

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

ORAL STATEMENT BY THE UNITED STATES

June 2, 2015

I. Introduction

1. Good morning, Mr. Chairman, and Members of the Panel. At the outset, I would like to thank you for the time and effort you have spent in connection with this matter. My team and I welcome the opportunity to meet with you today to highlight succinctly the key legal and factual reasons that, respectfully, support a finding that Guatemala has failed to effectively enforce its labor laws in a manner that is inconsistent with its obligations under the Central America - United States - Dominican Republic Free Trade Agreement (CAFTA). We also look forward to answering any questions you may have.

2. Allow me to begin by noting that the United States strongly values the longstanding friendship and close relationship we have with the people and country of Guatemala. We share strong connections of culture and community, as well as a robust trade relationship -- as is evident from the trade data in the record. We have long sought to make the most of our shared economic potential, including by ensuring that trade-driven growth is inclusive and broad-based, and we remain committed to those goals. For these reasons, I took the opportunity afforded by this proceeding to meet yesterday with Foreign Minister Morales to underscore the importance of our relationship. I am pleased to see Vice Minister Vielmann here this morning, who joined our meeting yesterday.

3. The importance of this issue and the strength of our bilateral relationship is reflected in the substantial efforts that both Guatemala and the United States made over a number of years to reach a resolution of this issue without having to resort to formal dispute settlement. For example, in April 2013, the United States and Guatemala asked the panel to suspend its work as the two governments finalized an “enforcement plan” to help ensure that Guatemalan workers are afforded the rights to which they are entitled under Guatemalan law. The Panel was patient

while our two countries worked together to achieve changes in law and on the ground.

Unfortunately, those efforts proved ultimately unsuccessful and my government determined to move forward with these proceedings. However, as we noted when the United States reactivated the panel proceeding, our goal continues to be to ensure that Guatemala effectively enforces its labor laws as expressly provided under the CAFTA. The Panel's resolution of this matter can serve only to enhance our important bilateral relationship.

4. Turning to the core substance of the United States presentation this morning, my colleagues, Justin Miller and Kathleen Claussen, will focus on two foundational issues. I will introduce each issue briefly.

5. The first issue is the proper interpretation of Article 16.2.1(a). This provision is a centerpiece of the labor Chapter of the CAFTA – requiring effective enforcement of laws to ensure that workers enjoy their rights under Guatemalan law, and that entities engaging in trade within the CAFTA-DR region can compete on a level playing field.

6. With respect to this issue, we will highlight the ways in which Guatemala's proposed interpretation of Article 16.2.1(a) is contrary to the plain meaning of the terms of that Article. Guatemala understands effective enforcement to mean merely taking action – even if only infrequently, and even if that action does not result in compliance with the law. As we have shown in our submissions to the panel and will highlight again this morning, that interpretation is not consistent with the letter of the CAFTA.

7. The second issue we will address is the manner in which Guatemala has failed to effectively enforce its labor laws. With respect to this issue, we will highlight and explicate further the three groups of failures that have been demonstrated and documented by the United States in our submissions.

8. In particular, we will highlight the ways in which the record evidence affirmatively supports the three groups of failures presented by the United States – and further illustrate that Guatemala’s evidence is insufficient to support a defense. Rather, the record in these proceedings establishes that over eight years, Guatemala’s sustained and recurring course of inaction constitutes a breach of Article 16.2.1(a).

9. As a final note, I would like to underscore that obtaining and presenting the evidence of record in this case that the United States has set forth, was a monumental and unprecedented task: obtaining and providing to this panel and to the Government of Guatemala the testimony of individuals took not only extensive effort by the United States, but more significantly courage on the part of the individuals to come forward out of an interest to improve the conditions in their communities and country, and for no personal gain.

10. Mr. Chairman, this concludes my opening remarks. With your permission, I will now ask Ms. Claussen to address the interpretative issues, Mr. Miller to address the first group of failures to effectively enforce and Ms. Claussen to address the second and third group of failures

II. Legal Standard

11. Good morning, Mr. Chairman, members of the Panel.

12. We would like to take this opportunity first to recall the legal obligations at issue in this dispute. The text of Article 16.2.1(a) requires a complaining Party to establish four elements:

- 1) First, that the laws in question are “labor laws” within the meaning of the CAFTA-DR;
- 2) Second, that the responding Party has failed to effectively enforce those laws;

- 3) Third, that the responding Party’s failure occurred through a sustained or recurring course of action or inaction; and,
- 4) Fourth, that the failure occurred in a manner affecting trade between the Parties.

A. Effective Enforcement

13. The centerpiece of Article 16.2.1(a) is the two word phrase “effectively enforce.”

14. The ordinary meaning of “effectively enforce” in Article 16.2.1(a) is to compel compliance with the law, or to apply the law with great effect -- that is, in a way productive of results.¹ Thus, effective enforcement is more than just taking action. To “effectively enforce” is to ensure that action is taken that achieves the outcome foreseen by the law.

15. This distinction between simply taking action and taking action that produces results is important, and explains much of the disagreement between the disputing Parties with respect to the specific facts at issue, which we will discuss further in a few minutes.

16. Regarding to “whom” Article 16.2.1(a) applies, the obligation not to fail to effectively enforce labor laws is incumbent on “a Party” – that is, all government actors of the Party. Article 16.2.1(a) does not limit the State actor or actors whose actions or inactions may result in a failure to effectively enforce. Effective enforcement of labor laws may require the engagement of several actors: prosecutors, judges, inspectors, or others.

17. Guatemala takes the view that Article 16.2.1(a) only encompasses certain aspects of a law’s enforcement -- enforcement by only certain actors which would mean enforcement up to a particular point.² But this reads into Article 16.2.1(a) words that are not there. A Party’s

¹ See U.S. Initial Written Submission, para. 29.

² See Guatemala’s Rebuttal Submission, paras. 100-106.

obligation is in respect of any and all of its actors that may be required to avoid failing to effectively enforce its labor laws.

18. I will now turn to the phrase in Article 16.2.1(a): “labor laws.”

B. Definition of Labor Laws

19. The phrase “labor laws” is defined in Article 16.8 as “a Party’s statutes or regulations, or provisions thereof, that are directly related to” five enumerated internationally recognized labor rights. Article 16.8 also defines “statutes or regulations.” In this case, the principal statute, or “law[] of [Guatemala’s] legislative body,” is the Guatemalan Labor Code and the relevant “regulations” are those regulations regarding the work of the Ministry of Labor. Guatemala acknowledges that the Labor Code is a labor law and that the regulations identified by the United States are the type of regulation covered by Article 16.8.³

20. However Guatemala conflates the Article 16.2.1(a) “effectively enforce” language with the Article 16.8 definition of labor laws. The conflation is most pronounced in paragraph 106 of Guatemala’s rebuttal submission where Guatemala defines the term “labor laws” by saying that it “includes only the application of provisions [i.e., parts of a statute] involving action by the executive branch.” There are at least two problems with this statement: first, the word “law” or “laws” does not mean or include “application.” One applies or enforces a law. Defining the law therefore is a separate exercise from identifying its application or enforcement.

