

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

REBUTTAL SUBMISSION OF THE UNITED STATES

March 16, 2015

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208	2011 Observation for Guatemala, International Labor Organization Committee of Experts on the Application of Conventions and Recommendations, "Article 5. Adequate inspection" (adopted 2011, published 101 st ILC session 2012)
209	Annual Report of the United Nations High Commissioner for Human Rights, Doc. A/HRC/19/21/Add.1, para. 73 (January 30, 2012)
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72	Collective Conflict, List of Grievances (November 13, 2006)
83	Decision in the case of Mr. OOO (April 8, 2011)
119	Ministry of Labor Conciliatory Meeting Report (April 26, 2013)

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Short title	Full Citation
<i>Argentina – Import Measures (AB)</i>	Appellate Body Report, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R, adopted 26 January 2015
<i>Argentina – Import Measures (Panel)</i>	Panel Report, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R, adopted 26 January 2015
<i>China – Auto Parts (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/340/342/AB/R, adopted 12 January 2009
<i>China – Raw Materials (AB)</i>	Appellate Body Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R, adopted 22 February 2012

<i>Costa Rica v. El Salvador – Tariff Treatment</i>	Final Arbitral Panel Report, <i>Costa Rica v. El Salvador – Tariff Treatment for Goods Originating from Costa Rica</i> , CAFTA-DR/ARB/2014/CR-ES/18, 18 November 2014
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Bananas III (Panel)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R
<i>EC – Large Civil Aircraft (AB)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
<i>ILC Draft Articles on State Responsibility</i>	International Law Commission, <i>Draft Articles on Responsibility of States for Internationally Wrongful Acts</i> , Nov. 2001, Supp. No. 10 (A/56/10), chp.IV.E.1
<i>Italy – Agricultural Machinery (GATT)</i>	GATT Panel Report, <i>Italian Discrimination Against Imported Agricultural Machinery</i> , L/833, adopted 23 October 1958
<i>Japan – Alcoholic Beverages II (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<i>Japan – DRAMs (Korea) (Panel)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R, adopted 17 December 2007
<i>Rompetrol v. Romania</i>	<i>Rompetrol Group N.V. v. Romania</i> , Award, ICSID Case No. ARB/06/3, 16 May 2013
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US – Countervailing and Anti-Dumping Measures (China) (AB)</i>	Appellate Body Report, <i>United States—Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R, adopted 22 July 2014
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , p. 23, DSR 1996:1
<i>US – Offset Act (Byrd Amendment) (AB)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, adopted 27 January 2003

<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:1, 323
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I. INTRODUCTION

1. The United States has demonstrated that Guatemala has breached its obligations under Article 16.2.1(a) of the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”) by failing to effectively enforce its labor laws, through a sustained and recurring course of inaction, in a manner affecting trade between the Parties.

2. The evidence and arguments establish that Guatemala has breached Article 16.2.1(a) in three ways. First, Guatemala has failed to secure compliance with the law concerning workers wrongfully dismissed for participating in union activities and for pursuing conciliation. Second, Guatemala has failed to enforce the law concerning acceptable conditions of work by not conducting investigations in accordance with the Guatemalan Labor Code and regulatory Protocol of Best Practices for Inspections in Guatemala to determine if employers are complying with the law and by not imposing the requisite penalties when the Ministry of Labor has identified employer violations. Third, Guatemala has failed to provide workers with their rights to organize and bargain collectively, and has failed to accord access to important enforcement mechanisms, by not registering unions or instituting conciliation processes within the time required by law.

3. The United States has shown that these failures involve workers at over a dozen companies, each in one of four of Guatemala’s important exporting sectors: shipping, apparel, steel, and agriculture. The labor laws not being effectively enforced are directly related to the right of association, the right to organize and bargain collectively, and the right to acceptable conditions of work. As a result of Guatemala’s enforcement failures, workers are deprived of these internationally recognized rights under Guatemalan law in a manner affecting trade between the Parties.

4. With respect to each of the three groups of failures, the United States has demonstrated a *prima facie* case as to each of the elements of Article 16.2.1(a).

5. In response, Guatemala has presented implausible legal interpretations and irrelevant facts that do not address the issues pertinent to the Panel’s analysis under Article 16.2.1(a) of the CAFTA-DR. For each element of the CAFTA-DR standard, Guatemala advances interpretations that have no basis in the ordinary meaning of the terms of Article 16.2.1(a) in their context and in light of the object and purpose of the CAFTA-DR. As will be shown in detail below, Guatemala’s arguments are not sufficient to rebut the U.S. *prima facie* case.

6. In Part II of this submission, the United States discusses Guatemala’s complaints regarding the evidence in this proceeding and how Guatemala’s evidentiary challenges are unavailing.

7. Part III returns to the meaning of each of the provisions of Article 16.2.1(a) of the CAFTA-DR and why the interpretations that Guatemala proposes are in error.

8. Parts IV, V, and VI show that Guatemala has failed to rebut the U.S. *prima facie* case as to the specific failures by Guatemala to effectively enforce its labor laws, and that these failures

have occurred through a sustained and recurring course of inaction, and in a manner affecting trade.

9. Finally, Part VI responds to Guatemala’s remaining contentions about the sufficiency of the U.S. panel request.

II. THE EVIDENCE PRESENTED BY THE UNITED STATES SUPPORTS A PRIMA FACIE CASE OF INCONSISTENCY WITH ARTICLE 16.2.1(A)

10. Much of Guatemala’s defense in this dispute is premised on a view that many of the U.S. exhibits suffer from evidentiary defects that render them insufficient to establish a *prima facie* case for any of the U.S. claims.¹ Guatemala argues that many of the U.S. exhibits should be given no probative value or weight because certain personally identifiable information has been redacted. Guatemala’s defense is without merit.

11. To establish a *prima facie* case, the party asserting a particular claim must adduce evidence sufficient to raise a presumption that what is claimed is true.² As explained by the CAFTA-DR dispute settlement panel in *Costa Rica v. El Salvador – Tariff Treatment*, a panel must establish and evaluate the case based on *prima facie* evidence presented by the parties.³ The complaining party cannot establish the existence of a fact based on simple assertions, conjectures, assumptions or remote possibilities.⁴ The precise amount and type of evidence that will be required to establish a *prima facie* case “will necessarily vary from measure to measure, provision to provision, and case to case.”⁵ For example, “[d]epending on the circumstances of a particular case, a single piece of evidence may constitute sufficient proof” to establish a claim or fact.⁶

12. Once the complaining party establishes its *prima facie* case, “the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.”⁷ Thus, if a panel finds that the complaining party has established a *prima facie* case, the responding party must sufficiently rebut those claims to prevail. It is in the discretion of the panel to weigh the evidence presented by the parties and to select the evidence it relies upon to establish certain

¹ Guatemala’s Initial Written Submission, paras. 3, 7.

² *Rules of Procedure for Chapter Twenty of the Dominican Republic-Central America-United States Free Trade Agreement*, Rule 65. See also, e.g., Appellate Body Report, *US – Wool Shirts and Blouses*, WT/DS33/AB/R, adopted 23 May 1997, p. 14. As the United States has noted previously, while not binding, the findings of other international tribunals, such as World Trade Organization (“WTO”) dispute settlement body findings, may provide helpful guidance to the Panel in this dispute. U.S. Initial Written Submission, para. 99.

³ Final Arbitral Panel Report, *Costa Rica v. El Salvador—Tariff Treatment for Goods Originating from Costa Rica*, CAFTA-DR/ARB/2014/CR-ES/18, 18 November 2014, para. 4.145, available at https://www.tradelab.org/notice_board/CS_SV_01_docs.html.

⁴ Final Arbitral Panel Report, *Costa Rica v. El Salvador—Tariff Treatment*, para. 4.145.

⁵ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

⁶ Appellate Body Report, *Argentina-Measures Affecting the Importation of Goods*, WT/DS438/AB/R, adopted 26 January 2015, para. 5.176.

⁷ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

facts.⁸ Whether any particular element or proposition has been proven “depends not just on [a party’s] own evidence but on the overall assessment of the accumulated evidence put forward by one or both parties, for the proposition or against it.”⁹

13. The United States maintains that Guatemala’s failure to effectively enforce its labor laws has occurred through a sustained and recurring course of inaction. Inaction, by its nature, likely will not be reflected in government documents. That is, an absence of corrective action on the part of the government to bring a private party into compliance with the law is unlikely to be documented in any government record. One form of inaction is ineffective action, wherein the action undertaken is not sufficient to result in achieving compliance. Ineffective action is also unlikely to be apparent from any government record. No document may exist to show that an inspector failed to carry out his or her inspection duties in a manner that directly confronts and resolves the concerns of workers. Given these considerations, statements of personal knowledge may be among the only documents to demonstrate inaction.

14. In its Initial Written Submission, the United States put forward 160 exhibits, comprising statements from 46 workers across the textile, steel, palm oil, coffee,¹⁰ rubber, and stevedore industries with first-hand knowledge of the relevant events: records issued by Guatemalan government entities, and documents submitted to Guatemala by workers, among others. The individuals who offered sworn statements and provided materials to the United States did so on the condition that the United States would not disclose the workers’ identities in this proceeding, out of concern for their personal safety. Such concern is well-founded, given that reprisals by employers and violence against workers seeking to pursue their labor rights are an ongoing concern in Guatemala.¹¹

⁸ Appellate Body Report, *Argentina-Measures Affecting the Importation of Goods*, para. 5.176.

⁹ *Rompotrol Group N.V. v. Romania*, Award, ICSID Case No. ARB/06/3, 16 May 2013, para. 178.

¹⁰ Many of the coffee farms also produce bananas and sugar. Statement of FFFF (March 22, 2010), p. 3 (USA-162).

¹¹ According to a 2013 report by the International Trade Union Confederation, “Guatemala has become the most dangerous country in the world for trade unionists Since 2007, at least 53 union leaders and representatives have been killed. In addition, there have been numerous acts of attempted murder, torture, kidnapping, break-ins and death threats, which have created a culture of fear and violence where the exercise of trade union rights becomes impossible.” *Countries at Risk: Violations of Trade Union Rights*, p. 20 (USA-189) available in English at http://www.ituc-csi.org/IMG/pdf/survey_ra_2013_eng_final.pdf; available in Spanish at http://www.ituc-csi.org/IMG/pdf/survey_ra_2013_es_final.pdf. The International Labor Organization (“ILO”) Committee of Experts on the Application of Conventions and Recommendations (“CEACR”) has noted “with regret that for a number of years, like the Committee on Freedom of Association (“CFA”), it has been dealing with allegations of serious acts of violence against trade union officials and members, and the related situation of impunity. The Committee again . . . notes with deep concern that the allegations are extremely serious and include numerous murders (58 murders have been examined so far by the CFA since 2004) and acts of violence against trade union leaders and members, in a climate of persistent impunity.” Sixteen additional murders have been reported since 2013. ILO Website, available in English at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3190227,en:NO; available in Spanish at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3190227,es:NO.

15. This Panel has determined that the submission of redacted or anonymous documents is permissible under the Rules of Procedure for Chapter Twenty of the CAFTA-DR.¹² In its *Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence of February 26, 2015*, the Panel confirmed that under Chapter 20 of the CAFTA-DR, a disputing party has the “prerogative to submit such evidence as it sees fit in support of its position.”¹³

16. Irrespective of personally identifiable information having been protected, each of the U.S. exhibits at issue establishes a factual foundation for the instances set out in the U.S. Initial Written Submission and further detailed in this rebuttal submission in which Guatemala failed to effectively enforce its labor laws. The United States supported these statements with contemporaneous documents from judicial and administrative bodies.

17. First, in demonstrating that Guatemala has failed to secure employers’ compliance with court orders directing the reinstatement of workers improperly dismissed for union activities or for pursuing conciliation, the United States has put forward reinstatement orders issued by Guatemalan courts with accompanying statements by the workers attesting to their non-reinstatement; other court decisions, correspondence and investigatory documents from the Ministry of Labor, and correspondence from unions reflecting the efforts of workers to ask the government to enforce the law; and written analysis from a labor lawyer in Guatemala confirming that the Guatemalan labor laws had not been enforced. The fact that personally identifiable information was not included for the protection of the workers or other individuals involved does not diminish the value of this evidence. Rather, on its face and as a whole, this evidence establishes Guatemala’s failure, through a sustained and recurring course of inaction, to effectively enforce its labor laws directly related to the right of association and right to organize and bargain collectively.

18. Second, in showing that Guatemala has failed to conduct inspections and impose penalties required by law with respect to acceptable conditions of work, the United States put forward statements from workers attesting to the conditions of their workplace and their personal knowledge of either lack of government inspections or insufficient inspections, formal labor complaints filed by workers and unions, and correspondence and investigatory documents from the Ministry of Labor reflecting the efforts of workers to ask the Ministry to enforce the law. This evidence demonstrates Guatemala’s failure, through a sustained and recurring course of ineffective action and inaction, to effectively enforce its labor laws directly related to acceptable conditions of work. Guatemala has not shown that the omission of the individuals’ identities undermines the probative value of these exhibits.

