it would be inconsistent with a general treaty interpretation principle of effectiveness that "course" means "a line of conduct, a person's method of proceeding" or "the way something progresses and develops" and that it is preceded by the terms "sustained" and "recurring." In fact, as Guatemala maintains, "the

[25] See 14 Reinstatement Orders (February 19, 2008) (USA-55); 40 Reinstatement Orders (February 19, 2008) (USA-57); 11 Reinstatement Orders (June 24, 2008 and August 25, 2008) (USA-59); see also GLC, Arts. 209, 379.

[26] Guatemala's Supplementary Submission, para. 18.

[27] U.S. Responses to Questions, para. 28.

[28] See U.S. Responses to Questions, paras. 25-28.

[29] Guatemala's Supplementary Submission, para. 21.

[30] U.S. Responses to Questions, para. 46.

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.'"[31] The terms reinforce one another but have distinct meanings to which the disputing Parties have largely agreed.[32]

Question 8: The United States says that "recurring" means "coming or happening again." (U.S. Initial Written Submission, ¶ 89) Guatemala says "recurring" means "[o]ccur or appear again, periodically, or repeatedly." (Guatemala Initial Written Submission, ¶ 130) What frequency or regularity of occurrence of a course of action or inaction is required for the course to be "recurring" within the meaning of Article 16.2.1(a)?

Question 9: The United States says that "sustained" means "maintained at length without interruption, weakening, or losing in power or quality: prolonged, unflagging." (U.S. Initial Written Submission, ¶ 88) Guatemala says "sustained" means "[c]ontinuing for an extended period or without interruption"; or "[t]hat has been sustained; esp. maintained continuously or without flagging over a long period." (Guatemala Initial Written Submission, ¶ 130) Over what period of time must a course of action or inaction continue for the course to be "sustained" within the meaning of Article 16.2.1(a)?

29. In response to Question 9, Guatemala referred the Panel to its response to Question 8. Therefore, we will address the response to both questions together.

30. In explaining its position regarding the meanings of "sustained" and "recurring," Guatemala comments that, in its view, an "intervening event" in a course of action or inaction disqualifies the course from falling within the scope of Article 16.2.1(a).[33] Guatemala then concludes that "isolated events thus would not fall within the meaning of 'sustained' or 'recurring.'"[34] Guatemala is incorrect on its initial supposition as well as on its inferential conclusion.

31. First, the disputing Parties agree that "recurring" means "occurring again, periodically"[35]; it does not mean "without interruption" as Guatemala now suggests. To the contrary, "periodically" implies that a recurring event could take place occasionally, with breaks or interruptions in the overall "course." Second, the term "sustained," set apart from "recurring" with the disjunctive "or," means "continuing," as the disputing Parties again have agreed.

[31] Guatemala's Supplementary Submission, para. 21.

[32] See, e.g., U.S. Rebuttal Submission, para. 48.

[33] Guatemala's Supplementary Submission, para. 23.

[34] Guatemala's Supplementary Submission, para. 23.

[35] See, e.g., U.S. Rebuttal Submission, para. 48; Guatemala's Initial Written Submission, para. 130.

32. But while the disputing Parties do not disagree with respect to the plain meanings of the words in the phrase "sustained or recurring course of action or inaction," or with respect to whether Article 16.2.1(a) is intended to capture conduct in the aggregate (that is, as a course), Guatemala takes each word beyond its plain meaning to formulate an implausible standard such that a complaining Party would have to demonstrate a total failure of enforcement over a prolonged period of time to establish a breach. As the United States has explained, however, Article 16.2.1(a) does not require such a demonstration.

33. Applying a proper interpretation of Article 16.2.1(a), the United States has shown three sustained and recurring courses of inaction, each with respect to a different type of failure to enforce specific provisions of the Labor Code and relevant labor regulations. An "interruption" or "intervening event," had Guatemala substantiated any, would not negate the existence of a course or that each course is sustained or recurring. The courses of action continued over seven years in the case of the second group of failures, and eight years in the case of the first and third groups. They comprise numerous instances, involve hundreds of workers, and span multiple sectors engaged in cross-border trade.

34. Whether a group of government failures constitutes a sustained or recurring course of action or inaction would need to be evaluated on a case-by-case basis. For example, depending on the type of enforcement action, one might expect to see a higher or lower frequency of conduct.[36] The United States has shown that the instances of failure at issue constitute a sustained and recurring course of inaction by Guatemala. Such course of inaction consists of similar government failures with respect to enforcement of the same provisions of labor laws, and which are both continuing and repeated.

Question 10: For purposes of determining whether there has been a breach of Article 16.2.1(a), what is the relevance of the fact that a course of action or inaction is either representative of Guatemala's conduct or exceptional? If this quality is relevant, what is the appropriate frame of reference? Is the appropriate frame of reference the Guatemalan economy as a whole? A particular sector? A particular geographical region? Or some other frame of reference?

35. Guatemala asserts that "conduct that is exceptional does not constitute a 'sustained or recurring course of action or inaction.'"[37] In Guatemala's view, "the terms of Article 16.2.1(a) refer to conduct that is representative of the overall situation in the country as a whole."[38] Guatemala claims that it reaches this conclusion on the basis of the plain meaning of the terms of the phrase. However, nothing in the respective plain meanings of the terms "course," "sustained," or "recurring" speaks to the representativeness or exceptionality of the actions or

[36] See U.S. Rebuttal Submission, para. 48.

[37] Guatemala's Supplementary Submission, para. 28.