21. Second, the definition does not say “exclusively” or “only” by the executive body, so it includes those statutes and regulations that are enforceable by the executive body whether additional entities may also enforce the law. All provisions of the Guatemalan Labor Code are enforceable by action of the executive body. The Code states in Articles 204, 278, and 280, to

³ Guatemala’s Request for a Preliminary Procedural Ruling, para. 93, fn. 45 (October 10, 2014); Guatemala’s Rebuttal Submission, para. 264.

name just a few, that the Ministry of Labor, part of the executive body, is responsible for ensuring enforcement of the Code.⁴ The Labor Code is enforceable by action of the executive body in whole and in part.

22. Thus, limiting the term “statute” to mean only provisions of a statute involving action by the executive body does not help Guatemala. Even under Guatemala’s strained interpretation, the Guatemalan Labor Code articles to which the United States refers still fall within the purview of Article 16.8 as they are enforceable by action of the executive body, among other entities.

C. Sustained or recurring course of action or inaction

23. Regarding “a sustained or recurring course of action or inaction”—the plain meaning of this phrase requires a complaining Party to demonstrate a continuing or periodic course of action or inaction on the part of the responding Party.⁵

24. Evaluating a course does not involve an evaluation as to the reasonableness of the action or inaction, as Guatemala suggests,⁶ such that the United States must demonstrate that the course shown represents an *unreasonable* exercise of discretion or that it did not result from a good faith decision regarding allocation of resources. Nor is it a “strict liability” standard. One instance or isolated instances cannot constitute a breach, and the United States has not suggested otherwise. Rather, the sustained or recurring element requires that the course be continuing or repeated per the plain meaning on which the Parties agree.⁷

25. The United States has previously addressed Guatemala’s argument that the term “course” implies “a deliberate policy of action or inaction adopted by [a] Party”.⁸ Nothing in Article

⁴ See also Guatemala’s Initial Written Submission, pp. 17-18.

⁵ U.S. Rebuttal Submission, para. 48.

⁶ Guatemala’s Rebuttal Submission, para. 109.

⁷ See U.S. Rebuttal Submission, paras. 47-55.

⁸ U.S. Rebuttal Submission, paras. 52-54.

16.2.1(a) indicates that the Parties intended to address only “deliberate polic[ies]” by governments, the purpose of which are to fail to effectively enforce the law. Reading such words into the provision would be contrary to the customary rules of international law on treaty interpretation.

26. As we will discuss in more detail in a moment, for each of the three groups of failures presented, the course of inaction by Guatemala was both sustained and recurring.

D. Manner affecting trade between the Parties

27. Regarding the final element – that the failure to effectively enforce labor laws must occur “in a manner affecting trade” – Article 16.2.1(a) does not require that a failure affect trade in a particular way (such as through price undercutting, price depression, or lost sales), or that the effect be of a certain magnitude or quantity. Where a government’s actions or inactions have the effect of modifying the conditions of competition by permitting employers to avoid the costs incurred through compliance with basic labor laws, those government actions or inactions have affected trade. The competitive relationship between the employers at issue and their competitors within the CAFTA-DR market is altered due to the cost-savings enjoyed as a result of their non-adherence to labor laws.

28. Guatemala urges an implausible interpretation.⁹

29. First, as addressed already, government intent is not required for the course of inaction to be in a “manner affecting trade”.¹⁰

30. Second, “manner affecting trade” does not require a before-and-after evaluation of each individual company for each instance of inaction. Not only would this impose an impossible burden on a complaining Party, but it ignores that it is the failure through a course that must

⁹ Guatemala’s Rebuttal Submission, paras. 115-123.

¹⁰ See U.S. Rebuttal Submission, paras. 52-54, 58.

occur in a manner affecting trade, not each instance. However, even viewing the failures individually, each has a clear economic effect. For example, if an employer illegally fires workers who have attempted to form a union and the employer is not required to reinstate those workers and provide them lost wages, as well as pay the relevant fine or penalty, the employer avoids these costs. Further, the employer avoids the additional costs of having a functioning union that can bargain collectively, and under the protection of the law, for improved working conditions. Given the record evidence, it is clear that Guatemala's failure to effectively enforce its labor laws has occurred in a manner affecting trade.

31. Finally, Guatemala argues that “between the Parties” requires a showing of trade effects among *all* the Parties to the CAFTA-DR.¹¹ Such a reading, in addition to being inconsistent with the text, would undermine Article 16.2.1(a) by providing that a Party has no obligation under this Article where trade is affected, even severely distorted, between two, three, four, five, or six Parties, but rather only applies where a particular product or service is traded among all the Parties.

32. I will now turn the floor over to my colleague, Mr. Miller, to address the facts in respect of the first group of failures by Guatemala.

III. First Group of Failures by Guatemala

33. The United States begins with the cases where the workers were fired for participating in the formation of a union or for undertaking conciliation processes to resolve employment disputes. Pursuant to the Labor Code, employers are expressly prohibited from dismissing

¹¹ Guatemala's Rebuttal Submission, para. 123.

workers on these bases absent court authorization.¹² If an employer violates these provisions, an action may be commenced in the labor court. For those claims that the court determines to be meritorious, the law requires that the worker be reinstated and paid the missing wages and economic benefits, and that the employer be fined.¹³ If the employer fails to remedy the violation after seven days, the court is required to increase the fine by 50 percent.¹⁴ If the failure to comply persists, the court must impose additional fines of 6 to 18 times the minimum monthly wage¹⁵ and refer the matter to the Public Ministry for possible criminal sanction.¹⁶

34. Here, the record evidence shows that (1) at least 89 workers were dismissed between 2008 and 2014 in reprisal for forming a union, and that at least 111 workers were dismissed between 2010 and 2014 in reprisal for seeking to resolve claims through conciliation; (2) Guatemalan courts issued orders for reinstatement and back pay for each of these workers; and, (3) in the majority of these cases, contrary to the statutory requirements, no effective action was undertaken by the government of Guatemala to ensure compliance with the order or to otherwise ensure compliance with the law.

35. Guatemala's course of inaction has significant consequences. As is reflected by the record, there are risks for workers in exercising their right of association or their right to organize and bargain collectively. Here, the workers were dismissed and threatened with violence. Despite the risk of further reprisal, the workers alerted their Government of this illegal activity and the labor court issued court orders to put them back at work with full compensation. Failing to compel compliance with these orders sends a very clear message to workers: the protections

¹² GLC, Arts. 10, 62(c), 209, 223, 379, and 380.

¹³ GLC, Arts. 209, 379, and 380.