19. Third, in establishing that Guatemala has failed to register unions or institute the conciliation process in a timely fashion to address worker concerns, the United States provided formal complaints filed by workers, union formation documents, copies of the official gazette

¹² *Panel’s Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence*, February 26, 2015, paras. 37-44.

¹³ *Panel’s Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence*, February 26, 2015, para. 41.

publishing the formation of unions, conciliation documents, and statements by workers attesting to administrative and judicial delays. This evidence demonstrates Guatemala’s failure, through a sustained and recurring course of inaction, to effectively enforce its labor laws directly related to the right of association, to the right to organize and bargain collectively, and to acceptable conditions of work. The names of the workers and other individuals involved are not necessary to establish this failure.

20. The evidence presented by the United States is not only appropriate to prove these failures, but it is likely the only evidence that may exist to show such inaction. For each group of failures, the evidence submitted by the United States is sufficient to demonstrate a *prima facie* case of Guatemala’s breach of its obligations under Article 16.2.1(a).

21. Here, once the United States made a *prima facie* showing of its claims, the burden shifted to Guatemala, “who will fail unless it adduces sufficient evidence to rebut the presumption.”¹⁴ In many instances, however, rather than advancing evidence to show that Guatemala is ensuring employers’ compliance with court orders, conducting inspections, imposing obligatory penalties, timely registering unions, and properly instituting the conciliation process, evidence that Guatemala is in a position to have and produce, Guatemala principally responds by challenging the sufficiency of the U.S. exhibits based on the protection of personally identifiable information. As described above, however, this approach does nothing to cast doubt on the probative value of the U.S. evidence.

22. Guatemala claims that the lack of case numbers and personally identifiable information prevents it from confirming the authenticity and credibility of the documents, and as a result, the documents cannot be trusted.¹⁵ Guatemala also claims that it is impossible “to determine whether the witnesses making the statements are real, whether their testimony was spontaneous, or whether they have been employees of the companies targeted by the United States’ claims.”¹⁶ Guatemala’s suspicions, however, are unwarranted.

23. The materials submitted by the United States bear the indicia of credibility, veracity, and reliability that would be expected of authentic documents created contemporaneously to the events described therein. For example, the labor court documents bear the official stamps of the court, the jurisdiction of the court, the court docket number, and often the name and signature of the Guatemalan judge overseeing the proceedings.¹⁷ The documents from the Guatemalan administrative agencies bear letterhead markers, the official stamps of the agency, and the names and signatures of the administrative personnel associated with the documents.¹⁸ Further, the U.S. exhibits contain other identifying information such as dates, the names of employers, locations,

¹⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

¹⁵ Guatemala’s Initial Written Submission, paras. 165–179.

¹⁶ Guatemala’s Initial Written Submission, para. 168.

¹⁷ *See, e.g.*, Reinstatement Order (November 22, 2006) (USA-74); Reinstatement Order (August 8, 2007) (USA-75); and, Reinstatement Order (August 9, 2007) (USA-76).

¹⁸ *See, e.g.*, Ministry of Labor Letter regarding the union confederation UNSITRAGUA to B (January 21, 2009) (USA-56); Response from Ministry of Labor listing inspections of African Palm companies (March 20, 2014) (USA-105); Ministry of Labor Resolution approving formation of executive committee (February 7, 2013) (USA-151); and Ministry of Labor Resolution approving registration of union (September 20, 2012) (USA-153).

and detailed descriptions of worksites or events that had an impact on the workers' employment that also speak to their authenticity.¹⁹

24. Each worker or attorney affirmed that after dictating his or her statement, he or she reviewed the statement, or that the statement had been read to him or her, and that the facts described therein are true and correct to the best of their knowledge and understanding. Each worker or attorney then signed his or her statement attesting, often to attorneys who are obligated under principles of professional responsibility to act with integrity, that every statement was correct and true to the best of his or her knowledge.

25. As an additional measure, the United States asked the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”)²⁰ to conduct an independent review of unredacted versions of the materials the United States has submitted in this proceeding. The Secretary-General has confirmed that, among other confirmations, the lettering system devised by the United States, which identified each worker anonymously through one or more letters, was applied accurately and consistently throughout the documents submitted by the United States. For example, where the United States refers to a statement as having been provided by Worker B and also refers to a judicial proceeding as having involved Worker B, the Secretary-General reviewed unredacted versions of these documents and confirmed that the statement and the judicial proceeding both refer to the same named individual. The results of the Secretary-General's review are provided to Guatemala and the Panel as part of this rebuttal submission²¹ to further reflect that the Panel and Guatemala may rely upon the information provided in the U.S. exhibits as being true and accurate.

26. Guatemala also suggests that the workers' statements are biased because the workers are often parties to a “domestic dispute” and “have their own views, interests and expectations about the outcome” of such matters.²² As a result, Guatemala claims that the workers “have an incentive to make self-serving comments and statements”²³ in this proceeding.

27. This argument is unsupported on a number of levels. Guatemala provides no description of the domestic disputes to which it refers. To the extent Guatemala intends to refer to civil

¹⁹ See, e.g., Statement of G (May 31, 2014) (USA-7), in which Worker G's statement and supplemental court documents jointly provide the relevant dates, the employer's name, description, and location, as well as a full description of the labor dispute at issue.

²⁰ The International Centre for Settlement of Investment Disputes (“ICSID”) is an international arbitration institution, and member of the World Bank Group, which facilitates legal dispute resolution and conciliation between international investors and States. Guatemala and the United States are parties to the ICSID Convention, the instrument that governs the institution and its proceedings. Guatemala has litigated three cases using ICSID's administrative services, two of which took place under the CAFTA-DR.

²¹ The United States provided ICSID with the identification key that assigned each worker with one or more letters as an identification marker. The United States then provided ICSID with unredacted copies of the worker statements, reinstatement orders, and other U.S. exhibits bearing the names of workers. The United States asked ICSID to confirm, among other things, that the letter or letter combination assigned for each worker was accurately and consistently applied by the United States. See Declaration of the ICSID Secretary-General (March 11, 2015) (USA-170); File of redacted exhibits provided to the ICSID Secretary-General (USA-188).

²² Guatemala's Initial Submission, para. 170.

²³ Guatemala's Initial Written Submission, para. 170.

actions between employers and workers before the labor courts, Guatemala’s argument has no legal basis. This proceeding is between two State Parties involving claims of a breach of the CAFTA-DR. The outcome of this proceeding bears no consequences for any pending civil action. This Panel cannot bind the labor courts or administrative bodies of Guatemala. Similarly, this Panel cannot award personal relief to any individual. Thus, any suggestion that workers are providing information with the intent of personal or financial gain would also be misplaced.

28. It is counterintuitive that workers, who have faced great personal risk to their physical safety and economic livelihood in affiliating themselves with unions and other organizing activities, would be inclined to come forward unnecessarily for this proceeding only to invent unrealistic anecdotes. In the course of advocating for their rights, some workers have noted that they have faced homicide attempts and threats.²⁴ In some instances, workers have notified the Ministry of Labor about such incidents, but authorities failed to respond.²⁵ The risk the workers have undertaken by assisting in this proceeding, even without revealing their names, casts doubt on Guatemala’s claim that they would come forward in a self-serving manner.

29. Finally, Guatemala challenges the legibility of certain U.S. exhibits.²⁶ The United States acknowledges that, due to the condition of the original documents or the manner in which they were scanned and transmitted to the United States, certain portions of the exhibits are difficult to read. The United States has endeavored to locate and provide replacement pages for the 19 pages which it agrees are, in part, difficult to read. Further, the United States has provided 23 pages to replace those that were cut off or poorly contrasted by the scanner.²⁷ The United States disagrees with Guatemala that the following exhibits contain illegible pages: USA-9, USA-16, USA-60, USA-61, USA-68, USA-69, USA-72, USA-108, USA-111, USA-126, USA-132, USA-133, USA-134, USA-146, USA-150, USA-152.

30. The United States did not advance these documents as the sole source of evidence for its claims. Most of these documents were part of a larger collection of documents transmitted by the workers, and the United States provided these documents out of a measure of completeness. The significance or content of the illegible portions is often readily ascertainable from the surrounding evidence. Regardless, each claim advanced by the United States is supported by information contained in clear, understandable documents.

31. Therefore, as shown in detail below, Guatemala has not raised sufficient argumentation or evidence to rebut the *prima facie* case established by the United States in its Initial Written Submission. In the following Parts, the United States will describe how Guatemala’s alternative arguments are misplaced and misleading.

²⁴ Supervisors at their worksite threatened these workers, giving them three days to renounce their membership in the union. Statement of GGGG (March 24, 2010) (USA-163); Second Statement of GGG (April 14, 2010) (USA-178); Statement of HHHH (April 20, 2010) (USA-177); Movimiento Sindical, Indígena y Campesino Guatemalteco (“MSICG”) Demand Against Threats (September 2, 2010) (USA-190).

²⁵ Statement from GGGG (March 24, 2010) (USA-163).

²⁶ Guatemala’s Initial Written Submission, paras. 165–167.

²⁷ Replacement exhibits for USA-27, USA-28, USA-37, USA-46, USA-83, and USA-119 are presented with this rebuttal submission.

III. GUATEMALA MISCONSTRUES THE CAFTA-DR STANDARD

32. To show a breach of Article 16.2.1(a) of the CAFTA-DR, the text requires a Party to establish that:

- 1) the laws in question are “labor laws” within the meaning of the CAFTA-DR;
- 2) the responding Party has failed to effectively enforce those laws;
- 3) the responding Party’s failure occurs through a sustained or recurring course of action or inaction; and,
- 4) the failure has occurred in a manner affecting trade between the Parties.

Guatemala develops in its Initial Written Submission a set of interpretations that would in effect require a complaining party to show additional elements not found in the text, including a blatant and deliberate government policy to breach Article 16.2.1(a).²⁸ Such a legal standard is at odds with a proper interpretation of the provision and would all but preclude a successful challenge to a government’s failure to effectively enforce its labor laws.

33. In short, Guatemala’s reconstruction of the legal standard in Article 16.2.1(a) is erroneous and inappropriate. The following sections take up each element of the standard.

A. THE LAWS AT ISSUE ARE “LABOR LAWS” UNDER ARTICLE 16.8

34. The Parties to the CAFTA-DR have committed not to fail to effectively enforce their respective “labor laws.” Article 16.8 defines “labor laws” for purposes of Chapter 16 as “a Party’s statutes or regulations, or provisions thereof, that are directly related to” the relevant internationally recognized labor rights. The term “statutes or regulations” is also defined for purposes of Chapter 16. With respect to Guatemala, that phrase refers to “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.”²⁹

35. There is no question that the provisions of the Guatemalan Labor Code and regulatory Protocol of Best Practices for Labor Inspections (“Inspection Protocol”) are “labor laws” as defined in Chapter 16. These are statutes and regulations that contain provisions directly related to at least three of the five internationally recognized labor rights set out in Article 16.8 at issue in this dispute: the right of association, the right to organize and bargain collectively, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

36. Guatemala confuses the issue, however, by trying to limit the scope of application of Article 16.2.1(a) to only those failures involving enforcement actions carried out by “entities

²⁸ Guatemala’s Initial Written Submission, para. 118.

²⁹ CAFTA-DR, Art. 16.8.

belonging to the executive branch of government.”³⁰ Guatemala relies on the phrase “enforceable by action of the executive body” in the definition in Article 16.8 of “statutes or regulations” with respect to Guatemala. Guatemala argues that this phrase limits the failures referenced in Article 16.2.1(a) to failures by the executive body. As a result, Guatemala argues that the only enforcement action or inaction that can form the basis for a claim in this dispute is action taken (or not taken) by the Guatemalan executive body. This interpretation is contrary to the plain reading of the text and the context of the provision, as well as the object and purpose of the CAFTA-DR. The United States will take up Guatemala’s misplaced attempt on limiting the realm of enforcement actions relevant to this dispute below.

37. With respect to whether the laws at issue in this dispute are “labor laws,” however, we note that each of the Articles of the Labor Code and each provision of the regulatory Inspection Protocol that the United States has presented in its Initial Written Submission fall squarely within the definition set out in Article 16.8 as they are “directly related to” the right of association, to the right to organize and bargain collectively, and to acceptable conditions of work, and are “laws of [Guatemala’s] legislative body or regulations promulgated pursuant to an act of its legislative body that are enforceable by action of the executive body.” Guatemala does not dispute that all labor laws in Guatemala are enforceable by its executive body.³¹

B. GUATEMALA ADVOCATES AN INAPPROPRIATE LIMIT ON ENFORCEMENT ACTORS

38. Each Party to the CAFTA-DR has committed to take those actions necessary to compel compliance with its labor laws so as to enforce those laws with substantial effect or result. Where a Party’s enforcement undertakings do not achieve remediation of labor law violations, that Party has failed to effectively enforce its labor laws.³²

39. Guatemala agrees that effective enforcement requires compelling compliance with the law.³³ However, Guatemala nevertheless urges an interpretation of Article 16.2.1(a) that cannot be sustained. Guatemala argues that Article 16.2.1(a) is limited to failures to effectively enforce labor laws attributed to entities of its executive branch only. This overly restrictive scope is unsupported by the text, context, and object and purpose of the CAFTA-DR and seriously undermines the concept of effective enforcement.