[38] Guatemala's Supplementary Submission, para. 28.

inactions. Likewise, nothing in the text of Article 16.2.1(a) suggests that certain courses of action or inaction simply are not covered. Rather, Article 16.2.1(a) refers to "*a* course of action or inaction"; not "*the representative* course" or "*the predominant* course." Indeed, it would be odd to read Article 16.2.1 as applying only where the course of action or inaction described there is the norm, and that therefore Article 16.2.1(a) would not apply to the exceptional failure to enforce. One would hope that the type of failure described in Article 16.2.1(a) would be the exception rather than the norm, and thus that Article 16.2.1(a) is intended to apply where the course of action or inaction is exceptional, as well as where it is the norm. Nor is there a threshold specified in Article 16.2.1(a) such that, for example, a "10 percent" or "15 percent" failure to effectively enforce would be accepted under the CAFTA-DR. That issue would be relevant, if at all, at the stage of assessing for purposes of Article 20.17.2 the "pervasiveness and duration of the Party's failure to effectively enforce the relevant law."[39]

36. To be sure, and as noted in the U.S. Responses to the Panel's Questions, the courses of inaction by Guatemala substantiated in the record are not exceptional.[40] The record shows dozens of instances of inaction documented by the United States, and refers to dozens more as seen in Guatemala's own public information and confirmed by private and public organizations. As a legal matter, however, an unusual or atypical course of action or inaction may constitute a breach of Article 16.2.1(a). Were this not the case, a responding Party might evade responsibility for any given course of action or inaction simply by showing that the same course is not occurring with respect to other sectors or in other regions of the country, for example. Such an outcome is not consistent with a proper interpretation of Article 16.2.1(a).

Question 12: If Guatemala considered the U.S. panel request to fail to meet the requirements of Article 20.6.1, did it have an obligation to promptly seek clarification of the request or take other action? If so, what is the source of that obligation, when did it apply, and what would be the consequences of not doing so?

37. The United States raises the timing of Guatemala's Request for a Preliminary Procedural Ruling ("PRR") as a matter of good faith and due process to demonstrate that Guatemala did indeed understand the matter set forth in the U.S. panel request filed on August 9, 2011.

38. Guatemala misunderstands the U.S. arguments on the timing of the PRR as a procedural matter covered by the Rules of Procedure or based on common WTO working procedures.[41] The United States does not argue that Guatemala's PRR should be rejected as procedurally defective because it was not filed in a timely fashion but rather that the timing of the PRR seriously calls

[39] CAFTA-DR, Art. 20.17.2.

[40] U.S. Responses to Panel Questions, para. 57.

[41] Guatemala's Supplementary Submission, paras. 29-33.

into question Guatemala's contention that it did not comprehend the subject matter of the U.S. panel request.

39. Here, Guatemala was presented with a number of opportunities to raise the alleged deficiencies prior to filing its PRR on October 10, 2014. Guatemala argues that it "took action promptly by raising its concerns . . . soon after the panel resumed its work and adopted the timetable for these proceedings."[42] Yet Guatemala does not address why it failed to raise its concerns after the U.S. panel request was filed on August 9, 2011, or during subsequent gaps in the suspension of the panel proceedings. As the United States has observed, Guatemala's failures to object "indicate that Guatemala accepted that there was a validly constituted panel with valid terms of reference on which to proceed. . . . Guatemala's actions with respect to the panel request are at odds with the arguments it is now making that the panel request was unclear. Those actions therefore undermine Guatemala's objections and indicate that the PRR should be rejected."[43]

40. Moreover, a prompt objection by Guatemala would have allowed the United States to correct the perceived deficiencies in the U.S. panel request, as Guatemala apparently expects to be the result of its objection. As the United States articulated in the U.S. Responses to Questions (June 17, 2015), Guatemala's years-long extended delay in presenting its concerns has delayed any opportunity for the United States to seek consultations again and request the establishment of a new panel and denied the United States the chance to address Guatemala's objections in a timely manner.[44] Thus, Guatemala's actions can only be understood as an attempt to delay any panel proceedings against it, rather than genuine concerns with the panel request.

Question 13: What is the purpose of the qualification "that are enforceable by action of the executive body" in the definition of statutes and regulations under Article 16.8? What distinction does it draw among statutes and regulations?

41. The United States agrees with Guatemala's view that, according to Article 16.8, "the scope of the laws or regulations that are considered to fall within the definition of 'statutes [or] regulations' in the case of Guatemala is limited to laws or regulations 'that are enforceable by action of the executive body.'"[45] That is precisely what the second half of Article 16.8 states. As the United States explained in its own response to this question, Article 16.8 provides which types of "statutes or regulations" may then be considered to be "labor laws." The qualification therefore excludes statutes or regulations that are not enforceable by the executive body.

[42] Guatemala's Supplementary Submission, para. 29.

[43] U.S. Responses to Questions, para. 67.

[44] U.S. Responses to Questions, para. 68.

[45] Guatemala's Supplementary Submission, para. 37.

42. Where Guatemala's interpretation fails, however, is in "read[ing] together" Article 16.8 with Article 16.2.1(a). Article 16.8 provides a definition to capture the scope of statutes or regulations that may be labor laws. Once a labor law is identified through the application of Article 16.8, the obligation on each Party to the CAFTA-DR extends to all aspects of enforcement of that law. Rather than reading this provision "together" with Article 16.2.1(a), however, Guatemala's reading appears to substitute the definition of labor laws for the obligation contained in Article 16.2.1(a). Nothing about Article 16.2.1(a) suggests that enforcement in this context is limited to actions taken by the executive body such that it excludes enforcement by the judiciary, as Guatemala contends.[46] As the United States has explained previously, not only is this interpretation not supported by the plain text, but the context of the provision, including Article 16.3 of the CAFTA-DR, also plainly belies such an interpretation.[47] Instead, Article 16.2.1(a) sets out the obligation on a "Party" to the CAFTA-DR and does not differentiate between or among enforcement actors.[48]

Question 14: What, if any, contextual guidance can the panel take from Article 20.17 in interpreting Article 16.2.1?