¹⁴ GLC, Arts. 209, 379, 380, 426.

¹⁵ GLC, Arts. 270-272; see also Guatemalan Judicial Organizations Law (March 28, 1989), Art. 179 (USA-54).

¹⁶ GLC, Arts. 364, 380; Guatemalan Penal Code (July 27, 1973), Art. 414; Guatemalan Code of Criminal Procedure (December 7, 1992), Art. 298.

of the law may not be there for you if you decide to form a union or undertake conciliation. This message has a significant chilling effect on workers exercising their rights under the law.

36. Guatemala responds in three principal ways. First, for ITM and NEPORSA, two companies that employ stevedores, Guatemala argues that it could not execute the orders due to purported actions of the workers.¹⁷ Second, for ODIVESA, Fribo, Mackditex, and Alianza, Guatemala claims that it had no legal obligation to execute the orders because either the orders were overturned on appeal or the workers and the employers entered into voluntary settlements.¹⁸ Third, for Alianza and Fribo, both apparel manufacturers, Guatemala suggests that it is in compliance with Article 16.2.1(a) by operation of subparagraph (b).¹⁹ Specifically, Guatemala argues that, as a result of the purported settlement agreements, its inaction regarding the employer's compliance with the court orders reflects a reasonable exercise of discretion or results from a *bona fide* decision regarding the allocation of resources.²⁰ None of these arguments is persuasive.

37. First, for ITM and NEPORSA, Guatemala's attempt to blame the workers for the non-execution of the orders is misplaced.²¹ Between February and May, 2008, ITM and NEPORSA improperly dismissed 54 stevedores in reprisal for forming unions.²² The labor court ordered that the workers be reinstated with back pay, and that the companies be fined.²³ The labor court failed to take the required actions, such as increase fines or refer the matter to the Public

¹⁷ Guatemala's Rebuttal Submission, paras. 139-144.

¹⁸ Guatemala's Rebuttal Submission, paras. 145-147, 149, 155, 156, 159-160, 162, 164-168.

¹⁹ Guatemala's Rebuttal Submission, paras. 168, 150-151.

²⁰ Guatemala's Rebuttal Submission, paras. 168, 150-151.

²¹ Guatemala's Rebuttal Submission, paras. 139-144.

²² 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).

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

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.²⁴

38. 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.²⁵ In support, Guatemala provides only two exhibits: GTM-52 and GTM-54. These exhibits comprise informal notices, 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.²⁶ From these documents, Guatemala concludes that the reinstatement orders could not be executed, and that because the employees did not pursue their reinstatement, there was no basis for the Public Ministry to take criminal action against the employer.²⁷

39. There are several evidentiary problems with Guatemala’s argument. First, the number of informal notices submitted by Guatemala does not match the number of workers that Guatemala discusses in its rebuttal submission.²⁸ As a result, for those workers not covered by the exhibits, Guatemala’s argument lack any support. As another example, none of the documents put forward in GTM-52 supports, or suggests, that any worker “voluntarily withdrew the

²⁴ 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).

²⁵ Guatemala’s Rebuttal Submission, paras. 139-144.

²⁶ Informal court notices (GTM-52 and GTM-54).

²⁷ Guatemala’s Rebuttal Submission, paras. 141, 144.

²⁸ Informal court notices (GTM-52 and GTM-54); Guatemala Rebuttal Submission, paras. 140, 143.

reinstatement request” or that the incorrect address of the workplace was the fault of the worker.²⁹ Accordingly, Guatemala overstates the significance of the evidence.

40. Turning to the merits, Guatemala is mistaken that the nonappearance of a worker on one occasion results in the termination of the reinstatement order or otherwise relieves the government of its obligation to enforce the law. Pursuant to Labor Code Articles 285, 380, and 425, judges are obligated to “execute” the judgments that they issue,³⁰ and 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. Rather, the order remains in place, and the labor court’s obligation to execute the order continues. If a worker fails to appear for reinstatement on one occasion, the court, through the executor, must attempt execution of the order again at a later time. Thus, Guatemala’s claim is not supported by the law, and the statements from the former employees of ITM and NEPORSA make clear that, in these cases, the workers have not abandoned their claims to reinstatement and back pay.³¹

41. Guatemala’s argument involving inaccuracies with the address of the employer, again, presents an incorrect view of the law. Pursuant to Labor Code Article 328, both the employee and the employer are required to provide correct addresses to the Court for purposes of court notifications.³² The employee must provide the employer’s address at the outset of the proceedings.³³ However, after the employer first appears for the legal proceedings, the employer must keep the court apprised of its address for purposes of legal notifications.³⁴ By the time the

²⁹ Informal court notices (GTM-52); Guatemala Rebuttal Submission, paras. 140, 141.

³⁰ GLC, Arts. 285, 380, 425.

³¹ 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).

³² GLC, Art. 328.

³³ GLC, Art. 328.

³⁴ GLC, Art. 328.

reinstatement orders were issued, the employer will have become a party to the proceedings and is therefore responsible for informing the court of its current address.

42. Therefore, Guatemala’s arguments that it could not execute the reinstatement orders due to the actions of the workers are without support.

43. I will now turn to Guatemala’s second defense that it had no legal obligation to execute the orders for ODIVESA, Fribo, Mackditex, and Alianza. For ODIVESA, Guatemala puts forward “case documents” from the Constitutional Court which purportedly show “that the reinstatement orders [for the ODIVESA workers] were quashed on appeal and, in some cases, that the employees themselves requested termination of the proceedings.”³⁵ Upon closer inspection, however, Guatemala’s “case documents”, GTM-53, only comprise the last page of six separate court decisions.³⁶ For all but one of the pages, there is no indication that the decision was rendered by the Constitutional Court.³⁷ Further, the excerpted pages do not reflect that any employees requested termination of the proceedings.³⁸ As a result, the documents do not substantiate Guatemala’s claims.

44. Second, even if the court files were produced, the documents would not reflect the final resolution of the claims for the majority of the former ODIVESA workers discussed in the U.S. submissions. We refer to new U.S. exhibits 237, 238, and 239, which comprise three decisions of the Constitutional Court.³⁹ These decisions confirm that the orders for 8 of the 11 workers noted in the U.S. initial written submission were affirmed on appeal.⁴⁰ These decisions also

³⁵ Guatemala’s Rebuttal Submission, para. 145.

³⁶ Selected excerpts from court decisions (GTM-53).

³⁷ Selected excerpts from court decisions (GTM-53).

³⁸ Selected excerpts from court decisions (GTM-53).

³⁹ Constitutional Court decisions (USA-237, USA-238, USA-239).