40. Article 16.2.1(a) does not require that the Guatemalan state actors involved in the course of action or inaction be part of the executive branch. Rather, the “enforcement” action or lack thereof under Article 16.2.1(a) can be carried out by any branch of government. Guatemala confuses the issue by referring to Article 16.8. Article 16.8 serves only to define which statutes or regulations fall within the definition of “labor laws.” Once a statute or regulation is within the definition of “labor law,” then the obligation under Article 16.2.1(a) applies to that law, and Guatemala is under an obligation not to fail to ensure that the law is effectively enforced. The

³⁰ Guatemala’s Initial Written Submission, para. 118.

³¹ Guatemala’s Initial Written Submission, para. 101 (“The Executive is responsible for enforcing Guatemala’s Constitution and labor laws.”).

³² U.S. Initial Written Submission, para. 32.

³³ Guatemala’s Initial Written Submission, paras. 121–123.

phrase, “enforceable by the executive body,” does not exclude the ability of a Party to enforce that labor law by bodies other than the executive body. Thus, Article 16.2.1(a) could encompass any type of enforcement action or inaction, which necessarily must include court conduct and punitive measures undertaken by the Public Ministry.

41. Put differently, Article 16.2.1(a), and the phrase “effectively enforce” in particular, do not give any guidance as to how they meet this obligation. In some instances, “effective” enforcement may require concerted action by several government actors: law enforcement investigators, prosecutors, administrative or judicial bodies, and other officials. Guatemala highlights this point in noting that Article 16.2.1(b)³⁴ grants the Parties discretion “with respect to investigatory, prosecutorial, regulatory, and compliance matters.”³⁵ Thus, Article 16.2.1(a) allows each CAFTA-DR Party to undertake enforcement in the way it chooses, including through the use of the judiciary or independent branch.

42. Guatemala’s contextual argument that Article 16.2.1(b) and Article 16.3 “confirm[] that the drafters did not intend to include actions or inactions by judicial entities within the scope of 16.2.1(a)” is unpersuasive.³⁶ Guatemala maintains that Article 16.2.1(b) “provides a closed list of matters falling with [sic] the concept of enforcement.”³⁷ The text of the Article indicates otherwise. Article 16.2.1(b) speaks only to the scope of a Party’s discretion. It does not set limits on the areas or types of enforcement, let alone types of enforcement relevant to Article 16.2.1(a). In any event, the term “compliance matters” in Article 16.2.1(b) would encompass judicial action.

43. Further, Article 16.3 *confirms* rather than rejects the proposition that judicial actors are subject to the requirement of effective enforcement. Nearly every provision of Article 16.3 speaks to the enforcement of labor laws by tribunals, requiring in Article 16.3.1 that each Party to the CAFTA-DR shall ensure that persons “have appropriate access to tribunals *for the*

³⁴ CAFTA-DR, Art. 16.2.1(b) states:

Each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.

³⁵ Guatemala’s Initial Written Submission, para. 142. Guatemala’s further argument that Article 16.2.1(b) requires that a panel evaluate conduct “against Article 16.2.1(b)” before a panel evaluates conduct under Article 16.2.1(a) is unfounded. Nothing about Article 16.2.1(b) suggests that it requires a panel to carry out an initial evaluation of a party’s use of discretion before turning to the elements of Article 16.2.1(a). Likewise, nothing about Article 16.2.1(b) suggests that the threshold for showing a breach of Article 16.2.1(a) is “high” or that it requires an “abuse of discretion,” as Guatemala contends. Guatemala’s Initial Written Submission, para. 144. In any event, the volume of evidence in the record of Guatemala’s failure to effectively enforce its labor laws cannot reflect an appropriate exercise of discretion. Nor could it have resulted from a *bona fide* decision regarding the allocation of resources. The sustained and recurring course of inaction presented here far exceeds the constellation of any reasonable exercise of discretion or resource allocation.

³⁶ Guatemala’s Initial Written Submission, para. 147.

³⁷ Guatemala’s Initial Written Submission, para. 144.

enforcement of the Party’s labor laws.”³⁸ These tribunals may include “administrative, quasi-judicial, judicial or labor tribunals.” Thus, Article 16.3 indicates that the Parties anticipated that labor courts and other adjudicative bodies could and would enforce a Party’s labor laws.

44. The object and purpose of the CAFTA-DR reinforce the same interpretation by focusing on achieving protection and enforcement for workers, without qualification. The Preamble memorializes the Parties’ resolution to “[protect], enhance, and enforce basic workers’ rights” without limitation with respect to mechanism or agent.

45. Guatemalan law provides for enforcement of Guatemalan labor laws by the Ministry of Labor, the Public Ministry, and the labor courts.³⁹ To adopt Guatemala’s interpretation would result in outcomes that cannot be reconciled with the text of Article 16.2.1(a). Considering that nearly all enforcement actions that may be carried out by the executive body could eventually be the subject of a court or Public Ministry proceeding, Guatemala’s interpretation suggests that Article 16.2.1(a) only addresses enforcement up to a particular point -- the exhaustion of administrative remedies. That surely is not effective enforcement.

46. Each of the laws that Guatemala has failed to effectively enforce is enforceable by the executive branch, among others. The ineffective actions and inactions of each of the entities that the United States has identified – the Ministry of Labor, as well as the courts and the Public Ministry – fall within the scope of Article 16.2.1(a). As described in greater detail with respect to each claim below, for Guatemala to effectively enforce its labor laws, it must act to correct behavior in violation of those laws, whether through remediating action or by facilitating resolution through timely processes as set out in its Labor Code or other statutes and regulations. The Parts below explain why, having not presented any evidence or arguments sufficient to do so, Guatemala has not rebutted the *prima facie* case established by the United States.

C. “A SUSTAINED OR RECURRING COURSE” DOES NOT IMPLY A DELIBERATE POLICY

47. Article 16.2.1(a) requires that a failure to effectively enforce a Party’s labor laws must occur through a “sustained or recurring course of action or inaction.” Although the Parties do not disagree as to the ordinary meanings of the terms of the phrase, Guatemala then assigns the phrase a meaning that departs from those agreed definitions. In so doing, Guatemala adds an element to the Article not there on its face. Going above and beyond the plain text, Guatemala argues that “sustained or recurring course of action or inaction” also requires a showing that these actions or inactions were “taken pursuant to a deliberate policy of neglect.”⁴⁰ Guatemala’s

³⁸ Emphasis added. Guatemala also argues that Article 16.3.8 “provides additional confirmation that judicial actions or inactions are not intended to be reviewed under Article 16.2.1(a).” Guatemala’s Initial Written Submission, para. 149. In fact, the text of Article 16.3.8 clarifies only that the CAFTA-DR is not intended for one Party to seek to revise or reopen judicial or administrative tribunals of another Party. Nowhere does the United States suggest that the Panel has such authority. Rather, the legal standard is “effective enforcement” and requires the Panel to review enforcement actions or inactions, which, in the case of Guatemala, includes actions or inactions by the labor courts.

³⁹ Guatemala appears to make reference to “[j]udicial enforcement” in describing the organization of its labor courts. See Guatemala’s Initial Written Submission, Subheading 3. “Judicial enforcement of a labor union,” between paras. 108–109.

⁴⁰ Guatemala’s Initial Written Submission, para. 118.

interpretation has no basis in the text of Article 16.2.1(a), and is based instead on a misplaced analysis of the phrase “sustained or recurring course.” Rather, a “sustained or recurring course” refers simply to continuing or repeated conduct.⁴¹

48. The disputing Parties both present definitions of “sustained” as meaning “continuing,” and of “recurring” as meaning “occurring again, periodically.”⁴² Guatemala emphasizes that implicit in these two terms is the idea of “prolonged” conduct because, according to Guatemala, it would otherwise be impossible to detect repetition.⁴³ “Prolonged” was also part of a definition the United States advanced of “sustained,”⁴⁴ though, in the view of the United States, “prolonged” does not carry the connotation that Guatemala suggests. In this context, neither “sustained” nor “recurring” requires conduct to occur over a “prolonged period” – a period that Guatemala does not define, but which implies an extension of considerable length, along the line of several years. While the instances of failures described by the United States in this case do span several years, such a period of time would not be necessary to satisfy the “sustained or recurring” element of Article 16.2.1(a) as a matter of law. On the plain meanings of the terms, a course of action or inaction could be “sustained” over the course of any segment of time – e.g., a few months, a year, or more – while an action or inaction may likewise “recur” merely twice. The precise contours of the “sustained or recurring” standard in a particular factual scenario therefore must be evaluated on a case-by-case basis. That is, depending on the type of enforcement action, one might expect to see a higher or lower degree of frequency of conduct.

49. Guatemala also argues that, under Article 15 of the International Law Commission Draft Articles on State Responsibility (“ILC Draft Articles”),⁴⁵ Article 16.2.1(a) is a “composite obligation” which begins with the first act or omission continuing through the last. Thus, according to Guatemala, to succeed in showing a breach, “it must be established that the defending Party engaged in a series of deliberate actions or inactions.” Article 16.2.1(a) does require a showing of a course of action or inaction; however, recourse to the ILC Draft Articles is unnecessary to reach this conclusion which is plain from the text.⁴⁶ There is no basis to then add to the text the concept of a “composite” obligation.

⁴¹ U.S. Initial Written Submission, paras. 87–90.

⁴² Guatemala’s Initial Written Submission, para. 130; U.S. Initial Written Submission, paras. 88–89.

⁴³ Guatemala’s Initial Written Submission, para. 131.

⁴⁴ U.S. Initial Written Submission, para. 88 (citing Webster’s Third New Int’l Dictionary, Unabridged (2003), definition of “sustained”: “maintained at length without interruption, weakening, or losing in power or quality: prolonged, unflagging”).

⁴⁵ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Nov. 2001, Supp. No. 10 (A/56/10), chp.IV.E.1.

⁴⁶ The purpose of Article 15 of the ILC Draft Articles as can be seen in the commentary to the Articles to which Guatemala refers is to show “when” something occurs – it sheds no light on anything other than the jurisdiction *ratione temporis* of a dispute resolution body. There is no question as to the jurisdiction *ratione temporis* of the Panel in this matter. The Panel has jurisdiction over any acts or omissions of Guatemala beginning from the date on which the CAFTA-DR came into force: July 1, 2006. See James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES*, Chapter 15 (Cambridge Univ. Press) (2002).

50. Contending that the phrase requires a showing of a “consistent *and* repeated series,”⁴⁷ Guatemala also neglects the word “or” between “sustained” and “recurring.”⁴⁸ The CAFTA-DR uses the disjunctive “or” between these terms, indicating that a failure could be either sustained or recurring, and need not be both.⁴⁹ However, if supported by the facts, as here, a course of action or inaction in practice could be both sustained and recurring.

51. In analyzing the term “course,” the disputing Parties find common ground in understanding the term to mean “conduct” or “a person’s method of proceeding,” according to contemporaneous dictionaries.⁵⁰ Guatemala also puts forward the meaning “the way in which something progresses or develops,” which the United States finds to be apt. These meanings, as well as the word “recurring,” indicate a degree of relatedness among the actions or inactions that makes up the course. Here, the instances of failures by Guatemala are connected in that they each relate to the failure to enforce particular laws. The United States has presented three groups of failures each of which constitutes a course of inaction or ineffective action to enforce a collection of statutes and regulations.

52. What Guatemala fails to explain, however, is how it derives “a deliberate policy of action or inaction adopted by [a] Party”⁵¹ from definitions of “course” referring to conduct and development. Nothing about the meaning of the word “course” indicates that the Parties intended to address “deliberate polic[ies]” by governments aimed at failing to effectively enforce the law. Nor can that interpretation be derived from the surrounding words in Article 16.2.1(a). Such an interpretation effectively would read into Article 16.2.1(a) a requirement of bad faith and is directly contrary to the customary rules of interpretation reflected in the *Vienna Convention on the Law of Treaties*.⁵²

53. In its discussion of the context of Article 16.2.1(a), Guatemala asserts that “Article 16.2.2 reinforces the conclusion that Article 16.2.1(a) requires the showing of a *deliberate policy* by the challenged government.”⁵³ To the contrary, Article 16.2.2 reinforces the U.S. position that subjective intent does not form part of the obligation of Article 16.2.1(a). Article 16.2.2 states the Parties’ recognition that “it is inappropriate *to encourage* trade or investment by weakening or reducing the protections afforded in domestic labor laws.”⁵⁴ The provision goes on to provide an aspirational obligation that the Parties “not waive or otherwise derogate from, or *offer to waive or otherwise derogate from*” their domestic labor laws “*as an encouragement* for trade with another Party, or *as an encouragement* for . . . an investment in its territory.”⁵⁵ That is,

⁴⁷ See, e.g., Guatemala’s Initial Written Submission, paras. 118, 140. Emphasis added.