43. Article 20.17.2 sets forth the factors a panel must take into consideration in determining the monetary assessment to be imposed on a responding Party for a breach of Article 16.2.1(a). Contrary to Guatemala's interpretation, Article 20.17.2 does not alter the substantive obligation of Article 16.2.1(a). Rather, the factors listed in Article 20.17.2 concern evaluation by a panel of the responding Party's breach for the purposes of determining the amount of monetary assessment.

44. Article 20.17.2 requires that the panel "take into account" the listed factors. However, even for a determination of a monetary assessment, Article 20.17.2 does not specify how these factors must be taken into account or what weight should be assigned to each factor. Nonetheless, Guatemala argues that the requirement in Article 20.17.2(a) to take bilateral trade effects into account transforms the determination of a monetary assessment into an exclusively "quantitative assessment," and indicates that a quantified showing of trade effects also is necessary for a violation of the obligation of Article 16.2.1(a).[49] Guatemala's reading is not tenable.

45. First, Guatemala incorrectly assumes that the determination of "bilateral trade effects" under Article 20.17.2 must be *the same* as the determination of "in a manner affecting trade" in Article 16.2.1(a). These determinations arise under two different provisions, use different

[46] Guatemala's Supplementary Submission, para. 38.

[47] U.S. Rebuttal Submission, para. 43.

[48] U.S. Oral Statement at the Hearing of June 2, 2015, para. 22.

[49] Guatemala's Supplementary Submission, para. 40.

language, and are undertaken for different purposes. Nothing in the text or context of either provision suggests that the analyses would be the same despite these differences.

46. Rather, the relationship between Articles 16.2.1(a) and 20.17.2 may be better understood by analogy to Articles 3.8 and 22.7 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Article 3.8 of the DSU provides that: "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge." As a result, for purposes of finding a breach, it is not necessary to quantify or determine the level of nullification or impairment. That is a separate exercise that would only be carried out where the dispute has progressed to a proceeding under Article 22 of the DSU. At that stage, Article 22.7 would apply, under which the arbitrator determines "whether the level of such suspension is equivalent to the level of nullification or impairment." That is, the arbitrator would quantify the level of nullification or impairment.

47. Similarly, under Article 16.2.1(a), there is no need for a panel to quantify the effect on trade. Only if the dispute were to reach the stage of a proceeding involving Article 20.17.2 would a panel need to take into account particular trade effects.

48. Second, Guatemala also misunderstands the evaluation required under Article 20.17.2(a) as it relates to the determination of the monetary assessment. Nothing in that provision indicates that it involves the summation of each listed factor. Article 20.17.2 requires only that the panel "take into account" each factor, and not that the panel assign a numerical value to each factor to reach the monetary assessment. Given the other factors listed in the article, such an assessment would not even be possible. For example, Articles 20.17.2(c) and (e) require that the panel consider the reasons for the Party's failure and the efforts by the Party to begin remedying the non-enforcement. Neither factor lends itself to a quantitative valuation. Finally, nothing in Article 20.17.2 suggests that a lack of bilateral trade effects would preclude the imposition of a monetary assessment. Therefore, a quantitative showing of bilateral trade effects is required neither for Article 20.17.2 nor Article 16.2.1(a).

49. Guatemala's arguments with respect to the other listed factors of Article 20.17.2 similarly fail. With respect to Article 20.17.2(b), the requirement that the panel take into account the pervasiveness and duration of the Party's failure in determining the monetary assessment does not indicate that Article 16.2.1(a) requires the failure to be widespread, or to occur over a prolonged period of time as Guatemala suggests.[50] Article 20.17.2(b) requires only that the pervasiveness and duration of the failure be taken into account as a factor, and indicates that there will be a spectrum of pervasiveness and duration of failures to enforce. Consequently, Guatemala's conclusion that Article 20.17.2(b) implies that a breach of Article 16.2.1(a) may

[50] Guatemala's Supplementary Submission, para. 42.

only be found for the most pervasive or the most prolonged failures simply does not follow. Such an interpretation would alter the substantive obligation set forth in Article 16.2.1(a). Instead, in the determination of a monetary assessment, *if* a panel finds the failure to have been pervasive or of an extended duration, the panel must take this into account. In the same way, the panel must also take into account any determination that the enforcement failure was *not* pervasive or of a prolonged duration. Therefore, again, neither Article 20.17.2 nor Article 16.2.1(a) requires a finding that the failure to effectively enforce labor laws is pervasive or of prolonged duration.

50. Similarly, the requirement in Article 20.l7.2(c) that the panel take into account the reasons for the failure in determining the monetary assessment does not indicate that the failure must have occurred for particular reasons, including that it was deliberate, to constitute a breach of Article 16.2.1(a).[51] Just the opposite is true. The reference to "the reasons for the Party's failure to effectively enforce the relevant law" again indicates that there will be a spectrum of reasons for the failure, not the single reason urged by Guatemala of a deliberate policy. If Article 16.2.1(a) confined the failures involved to those involving a deliberate policy, then there would be no reason to include the reference in Article 20.17.2 to "the reasons for the Party's failure to effectively enforce the relevant law." Guatemala's interpretation would render Article 20.17.2(c) a nullity.

51. Therefore, while the factors listed in Article 20.17.2 provide context for interpreting the obligation in Article 16.2.1(a), as the United States explained in its own response to this question,[52] Article 20.17.2 does not have the effect of modifying the substantive obligation of Article 16.2.1(a), as Guatemala suggests.

Question 15: What is the legal effect under Guatemalan law on the obligations of the Guatemalan government (courts, Public Ministry, or other authorities) of a worker failing to appear for his or her reinstatement pursuant to an order made by a labor court under the Guatemalan Labor Code?

