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

Guatemala's Supplementary Written Submission and Replies to the Panel's Questions

17 June 2015

1. This document contains both Guatemala's supplementary written submission and its responses to the Panel's questions. For the Panel's convenience, Guatemala has followed the structure of the Panel's questions and has incorporated its supplementary submissions into its responses to the Panel's questions, rather than providing two separate documents.

1. <u>To Both</u>: 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. As Guatemala explained in its Initial Written Submission, Article 16.2.1(b) further limits the obligation set out in Article 16.2.1(a) by recognizing that each CAFTA-DR Party retains the right to exercise discretion with respect to the enforcement of labor laws. This discretion extends to a wide range of matters, namely, investigatory, prosecutorial, regulatory, and compliance matters, as well as to the allocation of resources. Article 16.2.1(b) also recognizes that each Party retains discretion in terms of setting priorities and that the enforcement of labor matters does not necessarily take precedence over other matter to which a Party in its discretion assigns higher priority.

3. An express cross-reference to paragraph 1(a) is included in Article 16.2.1(b). This cross-reference clarifies and limits the scope of the obligation in Article 16.2.1(a). According to Article 16.2.1(b), where a course of action or inaction reflects a reasonable exercise of discretion, or results from a *bona fide* decision regarding the allocation of resources, the Party is in compliance with Article 16.2.1(a). Therefore, a panel examining a claim under Article 16.2.1(a) must examine the challenged conduct against Article 16.2.1(b) before arriving at a definitive conclusion as to whether a Party is in violation of the former. This is because a Party exercising its discretion in accordance with the second sentence of Article 16.2.1(b) cannot be found to be acting inconsistently with Article 16.2.1(a). Thus, the conduct described in the second sentence of Article 16.2.1(b) falls outside the scope of Article 16.2.1(a).

4. Consistent with the rules on burden of proof established in Rule 65 of the Model Rules of Procedure (MRP), it is for the complaining party to establish that the exercise of discretion has been unreasonable or that a decision regarding the allocation of resources is improper. Nothing in the plain language of Article 16.2.1(b) indicates a modification of the usual rules on the burden of proof reflected in Rule 65 of the MRP. Nor does the language of Article 16.2.1(b) indicate that it was intended to an exception or defense.

5. On the contrary, the second sentence of Article 16.2.1(b) provides that the "Parties understand that a Party *is* in compliance with subparagraph (a) where…". (emphasis added) The specific language of Article 16.2.1(b), and in particular the terms "is in compliance", indicate that the conduct is not of the type that is contrary to Article 16.2.1(a). Moreover, the second sentence reflects the "understand[ing]" of the Parties to the CAFTA-DR. In other words, Article 16.2.1(b) deems a Party to be in compliance as a result of a decision by the Parties to the CAFTA-DR at the time the Agreement was negotiated and not because the respondent Party has adduced certain arguments or evidence to trigger the provision's application. Thus, the text of the second sentence clearly indicates an intention to limit the scope of application of Article 16.2.1(a) and does not support the proposition that Article 16.2.1(b) was intended to operate as an exception or a defense.

2. <u>To the United States</u>: If the panel were to determine that it is the burden of the United States to demonstrate that the conduct of which it complains lacks the qualities described in paragraph (b) of Article 16.2.1, explain what would be required for a prima facie case that this is so and identify any evidence in the record that would support such a showing.

3. <u>To Guatemala</u>: 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.

6. Shifting the burden of proof under Article 16.2.1(b) to Guatemala is contrary to the plain text of that provision and the MRP. It would also place Guatemala in the untenable position of having to present evidence that it was never asked to provide or that it could not have expected to provide, resulting in yet another violation of Guatemala's due process rights.

7. Nevertheless, and merely for the sake of argument, Guatemala has tried to identify evidence and arguments in the record, which demonstrate that Guatemala, has exercised reasonable discretion and made *bona fide* decisions regarding the allocation of resources.