⁴⁰ Constitutional Court decisions (USA-237, USA-238, USA-239).

corroborate the representation of the workers that the reinstatement orders were final and not invalidated on appeal, as reflected in U.S. exhibits 6 and 161.⁴¹

45. For Fribo, Mackditex, and Alianza, Guatemala claims that the workers voluntarily settled their claims with their employers, and as a result, there was no basis for the labor courts or the Public Ministry to take further action, despite the fact that the workers purportedly settled for amounts less than what the workers were awarded by court order.⁴² Guatemala's argument, again, is premised on a flawed view of both the record evidence and its enforcement obligations.

46. I will first briefly discuss the record evidence as it relates to the workers of Fribo and Mackditex, and I will then address the legal error in Guatemala's analysis, which pertains to all three companies.

47. On March 17, 2009, Fribo improperly dismissed 24 workers in reprisal for the workers forming a union.⁴³ The labor court ordered that the workers be reinstated with back pay, and fined the company.⁴⁴ Fifteen of the 24 workers were reinstated, but most of these workers were assigned to positions with less pay.⁴⁵ None of the workers was paid the back pay or benefits mandated by the reinstatement order.⁴⁶ On August 21, 2009, Fribo closed its operations and provided the workers with a partial payment for the money that was owed to them.⁴⁷

48. Guatemala has presented no evidence to demonstrate that the partial payment was a settlement of the workers' legal claims, and nor do the statements of the workers support this. The workers explained that they informed the Ministry during a site visit on August 21, 2009,

⁴¹ Statement of F (May 28, 2014) (USA-6); Second Statement of B with table (March 5, 2015) (USA-161).

⁴² Guatemala's Rebuttal Submission, paras. 149, 155, 156, 159-160, 162, 164-168.

⁴³ Reinstatement Order (April 1, 2009) (USA-60); Statement of K, L, M, N, O (June 24, 2014) (USA-11).

⁴⁴ Reinstatement Order (April 1, 2009) (USA-60); Statement of K, L, M, N, O (June 24, 2014) (USA-11).

⁴⁵ Adjudication (July 10, 2009), p. 2 (USA-61); Statement of K, L, M, N, O (June 24, 2014), pp. 2-3 (USA-11).

⁴⁶ Statement of P (March 24, 2010), p. 1 (USA-12); Statement of Q (March 24, 2010), p. 1 (USA-13); Statement of R (March 24, 2010), p. 1 (USA-14).

⁴⁷ Statement of K, L, M, N, O (June 24, 2014), p. 3 (USA-11).

that they had not received the full amount of wages owed to them from Fribo.⁴⁸ Despite this notification of a violation of the law, the inspector advised the workers that they should accept a lower amount than what was due to them by order of the law.⁴⁹ See U.S. Exhibit 11, the second to last paragraph on page 3.⁵⁰ The workers do not state that, as result of the partial payment, they no longer wished to pursue their claims for the outstanding amounts.⁵¹

49. To the contrary, in statements provided on March 20, 2010, approximately five months after the alleged settlement, workers P, Q, and R indicate quite the opposite.⁵² I draw the Panel's attention to U.S. exhibits 12, 13, and 14, in particular the third section of U.S. exhibit 12.⁵³ The statements reflect that the workers did not wish to abandon their claims.⁵⁴ The evidence establishes that the labor court failed to take the necessary enforcement actions to ensure Fribo fully complied with the order of the court.

50. Guatemala also ignores that the inspector disregarded the Ministry's obligations to conduct a proper inspection and ensure Fribo's compliance with the law when it advised the workers to accept a partial payment for their claims.⁵⁵ Upon being notified of the nonpayment, the inspector should have taken steps to investigate the allegation, and once confirmed, notify the labor court of Fribo's continued noncompliance with the law.⁵⁶ The inspector failed to take the necessary steps to bring Fribo into compliance with the law.

51. Guatemala's arguments are equally deficient for Mackditex. In October of 2011, Mackditex improperly terminated a group of 17 workers for undertaking a conciliation process to

⁴⁸ Statement of K, L, M, N, O (June 24, 2014), p. 3 (USA-11).

⁴⁹ Statement of K, L, M, N, O (June 24, 2014), p. 3 (USA-11).

⁵⁰ Statement of K, L, M, N, O (June 24, 2014), p. 3 (USA-11).

⁵¹ Statement of K, L, M, N, O (June 24, 2014), p. 3 (USA-11).

⁵² Statements of P, Q, R (March 20, 2010) (USA-12, USA-13, USA-14).

⁵³ Statements of P, Q, R (March 20, 2010) (USA-12, USA-13, USA-14).

⁵⁴ Statements of P, Q, R (March 20, 2010) (USA-12, USA-13, USA-14).

⁵⁵ GLC, Arts. 204, 274, 278, 280, 281; Statement of K, L, M, N, O (June 24, 2014), p. 3 (USA-11).

⁵⁶ GLC, Arts. 204, 274, 278, 280, 281.

resolve a dispute involving the workers' forced suspension from work.⁵⁷ The labor court ordered that Mackditex reinstate the workers and pay them their wages and benefits for the period of their dismissal.⁵⁸ By 2013, the workers had not been reinstated, nor had they received payment for their wages and benefits claims.⁵⁹ It was at this time that an apparel company for which Mackditex supplied merchandise provided the workers with "a payment."⁶⁰ The workers state that this payment amounted to less than the wages owed to them from Mackditex.⁶¹ Again, Guatemala has put forward no evidence to demonstrate that the payment from the third party apparel company amounted to a legal settlement of the workers' claims. See U.S. Exhibit 18, the last full paragraph of page 2.⁶² As described by the workers, only after a year had passed and Mackditex had not complied with the reinstatement orders did the workers accept a payment from the apparel company.⁶³ At no point do the workers indicate that, as a result of the payment, they no longer wished to pursue the full compensation for their claims from Mackditex,⁶⁴ and Guatemala has provided no evidence that the workers withdrew their requests for reinstatement.

52. Irrespective of these evidentiary issues, Guatemala's argument is fundamentally flawed. 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.⁶⁵ 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

⁵⁷ Request for Reinstatement (October 12, 2011) (USA-65); Statement of W and Z (June 25, 2014), pp. 1-2 (USA-18); Statement of Y, Z, AA (June 25, 2014), p. 1 (USA-19); Inspector's Report (October 11, 2011), p. 2 (USA-66).

⁵⁸ Reinstatement Order (November 21, 2011) (USA-67).

⁵⁹ Statement of W and Z (June 25, 2014) (USA-18); Statement of Y, Z, AA (June 25, 2014) (USA-19);

⁶⁰ Statement of W and X (June 25, 2014), p. 3 (USA-18).

⁶¹ Statement of W and X (June 25, 2014), p. 3 (USA-18).

⁶² Statement of W and X (June 25, 2014) (USA-18).

⁶³ Statement of W and X (June 25, 2014) (USA-18).

⁶⁴ Statement of W and X (June 25, 2014) (USA-18).