52. In response to Question 15, Guatemala argues that "a worker can only be reinstated if he/she is present for the reinstatement proceeding" and that "[f]ailing to appear for his or her reinstatement pursuant to an order made by a labor court renders the reinstatement procedure non-executable."[53] Guatemala further claims that Guatemalan labor law "does not contain provisions to force a worker to be reinstated against his/her will."[54] Based on these views,

[51] Guatemala's Supplementary Submission, para. 43.

[52] U.S. Responses to Questions, paras. 76-78.

[53] Guatemala's Supplementary Submission, para. 47.

[54] Guatemala's Supplementary Submission, para. 46.

Guatemala concludes that "the enforcement obligations of the labor courts cease to operate in case of non-cooperation by the worker."[55]

53. Guatemala's argument is flawed for a number of reasons. First, nothing in the record indicates that the workers in question did not wish to be reinstated, such that enforcement actions by Guatemala would amount to "forcing" the workers to be reinstated "against their will." Guatemala raised the argument involving the non-appearance of a worker in responding to the record for ITM and NEPORSA. Between February and May 2008, ITM and NEPORSA improperly dismissed 54 stevedores in reprisal for forming unions.[56] The labor court ordered that the workers be reinstated with back pay, and that the companies be fined.[57] The labor court failed to take the required actions, such as increase fines or refer the matter to the Public Ministry, to compel the employer's compliance with the law. As a result, as of 2014, neither company had reinstated the workers or provided them with back wages.[58] The statements from the former employees of ITM and NEPORSA make clear that, in these cases, the workers do not wish to abandon their claims to reinstatement and back pay.[59]

54. Guatemala's argument improperly suggests that the non-appearance of a worker on one occasion in which the executor attempted execution of the order means that the worker did not desire to be reinstated or that the worker was in some way non-cooperative with the labor court. As reflected by the statements from the former employees of ITM and NEPORSA, this is not the case.[60]

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[55] Guatemala's Supplementary Submission, para. 48.

[56] 14 reinstatement orders (February 19, 2008) (USA-55); Letter from the Ministry of Labor with attached information regarding the union confederation UNSITRAGUA to B (January 21, 2009) (USA-56); 40 reinstatement orders (February 19, 2008) (USA-57).

[57] 14 reinstatement orders (February 19, 2008) (USA-55); 40 reinstatement orders (February 19, 2008) (USA-57).

[58] Statements from A, B, C, D, E, F (May 29 - June 1, 2014) (USA-1 - USA-6); email communication from NNN, Coordinators' Committee, UNSITRAGUA Histórica (October 15, 2014) (stating that none of the stevedores has been reinstated) (USA-58). Four of the dismissed stevedores have attested to their non-reinstatement. Statement of G (May 31, 2014) (USA-7); Statement of D (May 30, 2014) (USA-4); Statement of H (May 29, 2014) (USA-8); and, Statement of B (May 29, 2014) (USA-2). See also email communication from NNN, Coordinators' Committee, UNSITRAGUA Histórica (October 15, 2014) (stating that none of the stevedores has been reinstated) (USA-58).

[59] Statements of A, B, C, D, E, F, G, H (May 29 – June 1, 2014) (USA-1 to USA-8); Second Statement of B with table (March 5, 2015) (USA-161); Statement of JJJJ (March 23, 2010) (USA-183); Statement of KKKK (March 23, 2010) (USA-174).

[60] Separate from the implausible nature of Guatemala's argument, there are several evidentiary problems with Guatemala's argument involving the workers of ITM and NEPORSA. Guatemala argues that it could not execute the orders because either the worker did not appear for reinstatement, the worker withdrew the request for reinstatement, or the worker provided the wrong address of the employer. In support, Guatemala provides only two exhibits: GTM-52 and GTM-54. These exhibits comprise informal notes in the Guatemalan court record by the court executor, dated between 2010 and 2014, which reflect that on one occasion for each of 33 workers, the executor attempted to execute the worker's reinstatement order and the worker did not appear or the employer's address was not provided. As the United States explained during the hearing, the number of informal notes submitted by Guatemala does not match the number of workers that Guatemala discusses in its rebuttal submission. See GTM-52 and GTM-54; Guatemala Rebuttal Submission, paras. 140, 143. As a result, for those workers not

55. It is in any event difficult to accept Guatemala's claim that 37 of the 54 workers of ITM and NEPORSA discussed in the U.S. written submissions failed to appear for reinstatement out of an unwillingness by the workers to be placed back in employment.[61] There are several possible reasons for why a worker may not appear for the execution of a reinstatement order, including the labor court's failing to properly notify the worker of the time and date of the execution of the order. Given the record evidence, a lack of desire to be returned to gainful employment is the least plausible explanation. Particularly given the high number of workers at issue, a more likely explanation is that they were not sufficiently notified.

56. Furthermore, Guatemala's legal conclusion – that the enforcement obligations of the labor courts cease to operate in case of non-appearance by the worker – has no basis in the law. As the United States has explained, pursuant to Labor Code Articles 285, 380 and 425, judges are obligated to "execute" the judgments that they issue. Labor Code Articles 380, 426-428 provide procedures for executing judgments. There is no statutory provision that allows the court to vacate or suspend the order or close the proceedings in favor of the employer should the worker not appear for reinstatement on one occasion. Rather, the order remains in place, and the labor court's enforcement obligations to execute the order pursuant to Articles 285, 380, and 425 continue.

57. If a worker fails to appear for reinstatement, the court may summon the worker to appear before the court for an explanation and, if after adequate warning and good cause exists, the court may fine the worker.[62] The nonappearance of the worker, however, does not alter the obligation of Guatemala to execute a labor court order. Rather, the court, through the executor, must attempt execution of the order again at a later time. A judge may only close the proceedings or discontinue the execution of a reinstatement order at the request of the worker.[63]

Question 16: Under Guatemalan law, do any employer liabilities to employees survive a bankruptcy or closure of an employer? If so, which ones survive and under what conditions?