8. With respect to the United States' claim that there have been delays in the registration of three unions, Guatemala notes the following:

a) One delay allegedly occurred in 2011 and two in 2012. Guatemala and the United States agree that "isolated instances" cannot constitute a breach of Article 16.2.1(a). Therefore, there is no basis to find a violation of Article 16.2.1(a) and, consequently, no need to assess any alleged exception under Article 16.2.1(b).
b) In paragraph 376 of its Rebuttal Submission, Guatemala provided statistics of union registrations from 2008 and 2014. During this period, 415 unions were registered and the United States was able to identify delays in only three instances (i.e. less than 1% of the Unions registered).
c) More specifically, in 2011 and 2012, as reflected in the table in paragraph 376 of Guatemala's Rebuttal Submission, the number of unions registered increased exponentially. From 29 registered in 2010, the Ministry of Labor registered 141 unions in 2011, and 84 unions in 2012. That is an increase of 486% and 289%, respectively, of union registrations.
d) Even if the United States identified short delays in registration of three unions, such unions were registered and any delays would have been insignificant. Thus, there is no basis to consider that any alleged course of *inaction* (if any) reflects an unreasonable exercise of discretion or non-*bona fide* decisions regarding the allocation of resources.

9. Regarding the alleged failure to establish conciliation tribunals with respect to four companies, Guatemala has explained that the delays, if they in fact occurred, would simply reflect the practical difficulties and resource constraints that labor courts face in all countries.[1] In any event, even if the allegations of the United States were true, it would merely show delays with respect to four companies during a period of almost 10 years. There are 94,874 commercial entities (*sociedades anonimas*) in Guatemala and more than 730,000 enterprises registered and functioning in Guatemala.[2] Moreover, the statistics of the Judiciary give account of 12,697 labor

[1] Rebuttal Submission of Guatemala, para. 422.
[2] Rebuttal Submission of Guatemala, para. 349.

cases initiated in 2013 and 17,414 cases initiated in 2014.[3] Delays with respect to four companies would certainly not constitute a sustained or recurring course of inaction.

10. Furthermore, Guatemala has explained how the United States misunderstands Guatemala's law. The purpose of conciliation tribunals is not to enforce labor laws and they do not undertake enforcement activities.

11. The Panel also has before it evidence showing that the Guatemalan government has directed significant resources to enforcement activities. This is a reasonable exercise of discretion to the benefit of workers and enforcement of labor laws. This is clear from the table in paragraph 355 of Guatemala's Rebuttal Submission. For example, in 2012, the Guatemalan government hired 100 new inspectors, inspections increased in 247% at the national level; operative plans also increased in 225%. More importantly, the amount verified with respect to minimum wages increased 4,886% and beneficiaries of these actions increased by more than 200%.[4]

12. As acknowledged by the United States, "[p]roper inspections are an inherent and fundamental element of effective enforcement".[5] The Organization for Economic Cooperation and Development, cited by the United States in support of this stated that "[i]nspections are one of the most important ways to enforce regulations and to ensure regulatory compliance".[6] In view of this, the Panel may consider that giving priority to the allocation of resources to activities of inspection (fundamental enforcement activities) is a reasonable exercise of discretion and constitutes a *bona-fide* decision regarding the allocation of resources.

13. With respect to the alleged failure to conduct inspections or impose penalties, even if the Panel were to allocate the burden on proof under Article 16.2.1(b) to Guatemala, it is clear from the record that Guatemala does not have in place a deliberate policy of "inaction". As a matter of fact, an alleged course of "inaction" with respect to the conduct of inspections or the

[3] Rebuttal Submission of Guatemala, para. 349.
[4] Rebuttal Submission of Guatemala, para. 356.
[5] U.S. Initial Written Submission, para. 123.
[6] U.S. Initial Written Submission, para. 123.

imposition of penalties would be irreconcilable with the statistics provided by Guatemala in its Rebuttal Submission.

14. Regarding the imposition of penalties, the numbers also show impressive results and demonstrate that Guatemala has not taken any course of "inaction"; much less, that any alleged course of inaction reflects an unreasonable exercise of discretion or results from non-*bona fide* decisions regarding the allocation of resources. In the table in paragraph 357 of Guatemala's Rebuttal Submission, Guatemala shows that the number of labor proceedings for the imposition of penalties increased 100% and that the amount of penalties has also increased exponentially. For example, from 2011 to 2012, the amount of penalties imposed increased from 2.8 millions quetzals to 6.6 millions quetzals. That is an increase of 235%.

15. Finally, regarding the alleged failure to secure compliance with court orders, Guatemala demonstrated that the United States failed to establish that there has been inaction by the Guatemalan labor courts or the Public Ministry. In the cases cited by the United States, either the employees failed to show up for the reinstatement order or appear before the labor court; the employees voluntarily terminated the reinstatement proceedings; the reinstatement orders were quashed on appeal; the employees reached a voluntary settlement; or the United States failed to establish the existence of the reinstatement orders. Certainly, giving more priority to cases where employees are cooperating with the labor courts or in which employees have been unable to reach a voluntarily settlement is consistent with a reasonable exercise of discretion or a *bona fide* decision regarding the allocation of resources.