⁶⁵ GLC, Art. 12, Guatemalan Constitution, Art. 106.

set out in the Labor Code, among other laws, are void ipso jure and not will be enforceable against the workers.⁶⁶

53. Consequently, even if the workers executed agreements which purported to release the employers from their legal obligations in return for a partial payment to the workers, the agreement would be in violation of the law and the court order, and any approval or acceptance of this agreement by the labor court would be a failure by the Court to enforce the Labor Code.

54. I will now address Guatemala's third point -- the application of Article 16.2.1(b).⁶⁷ Guatemala must do more than simply assert that its course of inaction is consistent with Article 16.2.1(a) by virtue of Article 16.2.1(b). Rather, Guatemala must show that a particular course of action or inaction occurred as a result of or pursuant to a law or policy regarding the exercise of discretion, or that it occurred as a result of or pursuant to a government decision regarding the allocation of resources, and that that decision was *bona fide*.⁶⁸

55. With respect to the workers of Alianza, Guatemala's application of Article 16.2.1(b) is not supported by the law or the record. On March 26, 2010, Alianza improperly dismissed 33 workers in reprisal for undertaking a conciliation to resolve a collective conflict with the company.⁶⁹ The labor court ordered Alianza to reinstate the improperly dismissed workers and issued a fine.⁷⁰ Alianza did not reinstate any of the 33 workers.⁷¹ See U.S. Exhibit 22.⁷² After approximately two years of inaction, thirty of the workers signed settlements with the employer

⁶⁶ Guatemalan Constitution, Art. 106; *see also* GLC, Art. 12.

⁶⁷ Guatemala's Rebuttal Submission, paras. 168, 150-151.

⁶⁸ CAFTA-DR, Art. 16.2.1(b).

⁶⁹ Reinstatement Order (March 26, 2010) (USA-69).

⁷⁰ Reinstatement Order (March 26, 2010) (USA-69).

⁷¹ Statement of BB and CC (July 2, 2014) (USA-21); Statement of III and MMM (July 2, 2014), p. 2 (USA-22); Statement of HHH (July 2, 2014), p. 2 (USA-23); Statement of III, KKK, LLL (July 2, 2014), p. 2 (USA-24); Statement of III and JJJ (July 2, 2014), p. 1 (USA-25). *See also* Corruption and Greed: Alianza Fashion Sweatshop in Guatemala, Institute for Global Labour and Human Rights, (January 2014), available in Spanish at <http://www.globallabourrights.org/reports/alianza-fashion-guatemala-2014>, p. 21 (USA-70).

⁷² Statement of III and MMM (July 2, 2014), p. 1 (USA-22).

for less compensation than had been ordered by the court.⁷³ Guatemala argues that the decision not to impose additional fines or pursue criminal penalties subsequent to this settlement is consistent with Article 16.2.1(b).⁷⁴

56. However, Guatemala has not demonstrated that its failure to execute the court order was a “reasonable exercise” of discretion, or that it resulted from a *bona fide* decision regarding the allocation of resources.⁷⁵ Given the fact that the settlement agreement upon which the purported enforcement decision was based was contrary to Guatemalan law,⁷⁶ Guatemala cannot show that such a decision was “reasonable” or *bona fide*, regardless of the reason for which the decision was made.⁷⁷ Further, Guatemala’s argument overlooks the labor court’s failure to execute the order in the two years subsequent to the issuance of the order. While Guatemala describes the settlement agreement as voluntary,⁷⁸ a more reasonable inference is that the workers could not afford to wait any longer for full compensation, regardless of the award by the court. Guatemala cannot claim that its discretion not to enforce the order after the settlement was reasonable, when for the two years prior to the settlement, it did virtually nothing.

57. I will now turn back to my colleague, Ms. Claussen, who will address the remaining two claims.

⁷³ Statement of BB and CC (July 2, 2014) (USA-21); Statement of III and MMM (July 2, 2014), p. 2 (USA-22).

⁷⁴ Guatemala’s Rebuttal Submission, para. 168.

⁷⁵ CAFTA-DR, Art. 16.2.1(b).

⁷⁶ GLC, Art. 12, Guatemalan Constitution, Art. 106.

⁷⁷ CAFTA-DR, Art. 16.2.1(b).

⁷⁸ Guatemala’s Rebuttal Submission, para. 168.

IV. Second Group of Failures by Guatemala

58. The second group of failures by Guatemala comprises failures on the part of the Ministry of Labor’s General Labor Inspectorate, the GLI. With respect to this group of failures, I will first briefly describe the important role that inspections play in the effective enforcement of labor laws. I will then address two different ways in which Guatemala has failed.

59. The main function of the GLI is to conduct work site inspections and to ensure compliance with minimum labor standards set out in the law. Guatemalan law provides that the GLI must ensure compliance with the law generally and, in particular, when the GLI receives a complaint, it must investigate in response to that complaint.⁷⁹ During an inspection, the inspector must investigate all aspects of an employer’s compliance with Guatemalan labor laws.⁸⁰ Then, as Guatemala has also explained, where a breach of a labor law “is observed or is suspected” during an inspection, the inspector must issue a warning, giving the employer a short time to come into compliance.⁸¹ After this period expires, the inspector must return to the premises to verify compliance.⁸² And if the employer has not come into compliance, the inspector must pursue a sanction procedure with a labor court for imposition of a penalty.⁸³

60. This is how the GLI inspection process should work. However, with respect to acceptable conditions of work, minimum wage, and hours of work, the GLI has failed to effectively enforce labor laws directly related to these areas in at least two ways: first, by failing to conduct inspections in response to a complaint or by conducting insufficient inspections; and

⁷⁹ Guatemalan Labor Code (“GLC”), Arts. 278, 279.

⁸⁰ GLC, Art. 280.

⁸¹ GLC, Art. 280(1); Guatemala’s Initial Written Submission, para. 107.

⁸² Guatemala’s Initial Written Submission, para. 107; Protocol of Best Practices for Inspections in Guatemala, Art. I (USA-91) (“Inspection Protocol”).

⁸³ GLC, Art. 415; Guatemala’s Initial Written Submission, para 107.

second, by failing to take effective action to bring an employer into compliance after having confirmed that the employer has violated the law.

61. Turning to the first of these – the failure to conduct sufficient inspections or to carry out any inspection at all -- I will make three points about this failure.

62. First, as noted already, to “effectively enforce” means to carry out with great effect and to compel compliance with the law.⁸⁴ With respect to inspections, Guatemala argues that not all complaints filed will result in the confirmation of a violation and that the investigation is one of the mechanisms used to determine whether there is a violation.⁸⁵ We agree. The point is that the GLI must respond to a report of an alleged violation to effectively combat violations.