58. In response to Question 16, Guatemala acknowledges that "employer liabilities may survive bankruptcy or closure."[64] However, Guatemala argues that "the liabilities may be reduced in the light of the economic situation of the company concerned" and further, that the

covered by the exhibits, Guatemala's argument lacks support. As another example, none of the documents put forward in GTM-52 supports, or suggests, that any worker "voluntarily withdrew the reinstatement request" or that the incorrect address of the workplace was the fault of the worker. See GTM-52; Guatemala Rebuttal Submission, paras. 140, 141. Accordingly, Guatemala overstates the significance of the evidence.

[61] Guatemala's Rebuttal Submission, paras. 140, 143; Guatemala's Supplementary Submission, paras. 46-48.

[62] GLC, Arts. 270-272; Guatemalan Judicial Organizations Law, Arts. 178, 180, 184.

[63] Guatemalan Civil Procedure Code, Arts. 581, 582, 585, 586.

[64] Guatemala's Supplementary Submission, para. 50.

"employees must proactively pursue their claims in the bankruptcy proceedings" not the labor court.[65] Guatemala's arguments miss the mark.

59. First, Guatemala fails to support its claim that the liabilities of an employer may be reduced upon bankruptcy or closure. Guatemala refers to Article 85 of the Labor Code, but that provision expressly addresses circumstances that "constitute good cause for terminating any type of labor contract without any employee liability and without prejudice to the right of the employee . . . to demand and obtain payment of any benefits or compensation to which they may be entitled" under the Labor Code.[66] Thus, the provision would not support the alteration or vacatur of a labor court order directing the payment of back wages, benefits, and fines – even if a company should file for bankruptcy or closure subsequent to the issuance of the court order.

60. Second, the United States notes that no record evidence supports a finding that the entities in question closed due to bankruptcy. Guatemala raised the issue of company closure with respect to two factual scenarios before the Panel regarding the failure of Guatemala to compel compliance with reinstatement orders. In the case of Fribo, the company closed after failing to reinstate workers or pay back wages or fines, and Guatemala has put forward no evidence suggesting that the closure was the result of a bankruptcy. In the case of Avandia, the company failed to reinstate workers or pay wages due after reorganizing under a different name.[67]

61. Third, as described in the U.S. Responses to the Panel's Questions, voluntary closure by an entity does not constitute good cause, and does not relieve an entity of its obligations with respect to workers.[68] Under Guatemalan law, the obligations and liabilities of the employer toward the workers it dismisses depend in part on whether "good cause" existed for the termination of the worker's contract.[69] Where no good cause exists, the employer is liable to the worker for the "compensation set forth in [the] Labor Code" and for "the wages the employee has lost from the time of the discharge until compensation is paid, up to a maximum of twelve months' wages, plus court costs."[70]

62. As reflected in Article 77 of the Labor Code, an employer's voluntary closure of the business is not one of the conditions that merits a finding of good cause.[71] Consequently, the

[65] Guatemala's Supplementary Submission, para. 50.

[66] GLC, Art. 85.

[67] U.S. Responses to Questions, paras. 92-94.

[68] U.S. Responses to Questions, paras. 83-86.

[69] GLC, Art. 77.

[70] GLC, Art. 78.

[71] GLC, Art. 77.

voluntary closure of a company does not alter the employer's obligations to pay workers for the wages and benefits to which they are entitled under the Code.[72]

Question 17: Do Guatemalan authorities have any obligation under Guatemalan law to pursue a remedy under the Guatemalan Labor Code when a worker has filed a complaint but subsequently agreed with an employer to settle that complaint and the employer has complied with the terms of the settlement?

Question 18: Do Guatemalan authorities have any obligation under Guatemalan law to enforce a remedy awarded by a Guatemalan labor court under the Guatemalan Labor Code when a worker has subsequently agreed with an employer to settle his or her claim and the employer has complied with the terms of the settlement?

63. In response to Question 18, Guatemala referred the Panel to its response to Question 17. Therefore, we will address the response to both questions together.

64. In response to Question 17, Guatemala argues that the "labor courts do not have an obligation under Guatemalan law to pursue a remedy under the Guatemalan Labor Code when a worker has filed a complaint but subsequently has accepted the settlement and the counterparty has complied with the terms of the settlement."[73] Guatemala claims that if the labor court were to continue legal proceedings absent any request by the complainant, the labor court would be acting "against the worker's will and/or would be contrary to [the court's] obligation of impartiality."[74] Further, Guatemala argues that such intervention would be inefficient and counter-productive.[75]

65. Notably, Guatemala provides no authority for its analysis. As a result, its claims, which are wholly unsupported, fail to rebut the U.S. showing that obligations remain for Guatemala when agreements are executed that provide only partial payment for the workers' legal claims.

66. As the United States has explained, pursuant to Article 12 of the Labor Code and Article 106 of the Guatemalan Constitution, workers and employers may not negotiate away the rights or protections imparted to workers under the Labor Code. Specifically, "[c]ollective 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

[72] GLC, Arts. 61(g), 92, 93, 103, 121, 122, 126-130, 134, providing the standards for the payment of wages.

[73] Guatemala's Supplementary Submission, para. 54.

[74] Guatemala's Supplementary Submission, para. 53.

[75] Guatemala's Supplementary Submission, para. 55.

ratified by Guatemala, the regulations or other labor provisions are void ipso jure and not will be enforceable against the workers."[76]

67. In the context of settlements involving the conciliation of a collective conflict, the General Labor Inspectorate is obligated to "ensure that such agreements do not violate legal provisions protecting employees" among other requirements.[77]

68. Consequently, in these circumstances, any partial payments made to the workers for compensation owed would not constitute a legal settlement, and the labor court would be obligated to award and enforce all remedies due to the worker under the law.