4. <u>To Both</u>: 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?"

16. 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.

17. By its plain terms, Article 16.2.1(a) requires that the alleged course of action or inaction "affect" trade between the Parties. This can only be interpreted to mean that the course of action or inaction has an effect of trade. In other words, there must have been a trade effect and the cause of the trade effect must be the course of action or inaction established by the complaining party. Article 16.2.1(a) was never intended to capture mere happenstance.

18. The United States has failed to provide any evidence that the alleged isolated instances of inaction that underlie its complaint have an effect on trade, relying instead on unsubstantiated statements concerning the so-called "conditions of competition". The United States has provided some *hypothetical examples* of situations of the type of "competition" to which it refers and tries to tie these *hypothetical examples* to the standard set out in Article 16.2.1(a). The United States' argumentation on trade effects is based exclusively on hyperbole and speculation, while acknowledging concrete examples of the kind of analysis that it could have undertaken, but ultimately failed to undertake.

19. For example, the United States could have sought to demonstrate that the alleged inaction allowed the specific firms targeted in the U.S. complaint to lower their labor costs and that these lower labor costs gave them an advantage with respect to competitors. The United States has provided no such evidence. In fact, the United States has not provided any evidence that producers incurred decreased labor costs or benefited from the reduced labor costs. Nor has the United States provided any evidence to support its contention that the "conditions of competition" between the firms it targets and their competitors have been affected.

20. In the light of the United States' failure to provide evidence or otherwise substantiate its claim, the Panel must find that the United States has failed to make a *prima facie* case of trade effects.

5. <u>To the United States</u>: The United States asserts that certain failures by Guatemala to effectively enforce its labor laws reduced labor costs of the companies involved and thereby affected the terms of competition such that the failures to effectively enforce labor laws were "in a manner affecting trade between the Parties." Identify any evidence the United States has adduced either directly demonstrating such reduction in labor costs or that such reduction in costs is more likely than not.

6. <u>To the United States</u>: At paragraph 285 of the U.S. Rebuttal Submission, the United States asserts, "One company's impunity incentivizes other companies in the sector to follow suit, which unfairly depresses labor costs for non-compliant companies that compete with exports from other CAFTA-DR Parties." Identify any evidence of this phenomenon that the United States has adduced or any basis in the record evidence upon which its existence can be inferred.

7. <u>To Both</u>: 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"?

21. 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"[7] 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".[8] 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".[9]

22. In Guatemala's view, the terms "course of" are intended to convey that the sustained or recurring action or inaction reflects a *procedure* or *direction adopted* by the relevant Party. In other words, Article 16.2.1(a) is intended to capture a *deliberate policy* of action or inaction adopted by the relevant Party. The United States' interpretation, by contrast, reduces the terms "course of" to inutility. The United States' interpretation therefore is unsustainable under the customary rules of interpretation of Public International Law codified in the Vienna Convention on the Law of Treaties.

---

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

[8] Oxford Online Dictionary.

[9] 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).

8. <u>To Both</u>: 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)?

23. The term "recur" means to "[o]ccur or appear again, periodically, or repeatedly".[10][11] Thus, the term "recurring" describes conduct that repeats itself. The ordinary meaning of "sustained" is "[c]ontinuing for an extended period or without interruption"[12]; or "[t]hat has been sustained; esp. maintained continuously or without flagging over a long period".[13] Both with respect to "recurring" and "sustained", 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, moreover, the conduct that is continuing or repeats itself must be the same. Hence, the terms "sustained" and "recurring" denote that there is observable consistency. Furthermore, there cannot have been an intervening event that interrupts or breaks the repetition. If the conduct that is identified is distinct or if there is an intervening event, the conduct cannot qualify as continuing or repetitive. Isolated events thus would not fall within the meaning of "sustained" or "recurring".

24. The period of time that qualifies as "sustained", and the regularity of an occurrence that qualifies as "recurring", within the meaning of Article 16.2.1(a), must be assessed case-by-case. Yet, it is evident from the text and its context that the drafters intended Article 16.2.1(a) to establish a high threshold. First, the drafters required repetition or an extended, uninterrupted duration. Second, the alleged inaction must not only be continuing or repeat itself, it must constitute a "course of action or inaction". Thus, the mere fact that an occurrence has an extended duration or repeats itself is insufficient to constitute a "sustained or recurring course of action or inaction". Article 16.2.1(a) is not addressing the continuation or repetition of

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

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

[12] Oxford Dictionary Online.