⁴⁸ To confirm, the CAFTA-DR uses the word “or” in Article 16.2.1(a), despite Guatemala’s quoting it as “and.” Guatemala’s Initial Written Submission, paras. 125, 126.

⁴⁹ The United States explained how the two terms differ in the U.S. Initial Written Submission, para. 89.

⁵⁰ U.S. Initial Written Submission, para. 87; Guatemala’s Initial Written Submission, para. 134.

⁵¹ Guatemala’s Initial Written Submission, para. 135.

⁵² United Nations, *Vienna Convention on the Law of Treaties*, United Nations Treaty Series, vol. 1155, p. 331, (May 23, 1969).

⁵³ Guatemala’s Initial Written Submission, para. 146 (original emphasis).

⁵⁴ Emphasis added.

⁵⁵ Emphasis added.

Article 16.2.2 uses intentional language, expressly referring to actions taken on the part of Parties *as an encouragement* for trade or investment. Article 16.2.1(a), as the United States has shown, does not. Notwithstanding this difference in language, Guatemala attempts to import the requirement of Article 16.2.2 into Article 16.2.1(a), collapsing the two provisions in a way that renders the obligation imposed by Article 16.2.1(a) redundant and without effect. Such an interpretation does not comply with principles of treaty interpretation under customary international law,⁵⁶ and should be rejected by the Panel.

54. Other dispute settlement bodies have wisely “cautioned against” delving into the intent underlying a government measure.⁵⁷ Ascribing any animus to government officials acting in their official capacity would require speculation by the complaining party.⁵⁸ As a result, trade dispute settlement panels have found a government’s intent behind a measure to be “not conclusive” as to whether the measure is inconsistent with the agreement under which the measure is challenged.⁵⁹ This cautionary guidance is particularly relevant to the present action. Demonstrating deliberateness in the course of action or inaction that resulted in Guatemala’s failure to effectively enforce its laws would require the United States to speculate as to the animus for each labor court judge, Ministry official, labor inspector, or other government actor. Such speculation would not be appropriate, let alone required, under Article 16.2.1(a), and further, would not assist this Panel in determining whether Guatemala breached its obligations.

55. Contrary to Guatemala’s contentions, Article 16.2.1(a) requires only that a complaining party demonstrate a continuing or periodic course of action or inaction. The United States has shown both for each of the groups of failures that it has presented.

⁵⁶ Other international tribunals have made similar findings with respect to the interpretation of treaty obligations. See, e.g., Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, p. 23, DSR 1996:1, 3, at 21, in which the Appellate Body found that:

One 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 the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

⁵⁷ Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, para. 1050.

⁵⁸ For example, in the context of a discrimination claim under Article III of the *General Agreement on Tariffs and Trade (1994)*, the Appellate Body found that “[i]t is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent.” Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 27, DSR 1996:I, 97, at 119. Moreover, “there may well be a certain degree of speculation in seeking to establish the intent of a government in the abstract.” Panel Report, *Japan – DRAMs (Korea)*, WT/DS336/R, adopted 17 December 2007, para. 7.104.

⁵⁹ Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, para. 1050. See also Appellate Body Report, *US – Offset Act (Byrd Amendment)*, WT/DS217/AB/R, adopted 27 January 2003, para. 259; Appellate Body Report, *China – Auto Parts*, WT/DS339/340/342/AB/R, adopted 12 January 2009, para. 178, finding that the intent, stated or otherwise, of the legislators is not conclusive as to the characterization of a measure.

D. “IN A MANNER AFFECTING TRADE BETWEEN THE PARTIES” DOES NOT REQUIRE AN INTENTION TO AFFECT TRADE

56. In its initial submission, the United States demonstrated that the phrase “in a manner affecting trade between the Parties” refers to a way of conducting oneself that has a bearing on or influences the conditions of competition that exist with respect to cross-border economic activity between the Parties.⁶⁰ In response, Guatemala offers its own interpretation, through which it attempts to impose several requirements not found in the text of Article 16.2.1(a). Specifically, Guatemala asserts that this phrase sets out “an additional condition” whereby the complaining party must show that the “*intended consequence*” of the Party’s course of action or inaction was to “affect[] trade between the Parties.”⁶¹ Further, Guatemala suggests that “the ‘course of action or inaction’ must have an effect on FTA trade [as] a whole and not simply on bilateral trade flows.”⁶² Guatemala’s interpretation lacks any basis in the text of Article 16.2.1(a) and would impose an all but impossible burden on a complaining party. For the reasons below, these arguments should be rejected by the Panel.

57. As in its arguments with respect to intent in the context of “sustained and recurring,” Guatemala does not provide any evidence or argumentation that would support its proposition that the phrase “in a manner affecting trade” refers to a deliberative government policy. That is not surprising, given that nothing in this phrase supports such an interpretation. To the contrary, according to the plain meaning of the provision, a showing that a Party’s actions or inactions have occurred “in a manner affecting trade” does not require evidence that the responding Party intended through its actions or inactions to affect trade.

58. As the United States has explained, the plain meaning of the term “manner” is a “way of doing something,” or a form of conduct.⁶³ These definitions do not convey any element of deliberateness or intentionality. Rather, the plain meaning indicates only that the course of action or inaction of the responding Party must occur *in a way* that affects trade. The intention of the Party in taking those actions is not dispositive of such a result. It easily can be imagined that a series of actions or inactions could have an effect on trade without that having been the intention of the Party. And Guatemala provides no convincing reason to impose an intentionality requirement where the plain meaning of “in a manner” supports no such condition.

59. Guatemala also errs in arguing that the phrase “in a manner affecting trade” requires that “there must be an existing and continuous relationship of cause and effect.”⁶⁴ While the United States agrees that Article 16.2.1(a) requires a showing that a failure to effectively enforce occurs in a manner affecting trade,⁶⁵ Guatemala suggests that to do so a complaining Party must present evidence of actual trade effects, as well as evidence that those effects have been caused by the

⁶⁰ U.S. Initial Written Submission, para. 103.

⁶¹ Guatemala’s Initial Written Submission, paras. 136, 461 (emphasis added).

⁶² Guatemala’s Initial Written Submission, para. 138.

⁶³ American New Heritage Desk Dictionary, p. 14 (4th ed., 2003).

⁶⁴ Guatemala’s Initial Written Submission, para. 461.

⁶⁵ Indeed, the Parties agree that “affect” means to “influence, make a material impression on.” U.S. Initial Written Submission, para. 97; Guatemala’s Initial Written Submission, para. 136.

responding Party’s course of action or inaction. However, an econometric “before” and “after” analysis of the failure is not required by the text, context or object and purpose of the CAFTA-DR.

60. The meaning of the word “affecting” is supported by the findings of other trade dispute settlement tribunals that have interpreted the word, as the United States discussed in its Initial Written Submission.⁶⁶ The World Trade Organization (“WTO”) panels that have considered the word “affecting” have applied a broad plain text meaning. In particular, the WTO Appellate Body, in commenting on the phrase “affecting trade” in Article 1.1 of the *General Agreement on Trade in Services* (“GATS”),⁶⁷ determined that the phrase covered “any . . . bearing upon conditions of competition . . . regardless of whether the measure directly governs or indirectly affects the supply of the service.”⁶⁸ No actual trade effect need be shown, but rather a demonstration that the course of action or inaction has a “bearing upon” or “influences,” the conditions of competition.

61. Guatemala does not dispute that the Panel may look to WTO reports for guidance in this dispute.⁶⁹ Nor does Guatemala dispute the interpretations of the term “affecting” discussed in the cases raised by the United States. Rather, Guatemala argues that in those disputes the word “affecting” was “central” to the agreement in which it appeared, and that this prompted those panels to apply the word broadly.⁷⁰ In Guatemala’s view, Article 16.2.1(a) is not a “central” obligation because “CAFTA-DR is not a labor agreement, but rather a trade agreement,” and therefore the terms of that provision should be interpreted more narrowly.⁷¹ Guatemala’s proposition is erroneous and untenable.

62. The terms of a treaty obligation are not interpreted according to the subjective importance one party may assign to a particular provision. In this case, the Parties included a Labor chapter in the trade agreement, just as they included a chapter on “National Treatment and Market Access for Goods”⁷² and “Cross-Border Trade in Services,”⁷³ among many others. Nothing in the CAFTA-DR suggests that the Labor chapter is any less important than these other chapters. As noted, the Preamble to the CAFTA-DR states that, through the agreement, the Parties resolve to “Protect, enhance and enforce basic workers’ rights and strengthen their cooperation on labor matters.” This purpose is expressly reflected in the obligation contained in Article 16.2.1(a) requiring that each Party not fail to effectively enforce its labor laws in a manner affecting trade between the Parties. Therefore, the meaning of the terms of this obligation, and its consequent scope, must be understood based on the ordinary meaning of the terms themselves, read in

⁶⁶ U.S. Initial Written Submission, paras. 100–101.

⁶⁷ Article I.1 of the *General Agreement on Trade in Services* provides that “[t]his Agreement applies to measures by Members affecting trade in services.”

⁶⁸ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, adopted 25 September 1997, para. 7.281 (emphasis added). See also GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833, adopted 23 October 1958, para. 12.

⁶⁹ Guatemala’s Initial Written Submission, paras. 64–70.

⁷⁰ Guatemala’s Initial Written Submission, paras. 457–458.

⁷¹ Guatemala’s Initial Written Submission, paras. 457–458.

⁷² See Chapter 3 of the CAFTA-DR.

⁷³ See Chapter 11 of the CAFTA-DR.

context and in light of the object and purpose of the treaty – just as all other terms in the CAFTA-DR, like those in the WTO agreements, must be interpreted.⁷⁴

63. With respect to the meaning of the term “trade,” the disputing Parties agree that “trade” involves “cross border economic activity.”⁷⁵ In Guatemala’s words, trade is “cross-border exchange of goods and services.”⁷⁶ The United States agrees. “[T]rade,” by its ordinary meaning, includes the cross-border exchange of goods and services, and excludes competition among domestic products that have not been exported or imported.⁷⁷

64. Guatemala disagrees with the U.S. view, however, that a failure to enforce labor laws may “affect” such cross-border economic activity within the meaning of Article 16.2.1(a) by changing or influencing the conditions of competition between traded goods. In this respect, Guatemala makes the unsubstantiated assertion that to consider an influence on the “conditions of competition” as an effect on trade would contradict the text, context, object and purpose of Article 16.2.1(a).⁷⁸ However, the concept that a Party’s actions should not unfairly affect the conditions of competition among the Parties is reflected in the very first article of the CAFTA-DR. That is, Article 1 of the CAFTA-DR includes the “objective” to “promote conditions of fair competition in the free trade area.”⁷⁹ Interpreting Article 16.2.1(a) as prohibiting a Party from influencing the conditions of competition between the CAFTA-DR Parties through a failure to effectively enforce its labor laws is consistent with this objective to promote fair competition.

65. The “competition” to which the United States has referred may include competition between the domestically produced goods of “Party A” and the imported goods coming into Party A’s territory from other CAFTA-DR Parties, as well as competition between the exported goods of Party A and the domestically produced goods in the home markets of the other CAFTA-DR Parties for which those exports are destined. When labor laws are not enforced and producers are able to incur decreased labor costs – whether, for example, through avoidance of collective bargaining or the payment of less than the minimum wage – the conditions of competition between those producers and their competitors in the CAFTA-DR region have been altered. And where an entity’s ability to benefit from reduced labor costs is part of a sustained or recurring course of action or inaction with respect to labor law enforcement, the effect on the conditions of competition between the CAFTA-DR Parties results in a breach of Article 16.2.1(a).

66. In Guatemala’s view, while the WTO dispute resolution bodies have considered “conditions of competition” as a manifestation of an influence on trade, they have done so under treaty language that requires a determination of “like products” which the CAFTA-DR does not

⁷⁴ See Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, United Nations Treaty Series, vol. 1869, p. 401 (1994).

⁷⁵ Guatemala’s Initial Written Submission, para. 137. The U.S. Initial Written Submission sets forth a similar definition. U.S. Initial Written Submission, para. 98.

⁷⁶ Guatemala’s Initial Written Submission, para. 138.

⁷⁷ The United States does not adopt a position that, for example, failures to enforce labor laws in areas of the public sector not engaged in trade would fall within the scope of the provision.

⁷⁸ Guatemala’s Initial Written Submission, para. 460.

⁷⁹ CAFTA-DR, Art. 1.2 (emphasis added).

have.⁸⁰ Contrary to Guatemala’s assertion, the WTO Appellate Body has also applied the conditions of competition analysis outside the context of a “like products” analysis. In interpreting Article I.1 of the *GATS*, which governs the scope of that agreement, in *EC—Bananas*, the Appellate Body confirmed that a “conditions of competition” analysis was generally appropriate to address whether a measure at issue is “affecting trade in services.”⁸¹ As not all substantive provisions of the *GATS* involve a likeness determination, it is evident that the Appellate Body did not intend to limit the conditions of competition analysis to determinations of the likeness of goods or services.⁸²

67. Guatemala has presented no valid reason as to why examining changes in the conditions of competition is not an appropriate means by which to evaluate whether conduct may be affecting trade. Rather, such an approach is consistent with an understanding of “trade,” harmonious with the object and purpose of the CAFTA-DR, and has been deployed by other trade dispute panels.