69. With respect to mandatory fines and penalties imposed by the Labor Code for an employer's violation of the law, because these fines and penalties are paid by the employer to the Government of Guatemala, a worker and an employer cannot agree to settle the payment of these obligations. As a result, if a settlement agreement provided the worker with reinstatement and full compensation of back wages as provided for under the law, the Labor Court is still obligated to impose on, and collect fines from, the employer as a result of the employer's violation of the law.[78]

Question 19: At the hearing, Guatemala argued that in Guatemala reinstatement orders are often issued immediately at the outset of proceedings, that an employer can challenge such an order, that this often begins the litigation process, and that allowing parties to engage in this process is not evidence of failure to effectively enforce under Article 16.2.1(a). The panel requests that Guatemala elaborate further upon this argument and that the United States provide an initial response to it.

70. In response to Question 19, Guatemala argues that the existence of a reinstatement order is not sufficient to establish inaction by the labor courts because "execution of the reinstatement order may be suspended while the reinstatement order is subject to appellate review or other litigation."[79] On this basis, regarding Guatemala's failure to compel compliance with court orders, Guatemala argues that the "United States had to establish, as part of its *prima facie* case, that the reinstatement orders were upheld on appeal, that litigation was no longer pending, and that the employee cooperated with the labor court in executing the reinstatement order."[80]

71. Guatemala's argument, however, is simply without basis. The record evidence shows that at least 191 workers were dismissed between 2006 and 2011 in reprisal for forming a union

[76] Guatemalan Constitution, Art. 106; GLC, Art. 12 contains strikingly similar language.

[77] GLC, Art. 375.

[78] GLC, Arts. 209, 379.

[79] Guatemala's Supplementary Submission, para. 58.

[80] Guatemala's Supplementary Submission, para. 58.

or for seeking to resolve claims through conciliation. Guatemalan courts issued orders for reinstatement and back pay for each of these workers, and imposed a fine. Despite the statutory requirements, Guatemala failed to take effective action to ensure compliance with the orders or to otherwise ensure compliance with the law.

72. Contrary to Guatemala's contention, the United States does not have to show that "the reinstatement orders were upheld on appeal" or "that litigation was no longer pending" to demonstrate Guatemala's failure to compel an employer's compliance with court orders. Guatemala's argument implies that every reinstatement order is automatically appealed by the employer. This is not the case. After the employer has been notified of a court order, the employer has three days to decide whether to commence an appeal.[81] Only if the employer appeals the order would execution be temporarily suspended. Guatemala appears to seek to impose on the complaining Party the burden to show that no appeal was commenced or no other intervening development delayed enforcement – in other words, to prove the negative. However this is in error. To show that a responding Party has failed to compel compliance with court orders, a complaining Party need not address every contingent circumstance that could arise that could temporarily delay the execution of an order.

73. Further, there is no record evidence that the court orders at issue are currently suspended as a result of any appeals, and Guatemala has presented no evidence to suggest otherwise. The lengthy period of time that has elapsed subsequent to the issuance of the court orders reveals the baseless nature of Guatemala's claim. The employer has three days to commence an appeal challenging an order.[82] The appeals court then must "hear the arguments of the appellant" within 48 hours of receiving the case file.[83] After that time has elapsed, the appeals court must schedule a hearing within five days and must issue a decision within five days of the hearing.[84] Thus, the appeals process provided for under Article 368 of the Labor Code lasts no more than 12 days from the appeals court receiving the case file.[85] Here, the labor courts issued the relevant reinstatement orders between 2006 and 2011, and the record reflects that the employers disregarded the court orders for years subsequent to their issuance without any action from Guatemala. Accordingly, the contingency of an appeal, even if it occurred, could not explain or justify Guatemala's course of inaction regarding the compliance of court orders.

74. With respect to Guatemala's argument that the United States must show that the employee cooperated with the labor court in executing the reinstatement order, the United States refers the Panel to the U.S. response to Question 15.

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[81] GLC, Art. 365(b).

[82] GLC, Art. 365(b).

[83] GLC, Art. 368.

[84] GLC, Art. 368.

[85] GLC, Art. 368.

Question 20: The Parties have referred the panel to statistical evidence, including:

a. Diligencias y Verificaciones, Organismo Judicial de Guatemala (Aug. 1, 2012 through Sep. 4, 2014), see U.S. Rebuttal Submission ¶ 114;
b. Guatemalan data on 2014 agricultural exports (Exh. USA-199), see U.S. Rebuttal Submission, ¶¶ 129, 225, 285;
c. Report of the Special Rapporteur on the Right to Food, Olivier de Schutter, UN Human Rights Council, Doc. A/HRC/13/33/Add.4, (January 26, 2010) (Exh. USA-207), see U.S. Rebuttal Submission, ¶ 159; Guatemala's Rebuttal Submission, ¶ 227
d. 2011 Observation for Guatemala, International Labor Organization Committee of Experts on the Application of Conventions and Recommendations, "Article 5. Adequate inspection" (adopted 2011, published 101st ILC session 2012) (USA- 208), see U.S. Rebuttal Submission ¶ 159;
e. Annual Report of the United Nations High Commissioner for Human Rights, Doc. A/HRC/19/21/Add.1, ¶ 73(January 30, 2012) (USA-209), see U.S. Rebuttal Submission ¶ 159;
f. Statistics of the Judiciary, available at http://www.oj.gob.gt/estadisticaj/, see Guatemala's Rebuttal Submission, ¶ 249;
g. Guatemala Labor Inspectorate Statistics, see Guatemala's Rebuttal Submission, ¶¶ 355, 357;
h. Statistics from the Guatemalan Ministry of Labor on union registration, see Guatemala's Rebuttal Submission, ¶ 376;
i. The observation of the ILO Committee of Experts, see Oral Statement by the United States at the hearing, n. 106.

The Panel requests that the Parties consider providing further comments on the probative value and relevance of this evidence.