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

individual instances of action or inaction, but rather of the conduct that is wrongful in the aggregate. As Guatemala has explained, 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.

25. Third, the assessment must be made in the light of Article 16.2.1(b). Hence, there must be evidence that the continuation or repetition of the occurrence does not reflect a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.

26. Finally, Guatemala further recalls that the Panel's assessment of "sustained" and "recurrence" must proceed on the basis of the actual occurrences that the United States establishes on the basis of probative evidence and not on the basis of the occurrences it has alleged.

9. <u>To Both</u>: 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)?

27. Please refer to the response to question 8.

10. <u>To Both</u>: 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?

28. Conduct that is exceptional does not constitute a "sustained or recurring course of action or inaction". As Guatemala has explained, in order for conduct to be "sustained" or "recurring",

the conduct must occur continuously over a prolonged period or must repeat itself. Moreover, such conduct must form part of a deliberate government policy in order to constitute a "course of" action or inaction. Thus, based on their ordinary meaning, the terms of Article 16.2.1(a) refer to conduct that is representative of the overall situation in the country as a whole and cannot describe conduct that is exceptional. Identification of isolated instances that are unconnected to each other and that do not form the basis of an overall government policy do not rise to the standard required under Article 16.2.1(a).

11. <u>To the United States</u>: In its third set of allegations, the United States groups together (a) alleged failures to register unions in a timely fashion and (b) alleged failures to institute conciliation processes. See U.S. Initial Written Submission, ¶¶192 et seq. Why, in the view of the United States, should these alleged failures be treated together as a sustained or recurring course of inaction, as opposed to being treated separately?

12. <u>To Both</u>: 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?

29. 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 taken other action prior to Guatemala's request for a preliminary ruling. In this case, Guatemala took action promptly by raising its concerns about the vagueness of the United States' panel request soon after the Panel resumed its work and adopted the timetable for these proceedings.

30. At the oral hearing, the United States incorrectly sought to rely on WTO practice to suggest that Guatemala should have raised its concerns sooner. Yet, 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. Guatemala notes that WTO panels adopt their working procedures after consultations with the parties.

31. For example, paragraph 6 of the Working Procedures adopted by the panel in *Argentina – Import Measures*, where the United States was the complaining party, states:

> A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If any of the complainants requests such a ruling, the respondent shall submit its response to the request in its first written submission. If the respondent requests such a ruling, the complainants shall submit their responses to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted by the Panel upon a showing of good cause.[14]

32. An equivalent provision is included in most, if not all, of the panels to which the United States has been a party in recent years.

33. According to paragraph 6 and equivalent provisions adopted by other WTO panels, a request for a preliminary ruling, including on terms of reference, is considered to have been timely made if it is made in the first written submission or earlier. A party can even make the request at a later date with a showing of good cause.

34. In this case, Guatemala made its request for preliminary ruling much earlier than its initial written submission and thus there is no basis for the Panel to consider that it did not raise the matter promptly.

35. Furthermore, any "clarification" on the panel request would have been insufficient to "cure" such a panel request. Both Parties agree that the "sufficiency of a panel request must be evaluated on its face and as a whole".[15] That means that any potential clarification, including a clarification contained in any extraneous document to the panel request would be irrelevant in determining its sufficiency.

36. The United States also agrees with Guatemala that the respondent's ability to defend itself does not mean that the panel request complied with procedural requirements.[16] Even if a

[14] Panel Report, *Argentina – Import Measures*, Addendum, Annex A, p. A-1.

[15] U.S. Rebuttal Submission, para. 315, citing also Final Arbitral Panel Report, *Costa Rica v. El Salvador – Tariff Treatment*, para. 4.57.

[16] U.S. Rebuttal Submission, para. 312.

"clarification" had been given to Guatemala and Guatemala would have been put in a better position to defend itself, that would not have meant that the panel request complied with the procedural requirements set forth in Article 20.6.1 of the CAFTA-DR. As explained by Guatemala, compliance with procedural requirements must be demonstrated on the face of the panel request and cannot be subsequently "cured".[17]

13. <u>To Both</u>: 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?