63. Article 16.2.1(a) does not allow a Party to avoid a breach by never investigating whether employers are violating the law. If that were the case, a Party could simply cease all inspections, precluding the detection of labor law violations but allowing their continued commission, and nonetheless claim to have effectively enforced its labor laws. Such an interpretation is untenable and would sanction the very breach the provision is intended to prevent. Responding to complaints with sufficient inspections is a fundamental part of effectively enforcing labor laws and is required by Guatemalan law.⁸⁶

64. The facts presented by the United States show the lack of such action. For example, it took two months for an inspection attempt to be made when workers from four palm plantations sought assistance in 2011, and only then after workers agreed to give the inspectors money for

⁸⁴ *Supra*, para. 7.

⁸⁵ Guatemala’s Initial Written Submission, para. 280.

⁸⁶ GLC, Arts. 278-280.

gasoline.⁸⁷ Exhibit USA-101 describes the workers’ concerns in detail, which include the employer’s neglecting to pay them minimum wage and violation of laws regarding worker health and safety, in particular with respect to inappropriate safety tools and contact with harmful chemicals. A two month delay in response to allegations of this nature – allowing potentially dangerous conditions to continue – cannot constitute effective enforcement of the law.

Guatemala disputes only that the inspector would not have asked for money for gasoline because, according to its records, there was no shortage of gasoline during that period.⁸⁸

65. Second, and as a corollary to the first point, numerous complaints over a period of time warrant multiple inspections. Thus, when Guatemala argues that it need not take further action when, on a single occasion, an entity is found to be in compliance, it is mistaken. Where multiple complaints are filed or voiced, a single inspection is not effective enforcement. To illustrate this proposition, one need look no further than to the 70 coffee farms to which the United States has referred and to which I will return in a moment.

66. Finally, performing an inspection at a worksite requires more than just showing up. Guatemalan inspection regulations outline the procedures to be followed for a proper inspection.⁸⁹ For many of the inspections in the record, these rules do not appear to have been followed. A close look at the documents Guatemala has submitted in response to the U.S. showing is revealing in this respect.

67. Given our short time together, I would invite the Panel to look at the reports in particular and to evaluate just how effective those actions appear to have been. The dates are relevant, the

⁸⁷ Statement of AAAA, (June 26, 2014), p. 1 (USA-40); Report of the Mission in the Municipality of Sayaché, Petén, Office of the UN High Commissioner for Human Rights in Guatemala (February 27, 2012 – March 1, 2012), p. 1 (USA-102).

⁸⁸ See Guatemala’s Initial Written Submission, paras. 297-298 (citing Report by the Transportation Department and Fuels Coordination of MOL (GTM-7)).

⁸⁹ Inspection Protocol (USA-91)..

actors are relevant, the location is relevant, and the substance is relevant. Taking a look at just a couple of exhibits to illustrate this point, Guatemala provides two inspection reports to support its assertion that the GLI carried out one inspection at 52 of the 70 farms that filed a group complaint in August 2008.⁹⁰ These two reports in particular are dated October 28, 2008 and December 2, 2008 – both several months after the larger complaint had been filed. One of the two involved checking the books at a GLI office, not even at the farm itself. It appears that workers are not present for one and in the other, it is recorded that the workers state only that, for their part, they “have been paid.” These reports address only the issue of unpaid and low wages, and do not cover the other issues raised in the workers’ complaint including sanitation and safety measures, the length of the work day, and the provision of safe tools.

68. Another illustration of Guatemala’s failure in this respect can be seen at the palm plantations where Guatemala’s exhibits 13, 14, 19, 20, and 21 – inspection reports from these plantations -- all purport to show compliance but when reviewed closely one can see that the reports are incomplete, reflect that workers in the field were not consulted, or suffer from other defects. As does Guatemala’s assertion that its exhibit containing inspection reports from NAISA plantation, “demonstrated that inspectors acted promptly, in conformity with the law” in carrying out four inspections.⁹¹ In fact, this exhibit shows two, not four, inspections, the second of which, for the follow-up inspection, took place several weeks after the deadline for compliance had passed.

69. Particularly when juxtaposed with comments from workers and union leaders regarding the difficulties workers were experiencing at that time, these reports demonstrate that the

⁹⁰ GTM-5 (GTM-6).

⁹¹ NAISA Inspection Reports (GTM-46); Guatemala’s Rebuttal Submission, para. 300.

inspection activities by the GLI fell far short of sufficient and frequent enough such that they reflected effective enforcement.

70. The other way the GLI has failed to effectively enforce is by not taking action to ensure that a violation confirmed by the GLI has been corrected. These failures manifest themselves in different ways – in some instances in the lack of response to a violation found during an inspection, in others in the lack of action by the GLI following a conciliation hearing -- but the pattern is clear.

71. A simple example – I say simple because Guatemala has not submitted any documents to rebut the U.S. evidence – is the failure to bring the Koa Modas company into compliance in 2014. After an inspector found, during a verification check in February 2014, that the employer had not provided necessary safety and health facilities such as lockers, sufficient restrooms, an eye wash station, industrial fans, and emergency signage for the more than one thousand employees, the GLI did not ensure that Koa Modas came into compliance.⁹²

72. Similar omissions are seen throughout the record. Nothing Guatemala has provided has rebutted the showing of failure. Instead, with respect to some of the instances, Guatemala attempts to shift blame for its omissions to the workers. A particularly egregious misreading in which Guatemala contends that the worker asked the inspector not to verify Fribo's compliance can be seen in USA exhibit 114. It is clear from the context of this passage that the worker is asking the GLI to be diligent about checking as early as possible, i.e. at the conclusion of the compliance period because the workers are suffering from Fribo's several violations.

⁹² Adjudication (February 21, 2014) (USA-125).

73. Guatemala points to the fact on some occasions the workers requested that the inspector declare the administrative proceedings exhausted, implying that the workers wanted the inspector to stop his or her investigation.⁹³ This is not a fair depiction of the circumstances, however. The relevant circumstance for the Panel's evaluation is that the GLI did not take any action after the employer's acknowledgment of its violation. The workers have the right to end the conciliation process at any time and take their grievance to a labor court for adjudication; however, requesting exhaustion does not alleviate Guatemala's responsibility under the law to ensure compliance.

74. In most instances, it is the workers that have had to prompt the GLI to act. A good example of this can be seen at the Mackditex factory. There, after finding a failure to pay appropriate wages on September 16, 2011, the inspector did not return to verify compliance. The workers had to travel all the way to Guatemala City – a journey of over two hours and at their own cost -- to file a further complaint with the GLI three weeks later seeking an inspection to check on the employer's late payment of missing wages.⁹⁴ After the GLI confirmed there was a violation, Guatemala offers that the Ministry sought to commence a case against the employer in August 2012 -- ten months later.⁹⁵ We would note, however, that nothing about the document that Guatemala says shows that it started a sanction process suggests that it is related to the October 2011 proceedings. If it were related, it should be obvious that seeking to penalize an employer and compel compliance 10 months after having identified a violation of the law is not effective enforcement.