75. (a. *Diligencias y Verificaciones, Organismo Judicial de Guatemala (Aug. 1, 2012 through Sep. 4, 2014), see U.S. Rebuttal Submission ¶ 114*) In its response to Question 20(a) from the Panel, Guatemala contends that the United States has misunderstood the table provided on the Guatemalan judiciary website titled "Diligencia de Requerimiento de Pago No Cumple" (literally translated, "Payment Requirement Proceedings[,] Does Not Comply"), which the United States presented in its Rebuttal Submission to show the continuing nature and vast extent of employers' non-compliance with Guatemalan labor laws. According to Guatemala, this table represents the number of "judicial proceedings performed by authorities."[86] The table identifies 1,571 judicial proceedings between August 1, 2012 and September 4, 2014. For each of the 1,571 entries, in the column titled "Resultado" ("result"), the chart states "No Cumple con el Pago" ("Does Not Comply with the Payment"). Therefore, while the table indeed shows

[86] Guatemala's Supplementary Submission, para. 59.

"judicial proceedings performed by the authorities," it also appears to show consistent and repeated non-compliance by employers.

76. Next, Guatemala asserts that another table formerly available on the same web page titled "Verificación de Requerimiento de Pago No Cumple" (literally translated, "Verification of Payment Requirement[,] Does Not Comply") is the more appropriate reference to show "court orders still pending compliance."[87] The total number of proceedings listed in this second table covering the same time period is 193. Guatemala's position is that this second table, together with the first, shows that "compliance was the subject of further enforcement action with respect to only 193 [proceedings]."[88] Guatemala then concludes that the judiciary was "successful in enforcing 88 percent of the cases in the first stages of the enforcement procedures."[89] However, Guatemala's conclusion is not supported by the table.

77. While the Verificación table refers to 193 proceedings which appear to be a subset of the 1,571 cases on the first "Diligencia" table, it does not indicate that these 193 proceedings were the only proceedings that required follow-up, or that the remaining 1,378 judicial proceedings "were successful." Further, the "Verificación" table does not show that any additional action was taken with respect to the 193 cases. To the contrary, for each of the 193 cases noted, the "result" is listed as, in translation, "Did not Comply with Judicial Order." Therefore, the second table to which Guatemala refers only further supports the arguments made by the United States with respect to the first table.

78. A third table previously available on the website titled "Verificación de Requiermiento de Pago Si [sic] Cumple" (literally, "Verification of Payment Requirement[,] Yes Complies") provides another subset of 18 cases in which the result is listed as, in translation, "Complied with Judicial Order." Thus, reading these three tables together, as Guatemala suggests one should, the logical conclusion to be drawn is that, at most, of the 1,571 first proceedings, for only 18 cases were employers found to be in compliance during a "verification." It appears that 1,360 cases were not re-checked at all.

79. Therefore, as the United States articulated in its Rebuttal Submission and again in its Replies to the Panel's Questions, these tables demonstrate the ongoing nature of Guatemala's failure to effectively enforce its labor laws with respect to the first group of failures identified by the United States. They show, in particular, that non-compliance by employers other than those

[87] Guatemala's Supplementary Submission, para. 59. Guatemala notes that the table cited by the United States is no longer available on the Guatemalan Judiciary website nor is the additional table to which Guatemala refers. Both disputing Parties appear to have copies of the original tables. The United States would be pleased to provide a PDF copy of any or all of the tables to the Panel at the Panel's request.

[88] Guatemala's Supplementary Submission, para. 59.

[89] Guatemala's Supplementary Submission, para. 59.

identified by the United States is a problem and that Guatemala has publicly acknowledged this issue.[90]

80. Finally, Guatemala points to other statistics on the same website related to the payment of fines to argue that such payments increased between 2012 and 2015.[91] Even if the total value of payments increased, this does not demonstrate that Guatemala's enforcement actions with respect to the collection of fines also increased. Thus, Guatemala's reference to the increase in amounts of fines paid does not demonstrate effective enforcement. Moreover, when comparing those statistics to the information provided by Guatemala in its Rebuttal Submission regarding fines imposed, it appears that in some recent years, Guatemala collected only about 25 percent of the fines the authorities imposed.[92] And, not only do the data show that only a fraction of fines imposed were paid, but the incidents documented by the United States indicate that Guatemala has done little to adequately impose fines in the first place after having identified a violation of the Labor Code.

81. (b. *Guatemalan data on 2014 agricultural exports (Exh. USA-199), see U.S. Rebuttal Submission, ¶¶ 129, 225, 285*) Guatemala takes issue with USA-199 because it shows the total value of agricultural exports from and imports into Guatemala for 2014, and does not show with which countries this trade occurred or specify the Guatemalan companies referenced in this dispute. As the United States has previously articulated, however, Article 16.2.1(a) does not require the complaining Party to show trade data for each individual enterprise; rather, it is sufficient to show trade in the good or service at the sector level, given that a reduction of the costs of one entity affects the conditions of competition between that entity and its competitors within the sector.[93]

82. The United States has amply demonstrated trade in natural rubber and coffee between Guatemala and the other CAFTA-DR Parties. USA-199 shows that these commodities are not consumed solely within Guatemala but rather are traded cross-border. In addition, with respect to coffee, the United States has shown that between 2007 and 2014 Guatemala's coffee exports averaged US$1 billion annually, 35 percent of which went to other CAFTA-DR Parties.[94] Although not required, the United States has further established that the company FEFLOSA as well as several other coffee farms exported coffee to the United States from 2007 to 2014.[95]

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[90] Guatemala's Supplementary Submission, para. 59 (commenting that the statistics cited by the United States show that certain employers failed to cooperate).

[91] Guatemala's Supplementary Submission, para. 59.

[92] See Guatemala's Rebuttal Submission, para. 357.