37. In the case of Guatemala, the term "statutes and regulations" is expressly and specifically defined in Article 16.8 as "laws of its legislative body or regulations promulgated pursuant to an act of its legislative body that are enforceable by action of the executive body". The definition specifically identifies the "executive body" as the entity responsible for enforcing such "laws and regulations". Thus Article 16.8 defines the scope of Guatemala's legal obligations that fall within the term "statutes and regulations". According to Article 16.8, the scope of the laws or regulations that are considered to fall within the definition of "statutes and regulations" in the case of Guatemala is limited to laws or regulations "that are enforceable by action of the executive body". The limitation is express and unambiguous.

38. Therefore, when read together with the definitions provided in Article 16.8, Article 16.2.1(a) must be understood as referring to enforcement of labor laws by the Executive Body. According to Guatemala's Constitution, the Executive is headed by the President and also includes the Vice-President, Ministers, Vice-Ministers and other dependent officials.[18] Consequently, in the particular case of Guatemala, Article 16.2.1(a) covers enforcement of labor laws by the President, Vice-President, Ministers, Vice-Minister and other dependent officials. It does not cover the actions or inactions of the Judiciary or the Public Ministry.

[17] Guatemala's Preliminary Ruling Request, paras. 44 – 47.
[18] Guatemala's Political Constitution, Articles 182 and 193.

14. **<u>To Both</u>: What, if any, contextual guidance can the panel take from Article 20.17 in interpreting Article 16.2.1?**

39. Article 20.17 of the CAFTA, and in particular paragraph 2, provides contextual support for Guatemala's interpretation of Articles 16.2.1(a) and (b). Article 20.17(2) reads as follows:

> 2. The panel shall determine the amount of the monetary assessment in U.S. dollars within 90 days after it reconvenes under paragraph 1. In determining the amount of the assessment, the panel shall take into account:
>
> (a) the bilateral trade effects of the Party's failure to effectively enforce the relevant law;
> (b) the pervasiveness and duration of the Party's failure to effectively enforce the relevant law;
> (c) the reasons for the Party's failure to effectively enforce the relevant law, including, where relevant, its failure to observe the terms of an action plan;
> (d) the level of enforcement that could reasonably be expected of the Party given its resource constraints;
> (e) the efforts made by the Party to begin remedying the non-enforcement after the final report of the panel, including through the implementation of any mutually agreed action plan; and
> (f) any other relevant factors.
>
> The amount of the assessment shall not exceed 15 million U.S. dollars annually, adjusted for inflation as specified in Annex 20.17.

40. We begin with subparagraph (a). This subparagraph indicates that the "trade effects" are a factor that the Panel must take into account in determining the monetary assessment under paragraph (2). The assessment of the monetary assessment, in turn, is a quantitative exercise. The fact that "trade effects" is a factor in the determination of the monetary assessment strongly supports Guatemala's position that these trade effects must be quantifiable and not speculative or hypothetical.

41. In addition, subparagraph (a) makes clear that it is only the trade effects of the Party's failure to effectively enforce the relevant law that may be taken into account in calculating the monetary assessment. This supports Guatemala's position that the United States must establish a causal link between the alleged inaction and the trade effects.

42. Subparagraph (b) is also relevant. It focuses on two other factors, the *pervasiveness* and *duration* of the Party's failure to effectively enforce the relevant law. The term "pervasive" is used to describe something that is "spreading widely throughout an area or group of people".[19] The focus on the pervasiveness of the failure to effectively enforce the relevant law is consistent with Guatemala's argument that Article 16.2.1(a) is not intended to be a strict liability standard. Rather, Article 16.2.1(a) is intended to capture situations in which the instances of action or inaction are so numerous so as to be the prevalent condition, and form part of a deliberate policy such that the failure to enforce the relevant laws is widespread. For its part, the focus on the duration of the failure to effectively enforce in subparagraph (b) supports the conclusion that Article 16.2.1(a) is intended to cover action or inaction during a prolonged period. Instances of inaction occurring over a short period, such as the alleged delay in union registration, are not intended to be actionable.

43. Subparagraph (c) requires the Panel to take into account "the reasons for the Party's failure to effectively enforce the relevant law". This provision confirms that the failure to effectively enforce under Article 16.2.1(a) must be the result of a *deliberate policy* and is not inadvertent or accidental. Indeed, by requiring the Panel to take account of the reasons for the failure, subparagraph (c) confirms that Article 16.2.1(a) contemplates a situation when a Party has *decided not to enforce its labor laws*. Under the erroneous strict liability standard that, in fact, is being advocated by the United States,[20] the reasons for the failure would be irrelevant and thus there would be no logic in requiring the Panel to take account of such reasons.