68. Turning to the phrase “between the Parties,” Guatemala claims that the complaining party must show that the course of action or inaction has had an effect on “FTA trade [as] a whole” and not just “bilateral trade flows.”⁸³ To the extent Guatemala is arguing that a complaining party must show an effect with respect to the trade balance of every CAFTA-DR Party, Guatemala is wrong. A correct reading is that trade must be affected between any of the CAFTA-DR Parties, which would necessarily include at least two Parties.

69. In sum, Guatemala’s proposed interpretation of the phrase “in a manner affecting trade between the Parties” reflects requirements not found in the text of the CAFTA-DR or supported by the object and purpose of the agreement. Rather, this phrase encompasses any course of action or inaction by a Party that has a bearing on or influences the conditions of competition with respect to the cross-border exchange of goods and services between two or more CAFTA-DR Parties.

IV. GUATEMALA HAS FAILED TO EFFECTIVELY ENFORCE ITS LABOR LAWS BY NOT COMPELLING COMPLIANCE WITH COURT ORDERS

70. In the first part of the U.S. Initial Written Submission, the United States demonstrated that Guatemala has failed to effectively enforce certain statutes directly related to the “right of association” and the “right to organize and bargain collectively”: Articles 10, 62(c), 209, 223, 379 and 380 of the Guatemalan Labor Code. These Articles protect workers from reprisals by employers for exercising their right of association and right to organize and bargain collectively.

⁸⁰ Guatemala’s Initial Written Submission, para. 459.

⁸¹ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 220; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, para. 7.281.

⁸² For instance, in the *General Agreement on Trade in Services*, Article XVI, which governs specific market access commitments, does not require a like products analysis.

⁸³ Guatemala’s Initial Written Submission, para. 138.

In particular, these provisions prohibit employers from dismissing workers for participating in the formation of a union or for undertaking to resolve collective employment differences through the statutory collective conciliation process.

71. Guatemala failed to effectively enforce these labor laws by not compelling employers' compliance with orders issued by Guatemalan labor courts requiring them to correct their violations of these laws or by otherwise securing compliance. The evidence presented by the United States shows a sustained and recurring course of inaction, in that Guatemala consistently and repeatedly failed to compel compliance with these orders beginning in 2008 and continuing through 2014 and failed to take action that otherwise resulted in compliance. These failures have been carried out in a manner affecting trade between the Parties by reducing the labor costs these cross-border business entities in Guatemala incur.

72. We discuss each of Guatemala's responses to the U.S. case below, and explain why each is legally irrelevant or factually incorrect and therefore fails to rebut the U.S. *prima facie* case.

A. GUATEMALA HAS FAILED TO EFFECTIVELY ENFORCE LABOR CODE ARTICLES 10, 62(C), 209, 223, 379 AND 380

73. As discussed above, the disputing Parties agree that "to enforce" is "to compel observance of or compliance with" and that "effectively" is to do so with "the function of accomplishing or executing."⁸⁴ Putting these terms together in the context of Article 16.2.1(a), a Party shall not fail to compel observance of or compliance with its labor laws so as to achieve observance or compliance.⁸⁵ The United States explained in its Initial Written Submission how Guatemalan law relies upon both the administrative system, through the Guatemalan Ministry of Labor, and the judicial system, through the Guatemalan labor courts, to achieve compliance with Articles 10, 62(c), 209, 223, 379 and 380 of the Labor Code.⁸⁶

74. In responding to the claims of the United States with respect to Guatemala's failures to enforce Articles 10, 62(c), 209, 223, 379 and 380, Guatemala makes three general arguments. First, Guatemala contends that to demonstrate that a Party has failed to effectively enforce its labor laws requires a complaining Party to show a violation of those laws and that the United States has not done so here. Second, Guatemala maintains that enforcement by the courts is irrelevant to the CAFTA-DR standard; thus, there is no factual basis for the U.S. claim to the extent the United States discusses court action or inaction. Third, Guatemala argues that, in respect of the factual scenarios presented by the United States, the Guatemalan labor courts and Public Ministry have taken action to enforce the law and therefore the claim of the United States must fail. As discussed in the sections that follow, none of these arguments is supported by the text of Article 16.2.1(a) or by the facts in the record.

⁸⁴ Guatemala's Initial Written Submission, para. 122; U.S. Initial Written Submission, para. 29.

⁸⁵ Guatemala's Initial Written Submission, para. 123; U.S. Initial Written Submission, para. 29.

⁸⁶ U.S. Initial Written Submission, paras. 34-52.

1. Guatemala's Failures Are Related to Documented Labor Law Violations

75. Before turning to the factual evidence presented by the United States, Guatemala states that, in its view, claims of failure to enforce Articles 10, 62(c), 209, 223, 379, and 380 require the complaining party to demonstrate a violation of those Articles. The United States first notes that not every enforcement scenario will necessarily concern a demonstrated violation of domestic labor law. To the contrary, and as discussed in detail in the U.S. Initial Written Submission and in the next Part of this rebuttal, enforcement of labor laws includes inspections by a government in response to *alleged* labor law violations. Therefore, the premise of Guatemala's argument fails insofar as it suggests a complaining party must always demonstrate a violation of domestic labor law to challenge a Party's enforcement of that law.

76. That being said, with respect to compliance with court orders in particular, the United States in fact has shown a violation of one or more of Articles 10, 62(c), 209, 223, 379, and 380 for every instance of failure with respect to the right of association and right to organize and bargain collectively. That is, every instance presented by the United States is premised on a conclusion by a Guatemalan labor court that one or more of the Articles has been violated by an employer.

77. Guatemala's suggestion that the United States believes inaction by the courts *implies* a violation of the law is a plain misunderstanding of the claim and the facts presented. The United States has shown, rather, that upon a Guatemalan labor court's having found a violation of its law, Guatemala failed to correct the wrong. Put differently, after Guatemala identified an employer's non-compliance with its labor laws, it did not take action to ensure that that employer came into compliance.

78. The United States does not dispute that the Guatemalan labor courts have taken enforcement action in some instances where they have found violations by employers and issued reinstatement orders. For the first group of failures presented by the United States, the United States presented evidence of the issuance of a reinstatement order for each wrongfully dismissed worker. The failure to issue reinstatement orders, however, is not the basis of the U.S. claim. The United States has shown instead that, despite these orders having been issued, many workers were not reinstated to their previous posts and not paid their back wages, nor has the employer paid the ordered fine. The employer remains out of compliance with the labor laws in question. In response to this lack of compliance, however, the government of Guatemala has failed to take further enforcement action. Taking some enforcement steps, such as the issuance of a reinstatement order, is not enough for effective enforcement. To compel compliance with the law, further action was needed to ensure the employer abided by the reinstatement orders, and thereby complied with the labor laws at issue.

79. Here, on numerous occasions, employers have violated Guatemala's labor laws by dismissing or otherwise taking reprisals against workers for exercising their right of association and right to organize and bargain collectively. This violation has been established by an entity of the Guatemalan government, and a remedy has been prescribed. But Guatemala has failed to secure compliance with these laws and the remedy has not been obtained. The failure to compel reinstatement of the worker or payment of compensation and fines owed is a failure to

effectively enforce the law, namely one or more of Articles 10, 62(c), 209, 223, 379 and 380. It is not the case, as Guatemala would urge, that the issue is whether criminal penalties have been imposed or increased or the case referred to another entity. The issue is whether the law has been enforced, i.e., has Guatemala secured compliance. The answer is no. Guatemala has not provided any evidence to rebut the facts supporting this repeated scenario set out in the U.S. Initial Written Submission.

2. Guatemala Failed “Through a Course of . . . Inaction” By Multiple Government Entities Responsible for Enforcement

80. Guatemala’s principal response to the presentation of evidence by the United States in regard to the first group of Guatemalan failures is that the argument of the United States must fail “because it is premised on inaction by Guatemala’s Public Ministry and Guatemala’s labor courts and such inaction falls outside the scope of Article 16.2.1(a).”⁸⁷ As the United States has described above, this overly restrictive interpretation of Article 16.2.1(a) is unsupported by the text, context, and object and purpose of the CAFTA-DR and seriously undermines the concept of effective enforcement. Such an interpretation cannot stand. Rather, any Guatemalan government entity can be responsible for the effective enforcement of its labor laws.

81. Here, Articles 10, 62(c), 209, 223, 379, and 380 are enforced primarily by the labor courts and Public Ministry, although the Ministry of Labor also has a role.⁸⁸ The United States has demonstrated that these entities have not ensured compliance with these provisions by not increasing fines on non-compliant employers, by not referring cases to the Public Ministry when required to do so by Guatemalan law, and by not undertaking to execute court actions, among other omissions.

3. Guatemala’s Actions Do Not Demonstrate Effective Enforcement

82. To rebut the evidence provided by the United States suggesting inaction, Guatemala (1) contends that its labor courts “took action” against six of the companies and (2) attempts to cast doubt on the documentary evidence presented by the United States. For the reasons discussed below, however, Guatemala has failed to provide sufficient evidence or argumentation to rebut the *prima facie* case set out by the United States.

83. Despite the shared understanding of the disputing Parties on the meaning of “effectively enforce,” Guatemala mistakes “action” for “effective enforcement” throughout its Initial Written Submission. Documents submitted by Guatemala showing action by Guatemalan entities do not demonstrate effective enforcement of Guatemalan labor laws. The disputing Parties agree that “to effectively enforce” requires correction and the achievement of compliance. A record that

⁸⁷ Guatemala’s Initial Written Submission, Heading “B,” p. 30.

⁸⁸ The Guatemalan Ministry of Labor is obligated to investigate claims filed by workers concerning alleged labor law violations. Guatemalan Labor Code (“GLC”), Arts. 278, 274, 204. Labor inspectors of the Ministry’s General Labor Inspectorate (“GLI”) are required to intervene in all labor issues or disputes of which they receive notice. GLC Art. 281(e). Further, the GLI must urge or examine completion of procedures regarding labor offenses reported by labor inspectors and social workers and ensure that the respective penalties are imposed. GLC, Art. 280.

some action has been taken is not sufficient to rebut evidence of a failure to effectively enforce. To refute a complaining party's *prima facie* case that a Party failed to effectively enforce the law, a responding party would need to show that the Party took action that corrected the violation. Guatemala does not provide evidence of such remediation in its Initial Written Submission. The disputing Parties agree that the standard for "effectively enforce" is whether compliance has been achieved, but Guatemala's presentation of actions it has taken in favor of workers' rights does not meet that standard.

84. The United States has explained above why the fact of a Party's having taken some action with respect to enforcement will not preclude a finding that that Party has failed to effectively enforce its labor laws under Article 16.2.1(a). That is, action by some courts on some occasions is not mutually exclusive with a course of inaction reflecting a failure to effectively enforce, because a complaining party need not show inaction by showing that the responding Party has never, in any circumstance, acted to enforce its labor laws.⁸⁹ Rather, as the United States indicated in its Initial Written Submission, and in section III.B above, a complaining party must show a failure to secure compliance with those laws. The United States has made such a showing, and the actions cited by Guatemala in its Initial Written Submission fall far short of rebutting that showing.

85. The evidence the United States has presented shows a particular course of inaction with respect to compliance with court orders that constitutes a failure to effectively enforce the Guatemalan labor laws at issue. The United States does not contest that on some occasions Guatemala has taken action to enforce those laws. However, the limited actions Guatemala has taken have been insufficient to satisfy or irrelevant to its effective enforcement obligation under Article 16.2.1(a). In short, Guatemala has not achieved effective enforcement.

86. **Industrias de Transporte Marítimo (ITM):** In its Initial Written Submission, the United States demonstrated that a Guatemalan labor court had found that ITM, a port loading company, wrongfully dismissed 14 stevedores in violation of Articles 10, 62(c), and 209 of the Labor Code.⁹⁰ The United States also demonstrated that the 14 stevedores have yet to be reinstated or paid their back wages despite Guatemalan labor court orders issued on February 19, 2008 directing the company to take these actions, nor has the company paid a penalty fine as ordered by the labor court.⁹¹ To demonstrate these facts, the United States presented the reinstatement orders of the workers,⁹² statements from the workers attesting to the company's non-compliance with the orders,⁹³ and a 2009 letter from the Ministry of Labor with an attached table prepared by the workers' union describing the status of the workers' cases at that time.⁹⁴

⁸⁹ See MSICG Declaration (February 16, 2015), p.14 (USA-164); Statement of EEEE (July 21, 2010) (USA-165).

⁹⁰ U.S. Initial Written Submission, paras. 54–55.

⁹¹ U.S. Initial Written Submission, para 54.

⁹² 14 reinstatement orders (February 19, 2008) (USA-55).

⁹³ Statements of A, B, C, D, E, F (May 29 – June 1, 2014) (USA-1 to USA-6); Email communication from NNN, Coordinators' Committee, UNSITRAGUA Histórica (October 15, 2014) (USA-58) (stating that none of the stevedores has been reinstated).