⁹³ Guatemala's Rebuttal Submission, paras. 234-235.

⁹⁴ Examples of administrative and judicial documents (GTM-8).

⁹⁵ Inspector's request for the imposition of penalties against Mackditex (GTM-11).

75. Guatemala also claims that the United States underestimates the value of conciliation. In so saying, Guatemala suggests that conciliation is the manner through which it is achieving effective enforcement. But on this, it is wrong, and not because the United States undervalues conciliation. The problem is that Guatemala has used high-profile conciliation proceedings as a substitute for enforcement. They are not.

76. An illustration from the record is useful here. Throughout June and July 2014, the inspection reports from the Feflosa coffee plantations – Santa Elena & El Ferrol -- catalog a long list of violations of Guatemala’s labor laws related to acceptable conditions of work.⁹⁶ As of the start of this year, six months after the violations were identified, no penalties have been imposed and no compliance has been secured.⁹⁷ When, despite several conciliatory meetings, these violations have not been remedied, it is clear that conciliation cannot substitute for the statutory enforcement mechanisms of warning and sanction. In the high profile dialogue tables in particular, the Ministry appears to support the employer throughout the process rather than take the necessary action to ensure that the employer complies with the law.

77. Workers have mentioned this problem regarding the Ministry’s complicity with the illegal conduct of the employer in a dialogue table not only at Feflosa, but also at Serigrafía Seok Hwa screen printing factory, Tiki, REPSA, and NAISA palm plantations, and the Mackditex apparel factory.

78. Finally, Guatemala has not taken action after identifying violations by employers who have not attended mandatory conciliatory meetings. Guatemala’s inaction in this respect is a failure to effectively enforce Article 281(m) of the Labor Code. The evidence shows that at Koa

⁹⁶ Adjudication (June 6, 2014) (USA-126); Adjudication (June 16, 2014) (USA-127); Report, Department of Hygiene and Occupational Safety (June 16, 2014) (128); Inspector’s report (July 22, 2014) (GTM-27).

⁹⁷ Second Statement of FFF (March 9, 2015) (USA-182).

Modas, seven meetings were missed by the employer, no action was taken⁹⁸; at Serigrafia Seok Hwa, another seven, no action was taken⁹⁹; at Alianza, add another.¹⁰⁰ Examples date back to Fribo in 2007 and continue through 2014 at Las Delicias.¹⁰¹ The United States has provided several meeting reports from Koa Modas¹⁰², and today submits additional reports from Serigrafia, each of which memorializes the employers' absences.¹⁰³ Guatemala comments that only the GLI and the enterprises would know if a sanction was imposed for such an absence.¹⁰⁴ Having so indicated, implying that neither the United States nor the workers could know if enforcement action followed, Guatemala does not provide any documents to rebut the U.S. claim that no action was taken. Accordingly, since Guatemala is the disputing Party in possession of this evidence, a logical inference to be drawn is that no such sanction has been imposed.

79. The evidence I have just reviewed leaves no doubt that Guatemala has failed to effectively enforce its labor laws after having found violations of those laws. Thousands of workers have been affected by these several instances of inaction alone. Those instances together with the failures to undertake inspections or to carry out sufficient inspections constitute a sustained and recurring course of inaction stretching from 2006 to 2014.

⁹⁸ Ministry of Labor Conciliatory Meeting Reports (USA-117 – USA-123).

⁹⁹ Serigrafia Meeting Report (July 2, 2012) (USA-241); Serigrafia Meeting Report (July 5, 2012) (USA-242); Serigrafia Meeting Report (September 13, 2012) (USA-243); Interviews with II and GG (June 12, 2014 & June 18, 2014) (USA-130).

¹⁰⁰ Adjudication (March 19, 2013) (USA-131); Statement of BB, CC (July 2, 2014) (USA-21).

¹⁰¹ Statement of K, L, M, N, O (June 24, 2014) (USA-11); Statement of RR, SS, TT, UU, VV (June 30, 2014) (USA-26).

¹⁰² Ministry of Labor Conciliatory Meeting Reports (USA-117 – USA-123).

¹⁰³ Serigrafia Meeting Report (July 2, 2012) (USA-241); Serigrafia Meeting Report (July 5, 2012) (USA-242); Serigrafia Meeting Report (September 13, 2012) (USA-243).

¹⁰⁴ Guatemala's Rebuttal Submission, para. 254.

V. Third Group of Failures by Guatemala

80. With respect to Guatemala's third group of failures, the United States has offered several instances in which Guatemala has either failed to register unions in a timely manner or has failed to establish conciliation tribunals in a timely manner – sometimes not at all. These delays and omissions are not only inconsistent with Guatemalan law; as long as they persist, these delays prevent workers from exercising their right of association and right to organize and bargain collectively under the protection of the law. As can be seen from the facts in the record, for these workers, the delays also precluded them from pursuing additional avenues through which they could seek to ensure acceptable conditions of work to which they were entitled.

81. With respect to union registration: Guatemala does not dispute that the General Labor Directorate, the GLD, failed to register unions by the statutory deadline. The delays identified by the United States and acknowledged by Guatemala vary in length from several weeks for Serigrafía to several months in the case of Mackditex and Koa Modas. There are some discrepancies about the length of the delays between the disputing Parties, but no discrepancy with respect to the fact that there were substantial delays. The deadline, under Article 218 of the Labor Code, is 10 days.

82. Each of the delays at issue is significant, and has a significant effect on the ability of the workers to exercise their rights. That the unions were eventually registered weeks, months or years after they applied for recognition does not change this fact.

83. This brings me to the changes the GLD asked the workers to make in the registration applications. The evidence provided by the United States shows that the types of changes identified by the GLD were not of the sort that would require refusal of an application

under Article 218 of the Labor Code or even that were required under the law.¹⁰⁵ A close review of this evidence reveals that Guatemala’s attempt to blame the workers for the registration delay does not comport with the anticipated registration process. Even taking into account any delays resulting from the workers taking time to submit corrected applications, the GLD itself nevertheless failed to comply with the statutory deadlines.

84. We emphasize that the United States is not arguing that any delay beyond the statutory or regulatory limit is a breach of Article 16.2.1(a). A single delay would not be a breach, and if we were talking about a series of only one or two day delays, we would not be discussing this before the Panel today.

85. Nor does the “sustained or recurring course” element accommodate a comparative exercise. The text refers to “a” course of action or inaction. It does not need to be the “predominant” course. But in respect of registration delays, Guatemala has provided public information stating that, in the relevant years (2011, 2012), the time required from start to finish for union registration was, on average, seven months.¹⁰⁶

86. Finally, Guatemala claims in its rebuttal submission that the delays “would have been the result of limitations in resources during two years of peak activity,”¹⁰⁷ and cites to Article 16.2.1(b) of the CAFTA-DR. However, the circumstances surrounding the delays do not support an argument that they resulted from a good faith decision regarding the allocation of resources. To the contrary, the record shows a series of interactions between the proposed union and the GLD, demonstrating that the GLD had resources to devote to these applications.¹⁰⁸

¹⁰⁵ GLC, Art. 218(d).