44. Finally, pursuant to subparagraph (d), a panel shall take account of "the level of enforcement that could reasonably be expected of the Party given its resource constraints". Subparagraph (d) reinforces the conclusion that Article 16.2.1(a) does not impose a strict liability standard and does not require a perfect enforcement record. Subparagraph (d) also reinforces the key point that is also made by Article 16.2.1(b), which is that a party alleging a violation of

[19] Oxford English Dictionary.

[20] The United States asserted during the hearing that Article 16.2.1(a) does not impose a "strict liability" standard (U.S. Oral Statement, para. 24). However, as it formulated its claims, the United States is, indeed, advocating for a strict liability standard.

Article 16.2.1(a) must establish that the course of action or inaction does not reflect a reasonable exercise of discretion, or results from a *bona fide* decision regarding the allocation of resources.

45. In sum, Article 20.17 of the CAFTA-DR provides further contextual support for the interpretation of Articles 16.2.1(a) and (b) put forward by Guatemala and directly contradicts the erroneous interpretation advocated by the United States.

15. <u>To Both</u>: 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?

46. Guatemalan labor law protects workers by seeking to offset their economic inequality, granting them a preferential protection.[21] As such, it provides the means to protect workers' rights, including the institutions to solve the conflicts between employers and workers.[22] Guatemalan labor law, however, does not contain provisions to *force* a worker to be reinstated against his/her will.

47. A labor court has the authority to issue a resolution ordering the reinstatement and to designate an executor to perform such reinstatement.[23] The reinstatement as such, however, requires the cooperation of the worker concerned. As a matter of fact, a worker can only be reinstated if he/she is present for the reinstatement proceeding. Failing to appear for his or her reinstatement pursuant to an order made by a labor court renders the reinstatement procedure non-executable. The executor, when unable to execute the reinstatement order, informs the judge and the judge may ask the worker to explain the reasons for his/her failure to appear. Guatemalan law, however, does not foresee any legal procedure to *force* the worker to appear for his/her reinstatement against his/her will.

48. In view of the above, the enforcement obligations of the labor courts cease to operate in case of non-cooperation by the worker concerned to perform the reinstatement.

---

[21] Guatemalan Labor Code Preamble.

[22] Guatemalan Labor Code, Article 1.

[23] See, for example, Guatemalan Labor Code, Articles 209, 251 and 380.

49. In this case, the United States is improperly trying to impute inaction to the labor courts where there was no such inaction.

16. <u>To Both</u>: 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?

50. 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.

17. <u>To Both</u>: 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?

51. The Political Constitution of Guatemala provides that every person has the right to do whatever the law does not prohibit. Guatemala's labor law does not prohibit settlements between the workers and employers.

52. If both parties are in agreement and the employer has complied with the terms of the settlement, it is presumed (and certainly expected) that the worker concerned would not pursue further legal action.

53. Absent any further legal action by a complainant, the labor courts cannot continue the legal proceedings on behalf of the worker. Doing so would require them to act against the worker's will and/or would be contrary to their obligation of impartiality. The labor courts could not be regarded as impartial if they were to have to assume the role and act on behalf of one of the parties to a dispute.

54. Therefore, labor courts do not have any 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.

55. In addition, it would seem an inefficient use of resources to have the authorities pursue a remedy and/or continue enforcement activities against the will of the parties to a dispute and for which such parties considered the problem settled. More importantly, pursuing such remedies and continuing enforcement activities against the will of the parties would be counter-productive as that would constitute a negative incentive for the parties to reach agreements.

18. <u>To Both:</u> 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?

56. Please refer to the response to Question 17.

19. <u>To Both:</u> 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.

57. As explained at the hearing, reinstatement orders are issued immediately by a labor court at the outset of the proceedings. Once the reinstatement order is issued, the employer may seek to have the reinstatement order reviewed by the appellate court. The litigation could then advance to the Supreme Court. The right to appeal is a right that employers (and employees) can legitimately exercise.

58. In the light of the above, while the existence of a reinstatement order is a necessary factual element of the United States' claim, it is not in itself sufficient to establish inaction by the labor courts, much less a "sustained or recurring course of … inaction". This is because execution of the reinstatement order may be suspended while the reinstatement order is subject to appellate review or other litigation. Further, there is no legal basis for the labor courts to impose

fines or for the Public Ministry to pursue criminal penalties while litigation over the reinstatement orders is pending. Therefore, 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. Moreover, the United States cannot attribute inaction to the labor courts during the period in which litigation was pending.

20. <u>To Both</u>: 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.