⁹⁴ Letter from the Ministry of Labor with attached information regarding the union confederation UNSITRAGUA to B (January 21, 2009) (USA-56).

87. Guatemala takes issue with the letter presented by the United States (USA-56) and argues that questions about the document suggest that it cannot be relied upon.⁹⁵ In particular, Guatemala contends that there is no reference to the attachment in the letter itself and no date on the subsequent pages. The exhibit contains a letter from the Ministry of Labor to the workers' union. Although it is difficult to discern from the face of the document how the attached pages are related to the cover letter which concerns notification of two companies, the United States understands from the workers' organization that provided the document to the United States that the enclosed pages constitute tables that the labor union prepared and submitted to the Ministry regarding the status of the workers' case files. The union included the names and case files so that the Ministry could take action or otherwise comment. In its response, the Ministry returned these materials to the union without further comment beyond that which is seen on the front page. In sum, the attached pages reflect the status of the workers' cases as tracked by the workers' organization around the time of the letter. The authenticity of the document is further confirmed by the similar documents the union has continued to submit in the same format on later dates. As the union maintained its engagement with the Ministry over the following years, the union continued to prepare such tables chronicling the status of non-reinstated workers, seeking to prompt the Ministry to act.

88. To update and provide additional information, a union official has provided the most recent and comprehensive records of the union, submitted with this rebuttal submission.⁹⁶ The union official confirms in the spreadsheet the status of each of the ITM workers: reinstatement order valid, but pending execution.⁹⁷ There are no further barriers to execution of these orders. For each of the workers for whom the United States has provided reinstatement orders, the spreadsheet includes the following level of detail: the worker's full name, the employer's name, the date of the worker's wrongful dismissal, the case number of the Guatemalan court that ordered the worker's reinstatement and the date of that reinstatement order, the fines imposed by the court, other orders imposed by the court, the case status, whether the worker has been reinstated, and the status of the legal process.⁹⁸ These details leave no doubt that Guatemala has failed to take the appropriate action to ensure that ITM complied with Guatemalan labor law.

89. The evidence presented by the United States in its Initial Written Submission, as further confirmed by the union leadership as recently as March 2015, demonstrates that despite the workers' active steps to inform the Ministry of Labor of the company's ongoing non-compliance – steps that the workers should not, under Guatemalan law, have to take – Guatemala has taken no action to ensure compliance by ITM with Articles 10, 62(c), and 209, and Guatemala's arguments are insufficient to rebut the *prima facie* case established by the United States. By not ensuring that wrongfully dismissed workers have been reinstated and paid back wages and that the employer has paid the penalty fine on time, Guatemala has failed to effectively enforce laws directly related to the right of association and the right to organize and bargain collectively.

⁹⁵ The United States notes that USA-56 inadvertently contained one duplicate page (pages 2 and 4 are the same).

⁹⁶ Second Statement of B with table (March 5, 2015) (USA-161).

⁹⁷ Second Statement of B with table (March 5, 2015) (USA-161).

⁹⁸ Second Statement of B with table (March 5, 2015) (USA-161).

90. **Negocios Portuarios (NEPORSA)**: A Guatemalan labor court had found that NEPORSA, another port loading company, wrongfully dismissed 40 stevedores, in violation of Articles 10, 62(c), and 209 of the Labor Code. These stevedores also remain non-reinstated and unpaid despite having received reinstatement orders from the court directing NEPORSA to reinstate and pay them in 2008. With its Initial Written Submission, the United States provided the 40 reinstatement orders as well as declarations from workers and the head of the workers' union to demonstrate Guatemala's inaction.⁹⁹

91. With this submission, the United States has also provided a detailed spreadsheet constituting the records of the workers' union as to the status of the workers' respective cases. Guatemala takes issue with the 2009 table of the union reflecting that the workers' cases had been appealed. In fact, upon having won their appeal, the workers still did not receive their wages or reinstatement, nor did the company pay a penalty fine as ordered by the labor court. The table shows that the labor court indicated it would certify the workers' cases to the Public Ministry for criminal prosecution, but it asked the workers to pay the fee for transmitting their respective files. Under Guatemalan law, a court may not impose the cost of making copies of a case file on one of the parties to the case when those copies are for the purpose of transferring the file to the Public Ministry, such as when a labor court certifies a party's disobedience with a court order for possible criminal sanction.¹⁰⁰ Because the workers did not have the money to afford such fees, the cases have languished. Guatemala has not taken any action to further enforce the law. Having presented no evidence to suggest that these workers have been reinstated and paid and that employer has paid the penalty fine, or that the court orders are no longer valid,¹⁰¹ Guatemala has not shown that it has effectively enforced laws directly related to the right of association and the right to organize and bargain collectively against NEPORSA.

92. **Operaciones Diversas (ODIVESA)**: A Guatemalan labor court had found that ODIVESA, also a port loading company, wrongfully dismissed 11 stevedores, in violation of Articles 10, 62(c), and 209 of the Labor Code, and ordered their reinstatement. After more than

⁹⁹ Four workers provided statements with the U.S. Initial Written Submission, and two additional workers provided statements to accompany this submission. Statement of G (May 31, 2014) (USA-7); Statement of D (May 30, 2014) (USA-4); Statement of H (May 29, 2014) (USA-8); Statement of B (May 29, 2014) (USA-2); Statement of JJJJ (March 23, 2010) (USA-183); Statement of KKKK (March 23, 2010) (USA-174). The workers who were willing to provide statements for this proceeding were representative of the 40 workers who find themselves similarly situated. Statement of B (May 29, 2014) (USA-2). The union official has confirmed their status. Email communication from NNN, Coordinators' Committee, UNSITRAGUA Histórica (October 15, 2014) (USA-58) (stating that none of the stevedores has been reinstated). Guatemala has not shown otherwise.

¹⁰⁰ GLC, Art. 380 (If a party persists in failing to follow a court's orders, "the judge shall order certification of these events, so the matter can be processed.") (USA-49). *See also* Guatemalan Code of Criminal Procedure, Art. 298(1) (December 7, 1992) (USA-52). Under this provision, officers and public employees who become aware of crimes against the public in the exercise of their official duties must report them without delay. A party's disregard of a court order is included amongst these crimes. Accordingly, a judge's certification of a party's disobedience with a court order, and the subsequent transfer of the court file to the Public Ministry, must be reported without delay. Because the judge is obligated under Article 298(1) to report the disobedience, the judge may not impose the cost of transferring the court file onto the party.

¹⁰¹ Guatemala takes issue with a minor inconsistency in one worker's statement (Statement of B (USA-2)). As can be seen from the text of the exhibit, the exhibit is comprised of three statements with enclosures from the same individual. Worker B refers to and confirms that the enclosed additional statements were his. Worker B does not equivocate as to the number of workers dismissed by NEPORSA.

six years, Guatemala still has not effectively enforced these Articles with respect to ODIVESA. Six stevedores remain to be reinstated and paid. The company has never paid the fines imposed on it. The United States has provided the reinstatement orders of these workers, and declarations from workers and union officials as to the status of the workers' cases.¹⁰² Guatemala does not show otherwise.

93. Guatemala argues instead that the evidence presented by the United States demonstrates that the cases were appealed and therefore, in its view, there was no basis for enforcement.¹⁰³ Guatemala also provides an additional document dated August 25, 2009, that confirms that there was an appeal in this matter.¹⁰⁴ Contrary to Guatemala's assertions, the workers' cases are no longer pending appeal.¹⁰⁵ On May 26, 2011, the appellate court ruled in favor of the workers for each of the six workers who remain to be reinstated.¹⁰⁶ There are no further judicial proceedings to impede the effectuation of these orders.

94. **Fribo:** After a Guatemalan labor court had found that Fribo, a textiles manufacturer, wrongfully dismissed 15 workers in violation of Articles 10, 62(c), and 209 of the Labor Code, Guatemala has not acted to ensure that the Fribo company correct its non-compliance with Guatemalan labor law. The April 1, 2009 court order shows that the company wrongfully dismissed these workers on March 15, 2008, after they had been put on unpaid leave since August 2007.¹⁰⁷ The United States has shown that these 15 workers have not been paid the back pay and benefits owed to them as set out in the reinstatement order and statements of workers, and that Guatemala has taken no further actions to remedy this situation.¹⁰⁸ Nor did Guatemala act to ensure Fribo reinstate nine of the 15 workers.¹⁰⁹

95. Guatemala does not provide any evidence to suggest that Fribo complied with these orders or that the orders are no longer valid. Rather, in response, Guatemala contends that it has counted the number of names in the reinstatement order (USA-60) and "the number of employees wrongfully dismissed was 15 and not 24" as claimed in the U.S. Initial Written Submission.¹¹⁰ Guatemala, however, must have counted in error. As the ICSID Secretary-

¹⁰² Guatemala correctly points out that two reinstatement orders were missing from USA-59. These two orders are provided as USA-186 and USA-187.

¹⁰³ Guatemala's Initial Written Submission, para. 224.

¹⁰⁴ Inspector's report describing resolutions by the appellate labor court in favor of ODIVESA (GTM-4).

¹⁰⁵ The date of USA-56 is July 21, 2009. Fortunately, the workers' cases are no longer at the Second Instance Court nearly six years later. Second Statement of B with table (March 5, 2015) (USA-161).

¹⁰⁶ Second Statement of B with table (March 5, 2015) (USA-161).

¹⁰⁷ Guatemala obscures that the law was not enforced by drawing attention to the fact that the workers received some compensation. See Petition (March 26, 2008) (USA-191).

¹⁰⁸ U.S. Initial Written Submission, paras. 61-66.

¹⁰⁹ U.S. Initial Written Submission, para. 62.

¹¹⁰ Guatemala's Initial Written Submission, para. 229.

General has confirmed, the order from the labor court (USA-60) commanded the reinstatement of 24 workers.¹¹¹

96. Guatemala next asserts that because some of the Fribo workers agreed to a settlement, there was no corrective action for the Guatemalan authorities to undertake.¹¹² In Guatemala's view, because the workers and company agreed to a resolution, Guatemala effectively enforced its law. This position is unfounded. First, as reflected in the workers' statements, the workers' acceptance of payments from Fribo was far from a negotiated settlement and less than fully compensatory.¹¹³ On August 21, 2009, Fribo closed its operations.¹¹⁴ On that date, the Ministry conducted a site visit and advised the workers that they "should accept what the company offered [them] because [they] were not going to receive any more."¹¹⁵ The workers received a partial payment for their claims.¹¹⁶ Specifically, the company did not pay the workers what they were owed for the dismissals.¹¹⁷

97. Second, the workers' acceptance of the payment from Fribo did not absolve the Guatemalan authorities from taking corrective action where a violation of law had been verified.¹¹⁸ The Labor Code obligates the Ministry to ensure that employers comply with the law;¹¹⁹ this obligation continues regardless of whether the workers settle or abandon their claims. Here, the evidence shows that Fribo did not comply with the minimum wage laws, that it engaged in anti-union reprisals contrary to law, and that the Ministry did not take the required corrective action to bring Fribo into compliance with those laws.

98. Third, the inspectors' advice to the workers to accept a payment for a sum less than what the workers were entitled to under the law is not effective enforcement of the law.¹²⁰ As described by a labor attorney in Guatemala, workers accept settlements "because they know, or because those same labor inspectors lead them to believe, that their court case will take at least 10 years, and that it is better to settle, even if for only a small amount of money, rather than get nothing."¹²¹ Given the Ministry's overarching obligation to ensure compliance with the law, any

¹¹¹ Declaration of the ICSID Secretary-General (March 11, 2015), para. 24 (USA-170). The United States is also submitting with this submission a new copy of USA-60 that leaves unredacted the commas between each worker name for ease of counting.

¹¹² Guatemala's Initial Written Submission, para. 230.

¹¹³ Statement of K, L, M, N, O (June 24, 2014), p. 3 (USA-11).

¹¹⁴ Statement of K, L, M, N, O (June 24, 2014), p. 3 (USA-11).

¹¹⁵ Statement of K, L, M, N, O (June 24, 2014), p. 3 (USA-11). *See also* Second Statement of P (March 24, 2010) (USA-184); Second Statement of R (March 24, 2010) (USA-185).

¹¹⁶ Statement of K, L, M, N, O (June 24, 2014), p. 3 (USA-11).

¹¹⁷ Statement of K, L, M, N, O (June 24, 2014), p. 3 (USA-11).

¹¹⁸ GLC, Art. 419 ("As soon as the [GLI] learns of the commission of one of the acts referred to in this Chapter, either through direct knowledge or through a report, it shall issue a decision ordering that the appropriate verification be carried out as soon as possible.")

¹¹⁹ GLC, Art. 278 ("The General Labor Inspectorate, through its corps of inspectors and social workers, shall ensure that employers, workers, and union organizations comply with and respect [these] laws").

¹²⁰ Statement of K, L, M, N, O (June 24, 2014), p. 3 (USA-11). *See also* Second Statement of P (March 24, 2010) (USA-184); Second Statement of R (March 24, 2010) (USA-185).