¹⁰⁶ 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).

¹⁰⁷ Guatemala’s Rebuttal Submission, para. 381.

¹⁰⁸ See, e.g., Providencia (November 10, 2011) (GTM-38); Providencia (December 22, 2011) (GTM-31);

Thus, Guatemala cannot substantiate a defense under Article 16.2.1(b) with respect to delays in the registration of unions.

87. Turning to Guatemala's failure to set up conciliation tribunals, the United States has shown that the labor courts have not taken action in a timely fashion – or have not taken action at all – in response to lists of grievances filed by groups of workers. When such a list is filed, Article 382 of the Labor Code requires that the court proceed to set up the conciliation tribunal within 12 hours of receipt of the list.

88. In its rebuttal submission, Guatemala attempts to undermine the U.S. evidence, to no avail. A close review of the facts presented by the United States and Guatemala's response to them is instructive.

89. First, with respect to Las Delicias farm, the United States has presented an acknowledgment of the court of a list of grievances from Las Delicias workers dated March 29, 2001 on which the court never acted to set up the conciliation tribunal – in 14 years.¹⁰⁹ Guatemala disputes that the petition was submitted by the Las Delicias workers.¹¹⁰ However, the text of the court's acknowledgment indicates that the petition was submitted by Las Delicias workers, including because the location of the worksite in question is listed as the municipality where Las Delicias is located.¹¹¹ Guatemala has attempted to undermine this U.S. showing, but has offered no evidence in response that would rebut the facts presented.

Providencia (February 2, 2012) (GTM-32); MOL decision (February 14, 2012) (USA-146); MOL decision (March 7, 2012) (USA-155).

¹⁰⁹ Adjudication (March 29, 2011) (USA-227).

¹¹⁰ Guatemala's Rebuttal Submission, para. 403.

¹¹¹ Adjudication (March 29, 2011) (USA-227).

90. Second, regarding Avandia, the United States has presented three petitions from workers at the garment factory, none of which reached the conciliation tribunal stage due to inaction by the courts. With respect to the first petition filed in November 2006,¹¹² Guatemala contends that the petition did not fulfill the legal requirements, and submits in support a court document requesting workers to make revisions to a collective conflict petition.¹¹³ However, the document submitted by Guatemala reflects no connection with Avandia, its workers, or the November 13 petition. The courts are different, the case numbers are different, and in the Guatemalan document, the judge asks the submitters, whoever they were, to provide information that clearly was provided in the Avandia petition.

91. Regarding the second Avandia petition, filed in August 2007, Guatemala does not dispute that the conciliation tribunal was never constituted. Guatemala points instead to action the court took 18 months after the conflict had been filed.¹¹⁴ But again, even after this step was taken, the tribunal was never constituted. The same is true for the third petition from September 2009. Guatemala identifies action two years and 4 months after the date the petition was filed. Given the statutory deadlines, it clear that this evidence also fails to address the concerns raised by the United States.

92. With respect to Fribo, the United States has presented evidence of a fifth unanswered collective conflict petition.¹¹⁵ Here again, the court took no action to move the Fribo workers' petition forward in a timely manner. Guatemala notes that the court determined that the workers needed to provide additional information and requested that information; thus, in Guatemala's view, the court took action and there is no failure to effectively enforce through

¹¹² Collective Conflict (November 13, 2006) (USA-72).

¹¹³ GTM-56.

¹¹⁴ GTM-44.

¹¹⁵ Collective Conflict (August 18, 2007) (USA-136).

inaction here.¹¹⁶

93. Upon an examination of the evidence, however, it is clear that the information the court sought should not have been an impediment to the setting up of the conciliation tribunal according to the Labor Code. Article 381 of the Labor Code requires a court to move forward with a collective conflict petition even if it does not satisfy the legal requirements. In such cases, the court is required to correct the omission or error *sua sponte* and move the process forward. In pointing out this discrepancy, the United States is not seeking a reopening or revision of the court's decision as would be contrary to Article 16.3.8 of the CAFTA-DR. We point out this discrepancy between the labor law and the practice as illustrative of the court's hindering effective enforcement rather than enabling it.

94. The final fact pattern presented by the United States regarding conciliation tribunals relates to a collective conflict petition filed by workers at the Ternium steel manufacturing plant. This petition was filed on March 5, 2012.¹¹⁷ The following day, the court asked the workers to supplement their petition with additional information; the workers submitted this information on March 14, 2012.¹¹⁸ Guatemala again contends that because the court asked the workers for additional information, the court did not have to move forward with the conciliation tribunal until the workers provided that information pursuant to Article 381 of the Labor Code.¹¹⁹ But Guatemala's position is contrary to the plain text of the Article which requires that "The petition will be processed immediately" and directs the court to make corrections *sua sponte* to do so.¹²⁰

¹¹⁶ Guatemala's Rebuttal Submission, para. 416.

¹¹⁷ Collective Conflict (March 5, 2012) (USA-228).

¹¹⁸ Acceptance of collective conflict by the court (March 6, 2012) (USA-138).

¹¹⁹ Guatemala's Rebuttal Submission, para. 406.

¹²⁰ In addition to Article 381, see Article 285 (stating that the labor courts should expedite matters wherever

95. In any event, even if the court were to wait to set up the tribunal until after it received the workers' supplemental information, this did not occur. The court determined on March 26, 2012 that the workers had *not* submitted the information requested – this despite the clear “received” stamp on the March 14 workers' submission, contained in U.S. exhibit 229.¹²¹ This is now the sixth instance of the Guatemalan labor courts failing to effectively enforce their labor laws in this way.

96. Finally, and as with the registration of unions, none of the facts surrounding the delays and omissions with respect to conciliation tribunals can be explained by any good faith decision that Guatemala made with respect to the allocation of resources. Indeed, Guatemala does not even attempt to offer such an explanation. Instead, Guatemala asserts that the delays, “if they in fact occurred, would simply reflect the practical difficulties and resource constraints that labor courts face in all countries.”¹²² Such an assertion is not sufficient to sustain a defense under Article 16.2.1(b).

VI. Conclusion

97. Mr. Chairman, members of the Panel, these remarks conclude the opening statement of the United States to the Panel. The United States asks that, on the basis of the record before it, the Panel find that Guatemala has breached Article 16.2.1(a) of the CAFTA-DR. We look forward to answering any questions the Panel may have. Thank you.

possible, including by making corrections *sua sponte*).

¹²¹ Adjudication (March 26, 2012) (USA-230).

¹²² Guatemala's Rebuttal Submission, para. 422.