59. Guatemala's comments are noted below with respect to each item.

a. *Diligencias y Verificaciones, Organismo Judicial de Guatemala* (Aug. 1, 2012 through Sep. 4, 2014), *see* U.S. Rebuttal Submission ¶ 114;

The United States misunderstands the statistics of the *Organismo Judicial* and uses them out of context.

The Panel should note that there are two types of statistics: one under the title of "*Diligencias*" and other under the title of "*Verificaciones*". At the time of consultation by the United States, both covered the same period between August 1, 2012 and September 4, 2014. At the moment of submission of this document, the statistics were up-to-date until June 16, 2015.

The United States appears to make reference to the link titled "*Diligencia de Pago No Cumple*" and overlooked the one titled "*Verificación de Requerimiento de Pago No Cumple*". The difference between both is that one is recording the judicial proceedings *performed* by the authorities and the other the cases in which, at the moment of publishing the statistics, the court orders were still pending compliance.

In the example cited by the United States, "*Diligencia de Pago No Cumple*", the statistics at the moment of consultation showed that labor courts performed 1,571 judicial proceedings. Contrary to the United States' misunderstanding, these were not the number of court orders that have not been enforced. Out of those 1,571 judicial proceedings, the other statistics showed that compliance was the subject of further enforcement action with respect to only 193. That is, only 12% of the instances. Put differently, the labor courts were successful in enforcing 88% of the cases in the *first stages* of the enforcement procedures.

There are other relevant statistics that the United States overlooked in the same webpage cited in its Rebuttal Submission (in footnote 154) that refer to these actions for enforcement. For instance, the United States omits to mention the links under the titles of "*Multas por Faltas de Incidentes Laborales*", "*Multas por Incidentes de Reinstalación*" and "*Estadística del resultado del proceso penal por certificación de lo conducente*". Under the title "M*ultas por Faltas de Incidentes Laborales*", for example, one can obtain statistics showing an increase in penalties paid: in 2012, 1.1 million quetzals were paid in penalties while during the first semester of 2015, 4.9 millions quetzals. That is an increase of 445% and 2015 is not yet over.

The United States also overlooks the statistics under the title "*Certificaciones de lo conducente*". The interesting element in these statistics is that, as from 2014, the referral of matters to the Public Ministry for initiation of criminal procedures is made *electronically*. Again, another example of action (rather than the inaction alleged by the

United States) as to how Guatemala implements measures to further improve labor law enforcement.

Finally, the Panel should consider that the statistics do not show the current status of each of the cases. The statistics cited by the United States only show that certain employers failed to cooperate, but they are not evidence that further enforcement action was not taken.

b. Guatemalan data on 2014 agricultural exports (Exh. USA-199), *see* U.S. Rebuttal Submission, ¶¶ 129, 225, 285;

Guatemala brings to the attention of the Panel that Exhibit USA-199 provides data concerning *total* Guatemalan exports to the *world* for 2014 *only*.

Exhibit USA-199 does not refer specifically to exports of the companies targeted in the U.S. claims. Nor does Exhibit USA-199 refer specifically to exports to the CAFTA-DR Parties.

Regarding the situation of coffee, Guatemala has explained that the United States submitted documentation (which in any event is defective and therefore has no probative value) of alleged violations of labor laws for only two coffee farms. Without any sound evidentiary basis, the United States then improperly extrapolated the situation of these companies to 70 coffee farms. In its analysis of trade effects, the United States asserted that Guatemala's exports of coffee, between 2007 and 2013, averaged USD$ 1 billion annually and that CAFTA-DR took 35 percent of these exports of which 34 percent went to the United States. With this statement, the United States believes that it "demonstrated" trade effects. The United States' logic is flawed. The United States cannot make allegations with respect to only two companies and then, with the wave of a magic wand, apply them to the entire sector.

Even if the United States were successful in demonstrating non-compliance with labor laws with respect to one or two coffee companies, *quad non*, that cannot be considered as a sustained or recurring course of inaction in a manner affecting trade between the Parties. As indicated, the United States did not provide any evidence of trade effects and, the fact that there is or might be some trade between Guatemala and the CAFTA-DR Parties does not, by itself, discharge the burden of proving trade effects under Article 16.2.1(a). The United States has only provided unsubstantiated theories.