¹²¹ MSICG Declaration (February 16, 2015), p. 18 (USA-164).

encouragement by an inspector to accept a payment for less than what is provided under the law is not effective enforcement. These settlements are a reflection of the workers' frustration with the ineffectiveness and delays associated with Guatemala's labor law enforcement.

99. Guatemala's arguments are insufficient to rebut the U.S. showing that Guatemala has failed to effectively compel compliance with its labor laws directly related to the right of association and the right to organize and bargain collectively with respect to the workers of Fribo.

100. **Representaciones de Transporte Marítimo (RTM):** The port loading company RTM also remains in violation of Articles 10, 62(c), 379, and 380, as it has not corrected its past wrongful dismissal of six workers, nor has it paid another six workers their back wages and benefits or the court-imposed fine, as ordered by a Guatemalan court in August 2010. The United States has submitted the workers' reinstatement orders along with statements attesting that they have not received the wages owed to them nor have they been reinstated.¹²² To further corroborate the workers' statements, the United States also submitted a report prepared by a Guatemalan labor lawyer that confirms the continuing non-compliance of the company in respect of four of those workers. Guatemala contends, without explanation, that this report indicates that there was no legal basis for the labor court to take punitive action. The United States submits that the report clearly states that penalties were imposed on the company by a Guatemalan labor court in respect of each of these four workers in March 2014, and that those penalties had not been collected as of July 2014.¹²³ In this respect, Guatemala's arguments are insufficient to rebut the U.S. case that Guatemala has failed to effectively enforce its labor laws directly related to the right of association and the right to organize and bargain collectively.

101. **Mackditex:** A fifth company remains out of compliance with Guatemalan law for not having reinstated or paid workers whom the labor court found it had wrongfully dismissed in retaliation for their organizing activities.¹²⁴ Apparel manufacturer Mackditex has not reinstated 17 workers or paid them required back wages, nor has the company paid the court-ordered penalty fine, despite having been ordered to do so by a Guatemalan labor court, and Guatemala has not taken appropriate action to bring Mackditex into compliance. In responding to the presentation of the facts concerning these workers, Guatemala takes issue with a statement provided by two Mackditex workers.¹²⁵ Guatemala challenges the workers' credibility on the basis of conflicting dates regarding their employment. In their statement, the workers indicate that they were employed at Mackditex through 2012, but later they state that they were dismissed in October 2011.¹²⁶ A review of the workers' statement in its entirety however, reveals that Guatemala's concern is unwarranted. The workers state clearly that they were wrongfully

¹²² 12 reinstatement orders (August 19, 23, 25, 2010) (USA-62); Statement of S (May 31, 2014) (USA-15); Statement of G (May 31, 2014) (USA-7); Statement of U (May 28, 2014) (USA-16); Statement of I (May 28, 2014) (USA-9); Statement of J (May 28, 2014) (USA-10); Statement of V (May 28, 2014) (USA-17).

¹²³ Legal Expert Report of Alejandro Argueta (July 23, 2014), pp. 3, 5 (USA-63).

¹²⁴ U.S. Initial Written Submission, paras. 71-73.

¹²⁵ See Statement of W and X (June 25, 2014) (USA-18) (USA-18 was erroneously labeled in the U.S. Initial Written Submission as Statement of W and Z).

¹²⁶ Statement of W and X (June 25, 2014), p. 1 (USA-18).

dismissed in 2011,¹²⁷ but that they continued to pursue their lost wages and reinstatement through 2012.¹²⁸ Thus, to the workers, their employment relationship continued through 2012 and the continued engagement with their employer to obtain their unpaid wages constitutes the basis for their statement that they were “employed” until that time.

102. Guatemala further claims that there was “no basis for the labor court to refer the matter for criminal sanctions or increase the fines” because the workers “reached a settlement with respect to their complaint.”¹²⁹ Guatemala suggests that, as part of this settlement, the workers “voluntarily waived their right to be reinstated.”¹³⁰ Guatemala’s argument is plainly incorrect. As discussed in the U.S. Initial Written Submission, from October 6 through 8, 2011, Mackditex dismissed 17 workers.¹³¹ On November 21, 2011, a Guatemalan labor court ordered that Mackditex reinstate the 17 workers and pay them their wages and benefits for the period of their dismissal.¹³² Despite this order, Mackditex never reinstated the workers or paid the wages owed to them in full pursuant to the court’s order.¹³³

103. Approximately three years after the workers’ dismissal, an apparel company for which Mackditex supplied merchandise gave the workers “a payment.”¹³⁴ There is no indication, however, that this payment from a third party constituted a legal settlement of the workers’ claims with Mackditex. Thus, irrespective of this payment, Mackditex remained in violation of the court order, and the labor court failed to take the necessary corrective action to bring Mackditex into compliance with the law. In this respect, Guatemala’s arguments are insufficient to rebut the *prima facie* showing that Guatemala has failed to effectively enforce its labor laws directly related to the workers’ internationally protected labor rights at the Mackditex company.

104. The United States would like to take this occasion to correct the mislabeling of Exhibit USA-18 as the Statement of W and Z; in fact, the statement was by Worker W and Worker X, not Worker Z. A corrected copy of the exhibit is included with this submission.

105. **Alianza:** A Guatemalan labor court found that on March 25, 2010, the Alianza garment company wrongfully dismissed 33 workers, in violation of Articles 10, 62(c), and 379 of Guatemalan Labor Code. The court ordered the workers’ reinstatement and receipt of back wages, and fined the company.¹³⁵ Guatemala has not presented any evidence to show that it has taken effective enforcement action regarding the Alianza company. Guatemala notes that 30 of

¹²⁷ Statement of W and X (June 25, 2014), p. 1 (USA-18).

¹²⁸ Statement of W and X (June 25, 2014), pp. 1-2 (USA-18).

¹²⁹ Guatemala’s Initial Written Submission, paras. 244, 245.

¹³⁰ Guatemala’s Initial Written Submission, paras. 244, 245.

¹³¹ Request for Reinstatement (October 12, 2011) (USA-65); Statement of W and X (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).

¹³² Reinstatement Order (November 21, 2011) (USA-67).

¹³³ Statement of W and X (June 25, 2014), p. 2 (USA-18); Statement of Y, Z, AA (June 25, 2014), p. 7 (USA-19).

¹³⁴ The payment the workers accepted from the U.S. apparel company was for a sum less than what they were legally owed from Mackditex. Statement of W and X (June 25, 2014), p. 3 (USA-18).

¹³⁵ Reinstatement Order (March 26, 2010) (USA-69).

these workers accepted settlements from the company even though they had valid reinstatement orders.¹³⁶

106. The United States has presented five declarations in which individuals have attested that many Alianza workers accepted settlements for less than what they were owed from the company because they believed the Guatemalan authorities would not take action or because they could not afford to wait any longer for action.¹³⁷ The three workers who have continued to pursue their reinstatement were never reinstated or paid the wages owed to them.¹³⁸ Guatemala makes no attempt to show that it took any further enforcement actions in respect of these workers, such as increasing fines or referring the matter for criminal prosecution. In the absence of such actions, Guatemala has not rebutted the U.S. showing that Guatemala has failed to effectively enforce Articles 10, 62(c), and 379 of its Labor Code.

107. **Avandia:** Guatemala has not taken action to effectively enforce its labor laws with respect to at least nine workers who a Guatemalan court found were wrongfully dismissed in violation of Articles 10, 62(c), and 379 by the Avandia garment factory. In its Initial Written Submission, Guatemala did not provide any evidence to show that the Avandia workers were reinstated with back wages or, alternatively, that the reinstatement orders are no longer valid. Instead, Guatemala points out that one of the documents submitted by the United States containing the relevant order (USA-74) also contains a duplicate.¹³⁹ The inadvertent duplication does not detract from the content of the document, however, which reflects that a Guatemalan labor court ordered Avandia to reinstate the nine workers it wrongfully dismissed in November 2006 and pay them wages they were owed. Although two workers were later reinstated, seven were not and Guatemala did not take any effective action to bring Avandia into compliance.¹⁴⁰

108. Guatemala also takes issue with a second Guatemalan labor court record submitted by the United States (USA-75). This exhibit includes a complaint by the two Avandia workers who were finally reinstated on August 6, 2007.¹⁴¹ The complaint states that the two workers were not reinstated to their previous positions as ordered by the labor court, and that they had not received the back wages owed to them as a result of their wrongful dismissal on November 14, 2006.¹⁴² In their complaint, the workers refer to an additional reinstatement order from the court dated July 3, 2007, a copy of which is included as part of the exhibit.¹⁴³ This additional order supplements the workers' November 22, 2006 original reinstatement order and reflects that, as of July 3, 2007, the company had not reinstated the workers to their previous positions. The relationship between the two orders is further confirmed by the fact that the nine individuals

¹³⁶ Guatemala Initial Written Submission, paras. 249-250. Reinstatement Order (March 26, 2010) (USA-69).

¹³⁷ Statement of BB, CC (July 2, 2014) (USA-21); Statement of III, MMM (July 2, 2014) (USA-22); Statement of HHH (July 2, 2014) (USA-23); Statement of III, KKK, LLL (July 2, 2014) (USA-24); Statement of III, JJJ (July 2, 2014) (USA-25).

¹³⁸ Statement of BB, CC (July 2, 2014) (USA-21).

¹³⁹ The United States would also correct the typographical error in footnote 93 of the U.S. Initial Written Submission which refers to "USA-191"; the footnote should have referred to USA-73.

¹⁴⁰ Statement of OOOO (March 6, 2015) (USA-169).

¹⁴¹ USA-75 as submitted contained an inadvertent duplicate.

¹⁴² Reinstatement Order (August 8, 2007) (USA-75) (the complaint appears on pp. 1-2 of the exhibit).

¹⁴³ The reinstatement order of July 3, 2007 is pp. 3-4 of USA-75.

named in the July 3, 2007 reinstatement order are the same as those named in the November 22, 2006 reinstatement order (USA-74).¹⁴⁴

109. In sum, Guatemala's attempts to discredit the U.S. evidence are misplaced. The documentary evidence leaves no doubt that the court went so far as to order the workers' reinstatement to their proper positions a second time. Even then, as the workers have attested, the company's behavior was not corrected in this respect, nor were the other seven workers reinstated or paid the wages owed to them.¹⁴⁵ The United States has shown that Guatemala has not taken the necessary action for effective enforcement of its labor laws directly related to the right of association and the right to organize and bargain collectively at Avandia, and Guatemala's arguments are insufficient to rebut this *prima facie* case.

110. **Solesa:** The evidence provided by the United States demonstrates that a Guatemalan labor court found that rubber company Solesa wrongfully dismissed 49 workers at the Solesa plantation called Finca La Soledad in violation of Articles 10, 62(c), 379 and 380, and issued orders for their reinstatement.¹⁴⁶ Guatemala has not taken action to effectively enforce its labor laws with respect to at least 23 of these 49 workers.¹⁴⁷ The evidence further demonstrates that Solesa filed an appeal challenging these reinstatement orders, but that appeal was unsuccessful and the company did not come into compliance with the law.¹⁴⁸

111. As indicated in the U.S. Initial Written Submission, after the workers won the appeal, they requested on several occasions that the labor court take further action to enforce the orders.¹⁴⁹ The United States submitted an October 28, 2011 court decision denying the workers' request that the court proceed with partial liquidation of the company's assets, a request the workers had made to obtain the back wages owed to them.¹⁵⁰ Guatemala argues that this October 28, 2011 decision submitted by the United States does not support the allegation of the

¹⁴⁴ Reinstatement Order (November 22, 2006) (USA-74); Declaration of the ICSID Secretary-General (March 11, 2015), para. 38 (USA-170).

¹⁴⁵ Statement of OOOO (March 6, 2015) (USA-169).

¹⁴⁶ ILO Interim Report No. 373, Case No. 2948, para. 342, *available in English at* [http://www.ilo.org/dyn/normlex/es/f?p=1000:50002:0::NO::P50002_COMPLAINT_TEXT_ID,P50002_LANG_CODE:3189007,en:NO](http://www.ilo.org/dyn/normlex/es/f?p=1000:50002:0::NO::P50002_COMPLAINT_TEXT_ID,P50002_LANG_CODE:3189007,en:NO;available in Spanish at); *available in Spanish at* http://www.ilo.org/dyn/normlex/es/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3189007. Guatemala complains that the United States has not shown that Solesa is the employer of the workers at Finca La Soledad. The Guatemalan court documents, e.g., (USA-193), note that Finca la Soledad is the workplace of employees of the Solesa company.

¹⁴⁷ U.S. Initial Written Submission, paras. 81-82.

¹⁴⁸ Court Order (March 8, 2011) (USA-82); Petition (May 14, 2011) (USA-192); Court Order (March 12, 2012) (USA-197). Guatemala discusses the limited evidentiary value of USA-80. Guatemala's Initial Written Submission, paras. 261-262. However, the United States referred the Panel to USA-82, not USA-80 (*See* U.S. Initial Written Submission as corrected, para. 81, footnote 100). USA-82 is the order of the appellate court upholding the workers' reinstatement orders. Finally, the United States provides with this submission a new copy of USA-83 which may be easier to read; the new copy was made by the United States by increasing the document contrast with a photocopier.