[93] See, e.g., U.S. Responses to Questions, para. 29. Note that, under Guatemala's interpretation, barriers to potential market entrants due to a responding Party's failure to effectively enforce would not satisfy the "manner affecting trade" requirement and thus not result in a violation of Article 16.2.1(a).

[94] See U.S. Initial Written Submission, text accompanying notes 241, 242, 300, 301 (citing Global Trade Information Services Database, HS2 Chapter 9).

[95] See Declaration of U.S. Customs and Border Control (USA-198); see also U.S. Rebuttal Submission, para. 224 (documenting, for example, trade in coffee between Guatemalan coffee farms and U.S. entities).

With respect to natural rubber, the United States has shown that Guatemala is a major exporter of natural rubber, including to the United States and other CAFTA-DR Parties.[96] The United States has also shown that, consistent with USA-199, Guatemala imports rubber and rubber articles from the United States.[97]

83. (c. *Report of the Special Rapporteur on the Right to Food, Olivier de Schutter, UN Human Rights Council, Doc. A/HRC/13/33/Add.4, (January 26, 2010) (Exh. USA-207), see U.S. Rebuttal Submission, ¶ 159; Guatemala's Rebuttal Submission, ¶ 227*) Guatemala comments that the report by the Special Rapporteur (of the United Nations) on the Right to Food is "outdated and that the subject matter refers to a different topic (food)." In fact, in the passage cited by the United States, the Special Rapporteur speaks to data from 2009, which is squarely within the period of the Panel's consideration. Furthermore, these data identify widespread non-compliance with the minimum wage law by employers in the agricultural sector, which also is squarely within the subject-matter at issue in this dispute. Therefore, Guatemala's arguments in this respect are without merit.

84. (d. *2011 Observation for Guatemala, International Labor Organization Committee of Experts on the Application of Conventions and Recommendations, "Article 5. Adequate inspection" (adopted 2011, published 101st ILC session 2012) (USA- 208), see U.S. Rebuttal Submission ¶ 159*) In response to the Panel's question about the probative value and relevance of the 2011 Observation for Guatemala by the International Labor Organization Committee of Experts on the Application of Conventions and Recommendations, Guatemala asks the Panel to consider Guatemala's "policy to improve inspections."[98] Guatemala proceeds to describe how it hired new inspectors in 2012 and how these additional staff made it possible for it to increase the number of inspections conducted.

85. This information, while perhaps indicating a positive development regarding the resources available with respect to inspections, does not demonstrate effective enforcement. Without more, such information does not indicate that inspections are taking place; nor does it provide qualitative information about any inspections that are occurring. Nor does the hiring of more inspectors in 2012 have any relevance to the Panel's analysis of the course of inaction the United States has demonstrated in the years leading up to the date of the Panel request: August 9, 2011. Given the U.S. claims in this dispute, Guatemala would need to provide evidence that inspections are taking place, qualitative evidence about those inspections, and the evidence would need to be with respect to the appropriate time period to evaluate whether Guatemala has been effective in compelling compliance with its labor laws.

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[96] See Grupo Agroindustrial (Overview of the Guatemalan Natural Rubber Industry) (USA-159); see also USITC HTS Data on U.S. Imports of Natural Rubber (USA-202) (documenting that, over the time period of this dispute, the United States imported natural rubber from Guatemala amounting to over US$322 million).

[97] See U.S. Census Declaration (USA-200) (U.S. export data documenting a significant amount of rubber and rubber article exports to Guatemala).

[98] Guatemala's Supplementary Submission, para. 59.

86. (e. *Annual Report of the United Nations High Commissioner for Human Rights, Doc. A/HRC/19/21/Add.1, ¶ 73(January 30, 2012) (USA-209), see U.S. Rebuttal Submission ¶ 159*) In commenting on the 2011 Annual Report of the United Nations High Commissioner for Human Rights, Guatemala again contends that improvements it has undertaken since 2012 contradict the finding of this report that, across the agro-industry, there was a tendency to pay workers less than the legal minimum wage. As the United States observed above, while improvements in enforcement capacity would be a welcome development for workers on the ground, any such improvements do not establish effective enforcement. Nor would improvements since 2012 have a bearing on whether Guatemala was effectively enforcing its labor laws at the time of the Panel request. In any event, to the extent Guatemala disputes that it has continued to fail to effectively enforce its labor laws after the date of the Panel request as the United States maintains, the United States would refer to the dozens of instances of failure it has documented from 2012 to the present that would contradict such a claim.

87. (i. *The observation of the ILO Committee of Experts, see Oral Statement by the United States at the hearing, n. 106*) Guatemala comments that there is no express reference to the years 2011 and 2012 in the 2013 observation made by the ILO Committee of Experts to which the United States referred in its oral statement. The relevant passage states that the Government of Guatemala informed the Committee that it had been able to reduce the average period for registration of unions from the prior average of seven months.[99] Given that the Government was reporting to the Committee in 2013, it is appropriate to infer that the prior average of seven months for registration of unions would have occurred prior to 2013, such as in 2012, 2011, or earlier, as the United States indicated in its oral statement. Therefore, this document supports the examples presented by the United States, which also show delays of several months.

Question 21: Can one deduce from the provision contained in Article 16.2.1 (b) that it is an exception to the general principle that the Party making the claim bears the burden of proof, which is recognized in Article 65 of the Model Rules?

88. Rather than separately addressing Question 21, Guatemala referred the Panel to its responses to Questions 1 and 3. Accordingly, the United States also refers to its comments on Guatemala's responses to Questions 1 and 3 set forth above, and as well as the responses of the United States to the Panel's Questions 1, 2, and 21, dated June 17, 2015.

[99] ILO CEACR Observation regarding Guatemala's compliance with the Freedom of Association and Protection of the Right to Organize Convention (1948), adopted 2013, published 103rd ILC session (2014).