With respect to rubber exports, Guatemala also fails to see the relevance of the United States' statements and interpretation of the information in USA-199. The United States is claiming failure to effectively enforce labor laws with respect to one single company producing rubber. Even if Guatemala exported over US$50 million in natural rubber in 2014 and it is considered one of the largest rubber exporters in the Americas, there is no basis to conclude that an alleged situation with respect to one single company is the same for the whole sector (composed of hundreds of companies).

Interestingly, in Exhibit USA-198, the United States did not report Solesa's exports to the U.S. market from 1 July 2006 to 31 December 2014. Thus, and for the sake of argument, should the Panel follow the flawed logic of the United States (i.e., that mere existence of trade between two CAFTA-DR Parties is enough to argue affectation of trade), it is difficult to see how the alleged situation for one company that did not export to the United States may still affect trade between the Parties with respect to the rubber sector.

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 has nothing to add for the moment. Guatemala simply reiterates that this document is outdated and that the subject matter refers to a different topic (food), irrelevant to the case at hand.

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;

Exhibit USA-208 contains an observation made by the Committee of Experts in 2011 on the basis of the report of the United Nations Special Rapporteur on the Right to Food (Exhibit USA-207). As indicated in Guatemala's Rebuttal Submission, Exhibit USA-207 is outdated and the subject matter is "food".

If the Panel were to give any weight to this outdated document, the Panel also needs to consider Guatemala's policy to improve inspections. Among other actions, Guatemala hired 100 new inspectors in 2012 (that is, the year after issuance of the report contained in Exhibit USA-208). As noted in the table of paragraph 355 of Guatemala's Rebuttal Submission, inspections increased 247% at the national level; operative plans to monitor compliance with labor legislation also increased in 225%. The amount verified with respect to minimum wages increased 4,886% and beneficiaries of these actions increased by more than 200%.

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;

The Annual Report of the United Nations High Commissioner for Human Rights refers to a perceived situation in Guatemala, in 2011. For example, paragraph 72 of that Report indicates that the OHCHR only appears to have interviewed "agricultural workers" to reach a conclusion without apparently making an effort to seek the views of the Government and the private sector with the objective of obtaining a more accurate picture of the situation in Guatemala.

Leaving aside the doubts about the impartiality and accuracy of the OHCHR Report, the situation described in para. 73, which the United States cites in para. 159 of its Rebuttal Submission, simply cannot be reconciled with the situation that prevails since 2012 in Guatemala (that is, the year after the issuance of the Report).

As indicated earlier, Guatemala has continuously adopted measures to improve labor law enforcement. Guatemala has shown extraordinary progress. In particular, Guatemala has demonstrated tangible results in the area of inspections and, in particular, regarding the payment of minimum wages, which is at issue in para. 73 of the Report. Guatemala refers to its previous responses and the data submitted in its Rebuttal Submission in para. 355.

Therefore, if the Panel were to attribute any probative value to the OHCHR Report, the Panel also needs to consider that Guatemala's evidence contradicts the finding of that Report.

f. Statistics of the Judiciary, ***available at*** **http://www.oj.gob.gt/estadisticaj/,** ***see*** **Guatemala's Rebuttal Submission, ¶ 249;**

Guatemala understands that the Panel intended to make reference to paragraph 349 of Guatemala's Rebuttal Submission. Guatemala has no additional comments.

g. Guatemala Labor Inspectorate Statistics, ***see*** **Guatemala's Rebuttal Submission, ¶¶ 355, 357;**

Guatemala has no additional comments.

h. Statistics from the Guatemalan Ministry of Labor on union registration, ***see*** **Guatemala's Rebuttal Submission, ¶ 376;**

Guatemala has no additional comments.

i. The observation of the ILO Committee of Experts, ***see*** **Oral Statement by the United States at the hearing, n. 106.**

The United States distorts the facts. The portion of the ILO CEACR Observation referenced by the United States is the following:

> Registration of trade unions. The Committee notes that the Government informed the mission of the accelerated operation of the system for the registration of trade unions, with the average period required having fallen from seven months to one month.

There is no reference to the "relevant years (2011, 2012)" nor is seven months the average period for the registration of trade unions as the United States misleadingly referred to in its oral statement.

21. To Both: 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?

60. Please refer to Guatemala's response to Questions 1 and 3.

22. To the United States: What, in your view, is the basis for the Panel's jurisdiction with respect to the third set of claims by the United States – that is, the claims pertaining to Guatemala's alleged failures to register unions in a timely fashion and to timely fashion or institute conciliation proceedings, as set forth in Section III.C of the U.S. Initial Written Submission? In particular, which language in the U.S. panel request identifies this matter as a measure or other matter at issue?