¹⁴⁹ *See, e.g.*, Letter of Mr. OOO to the court (October 25, 2011) (USA-86); Petition (October 31, 2011) (USA-194); Petition (January 4, 2012) (USA-195); Petition (March 7, 2012) (USA-196).

¹⁵⁰ The ICSID Secretary-General confirms that the case number for the court's decision, USA-87, and the worker's request, USA-86, are the same number. Declaration of the ICSID Secretary-General (March 11, 2015), para. 39 (USA-170).

United States that the labor court failed to take action and that the United States may not, under the CAFTA-DR, “second-guess” the decisions of the Guatemalan labor courts.¹⁵¹

112. Guatemala misunderstands the import of the court’s decision. Regardless of whether the workers succeeded in pursuing liquidation of Solesa’s assets to obtain the wages owed to them, the orders requiring Solesa to reinstate and pay the workers the wages due to them are still valid and outstanding.¹⁵²

113. The labor court’s last action in the court file was to again order the company to pay the salaries and other payments owed to the workers, under penalty that the court certify the matter to the Public Ministry.¹⁵³ The company has not done so, nor has it reinstated the workers, and Guatemala has taken no further action against the company. Guatemala has not rebutted the U.S. *prima facie* case showing that the workers remain in the same position without being able to exercise their internationally protected rights because Guatemala did not effectively enforce its labor laws.

114. Guatemala’s own public statistics further support the record presented by the United States by also showing a high rate of court orders that have not been enforced. The website for the Guatemalan Judiciary highlights the hundreds of occasions when Guatemala has failed to effectively enforce its labor laws. A report published by the judicial branch, for example, appears to reflect that, between August 1, 2012 and September 4, 2014, employers refused to comply with court orders for the payment of minimum wages and benefits on 1,571 instances.¹⁵⁴ This number is significant compared to the 23 instances of employers complying with such court orders over the same time period.

115. The facts discussed by the United States demonstrate that: (1) employers dismissed workers for forming a union in violation of Articles 10, 62(c), 209, and 223, or for seeking to resolve claims through conciliation in violation of Articles 10, 62(c), 223, 379 and 380; (2) Guatemalan labor courts issued orders for reinstatement, back pay, and penalty fines; and (3), in most cases, contrary to the statutory requirements, no effective action was undertaken by Guatemala to ensure compliance with the order or to otherwise ensure remediation of the violation. By not presenting sufficient evidence to contradict the evidence provided by the United States, Guatemala’s factual presentation fails to rebut the U.S. *prima facie* case.

¹⁵¹ Guatemala’s Initial Written Submission, para. 268.

¹⁵² Statement of GGG (October 3, 2014) (USA-20); Email from counsel for the union to the U.S. Department of Labor (April 4, 2014) (USA-84).

¹⁵³ Court Order (March 12, 2012) (USA-197).

¹⁵⁴ See, e.g., Diligencias y Verificaciones, Organismo Judicial de Guatemala, (August 1, 2012 through September 4, 2014) available at <http://www.oj.gob.gt/estadisticaj/> (recording “did not comply with the payment” status for Koa Modas, Avandia, among others). Between August 1, 2012 and September 4, 2014, Guatemala documented 530 instances of employers refusing to comply with orders for the reinstatement of improperly terminated workers.

B. GUATEMALA FAILED THROUGH A SUSTAINED AND RECURRING COURSE OF INACTION

116. As discussed above, Article 16.2.1(a) encompasses only those failures that are carried out “through a sustained or recurring course of action or inaction.” The plain text of this phrase requires that a complaining party demonstrate a continuing or repeated course of action or inaction.

117. The United States explained in its Initial Written Submission that the evidence it presented as part of its first group of failures shows a sustained course of inaction because Guatemala consistently and repeatedly failed to enforce Articles 10, 62(c), 209, 223, 379 and 380 of its Labor Code beginning in 2008 and continuing through 2014. The evidence also demonstrates a recurring course of inaction because Guatemala has failed to effectively enforce these provisions – not just with respect to one worker or one company, or in isolated instances – but with respect to over a hundred workers, at nine separate companies, and across three sectors. Despite that Article 16.2.1(a) does not require that the actions or inactions of a Party occur “over a prolonged period of time,” as Guatemala contends, the failures of Guatemala satisfy even this standard.

118. Guatemala alleges that in the case of the failure to enforce Articles 10, 209, and 223 of the Labor Code, the United States provides no evidence that the omissions with respect to ITM, NEPORA, ODIVESA, and Fribo constitute consistent or repeated conduct. Guatemala comes to this conclusion because the omissions occurred “at each company during a single year,” which may not be considered “conduct of a ‘prolonged period.’” Guatemala advances the same theory with respect to its failure to enforce Articles 10, 223, 379 and 380 at Mackditex, Alianza, Avandia, RTM, and Solesa.

119. Guatemala’s argument is deficient for two reasons. First, Article 16.2.1(a) does not require that the *course* of action or inaction occur with respect to each *individual* entity to demonstrate that a government’s failure to effectively enforce its labor laws is a sustained or recurring course of action or inaction. Rather, the subject of evaluation for the “sustained or recurring” element is the measure at issue; that is, Guatemala’s failure to effectively enforce its labor laws. Nor does Article 16.2.1(a) require instances of inaction at companies to be “connected” beyond the fact that the government failed to obtain compliance with the labor laws related to organizing or collective bargaining activities and conciliation proceedings. This connection is plain from the description of the issues from the workers and in the text of the courts’ reinstatement orders.

120. Next, Guatemala misinterprets “sustained or recurring” to require that a measure persist for more than one year. Based on a plain reading of the text, Article 16.2.1(a) does not set forth any unit of time by which to measure sustained or recurring action or inaction. As the United States articulates above, the rate or frequency of what constitutes sustained or recurring must be determined on a case-by-case basis, based on the underlying facts at issue. Article 16.2.1(a) does not require conduct necessarily to occur over several years, as Guatemala suggests.

121. Nevertheless, the United States demonstrates in its Initial Written Submission that Guatemala failed to effectively enforce its labor laws related to the right of association and the

right to organize and bargain collectively by failing to enforce those laws between 2008 and 2014. The omissions documented at nine companies span a six-year period of inaction.¹⁵⁵ By either Party's standard, this pattern of failure to compel compliance with the labor laws is both sustained and recurring within the meaning of Article 16.2.1(a).

122. In sum, Guatemala's arguments are insufficient to rebut the U.S. showing that Guatemala has failed to effectively enforce Articles 10, 62(c), 209, 223, 379 and 380 of its Labor Code through both a sustained course of inaction and a recurring course of inaction, within the meaning of Article 16.2.1(a).

C. GUATEMALA FAILED IN A MANNER AFFECTING TRADE

123. In its Initial Written Submission, the United States demonstrated that Guatemala's enforcement failures occurred in a manner affecting trade. Each of the nine companies discussed above engaged in trade between the CAFTA-DR Parties in at least one of two ways: (1) their goods were exported to, or they participated in export-related activities with, CAFTA-DR Parties; or (2) they competed with imports from CAFTA-DR Parties in Guatemala.

124. Referring to the U.S. Initial Written Submission, Guatemala takes issue with the sector-level data presented by the United States.¹⁵⁶ Guatemala further argues that there cannot have been a modification to the conditions of competition between the Parties because only one of the 16 companies cited in the U.S. Initial Written Submission exports to CAFTA-DR Parties.¹⁵⁷ Based on a declaration from a Guatemalan customs agency, Guatemala asserts that there is negligible trade between over 15 Guatemalan companies—which operate in diverse sectors, including coffee, apparel, shipping services, steel manufacturing, and palm oil production—and any of the six other Parties to the CAFTA-DR. Guatemala errs in both the standard it espouses and the facts it presents.

125. As set out above in section III.D, the United States need not demonstrate actual trade effects to demonstrate that Guatemala's labor law enforcement failure has occurred in a manner affecting trade. Furthermore, the United States need not show that each individual company's non-compliance is affecting trade, but rather that Guatemala's failure to effectively enforce its labor laws has occurred in a manner affecting trade. As described above, this obligation does not require an econometric analysis of actual trade effects on specific products or companies. Rather, it is sufficient to show that the companies or sectors in which Guatemala has failed to effectively enforce its labor laws are engaged in cross-border trade between the CAFTA-DR Parties, through either export or export-related activities¹⁵⁸ or competition with imported goods from these Parties. In this case, all the companies or sectors cited by the United States fall into one of these two categories.

¹⁵⁵ Some Guatemalan labor lawyers have noted that these problems have persisted since before the CAFTA-DR came into force. *See* Statement of QQQQ (July 23, 2010) (USA-173); Statement of MMMM (July 20, 2010) (USA-171); Statement of PPPP (July 20, 2010) (USA-172).

¹⁵⁶ Guatemala's Initial Written Submission, paras. 463-467.

¹⁵⁷ Guatemala's Initial Written Submission, para. 471.

¹⁵⁸ Export-related activities include, for example, the services provided by the stevedore companies at ports.

126. While not necessary, however, evidence of actual trade nonetheless may be relevant and can be used to support a claim under Article 16.2.1(a). The United States provided such evidence in its Initial Written Submission.¹⁵⁹ In asserting that the companies featured in the U.S. Initial Written Submission do not engage in trade, Guatemala asserts that it has carried out a search for listings of “tariff duty records.”¹⁶⁰ Guatemala provides no explanation of the data that resulted from this search nor does Guatemala provide any detail of the search performed. At a minimum, Guatemala appears to have limited its search to only some of the company names at the exclusion of alternate corporate identities.¹⁶¹ Regardless, the evidence set forth by the United States directly refutes Guatemala’s claim of negligible trade for these companies.

127. In fact, all four apparel companies cited above engaged in export activities such that their products were exported to the United States in the amount of over US\$204 million between July 1, 2006 and December 31, 2014.¹⁶² Over this time period, Fribo products were brought into the United States at an aggregate value of at least US\$7 million.¹⁶³ Mackditex products were brought in in a total amount of at least US\$32 million.¹⁶⁴ Alianza products came in to the United States at a value of over US\$148 million during this time frame.¹⁶⁵ Finally, Avandia products valued at US\$17 million were brought to the United States between 2006 and 2014.¹⁶⁶

128. Additionally, of the nine companies at issue, four provide stevedore services at Port Quetzal in Guatemala. These companies participate in trade between the CAFTA-DR Parties by engaging in activities directly relating to exports, namely by providing the service of loading goods to be shipped to the CAFTA-DR Parties.¹⁶⁷ For instance, between July 1, 2006 and December 31, 2014, at least five companies cited in the U.S. Initial Written Submission produced goods exported through Port Quetzal, amounting to an aggregate value of over

¹⁵⁹ See sections III.A.4, III.B.4, III.C.4 of the U.S. Initial Written Submission.

¹⁶⁰ Report by the Director of the Foreign Trade Administration (January 27, 2015) (GTM-35).

¹⁶¹ It also appears that Guatemala’s search omitted successor companies. Four of the 13 entities listed have been incorporated under different names at various times between 2006-present. Fribo, S.A. transferred ownership to Modas Dae Hang, S.A. between October 2007 and January 2008. Alianza Fashion, S.A. went by at least two additional names, including Industrial D&B, S.A. and Modas Alianza, S.A. Compañía Agrícola Industrial Solesa, S.A. is also referred to by the name of its farm, Finca la Soledad. Last, Agrícola Guatemalteca Santa Elena, S.A. is also known as Empresa Plantaciones De Café El Ferrol, La Florida y Santa Elena, S.A. (FEFLOSA, S.A.).

¹⁶² Declaration of Mark Ziner, U.S. Customs and Border Protection (executed March 3, 2015) with attachment, table of U.S. import data (USA-198).

¹⁶³ Declaration of Mark Ziner, U.S. Customs and Border Protection (executed March 3, 2015) with attachment, table of U.S. import data (USA-198). Fribo’s company registration documents further demonstrate that the company exports apparel to the United States. Registration of Fribo in Merchants’ Register (USA-158).

¹⁶⁴ Declaration of Mark Ziner, U.S. Customs and Border Protection (executed March 3, 2015) with attachment, table of U.S. import data (USA-198).

¹⁶⁵ Declaration of Mark Ziner, U.S. Customs and Border Protection (executed March 3, 2015) with attachment, table of U.S. import data (USA-198).

¹⁶⁶ Declaration of Mark Ziner, U.S. Customs and Border Protection (executed March 3, 2015) with attachment, table of U.S. import data (USA-198).

¹⁶⁷ Declaration of Mark Ziner, U.S. Customs and Border Protection (executed March 3, 2015) with attachment, table of U.S. import data (USA-198).

US\$44 million.¹⁶⁸ Moreover, bananas, a major Guatemalan export commodity, are commonly loaded by NEPORSA stevedores for export to the United States.¹⁶⁹ Guatemala omits the shipping companies from its analysis. Changes to the conditions of competition for shipping companies would necessarily influence trade between the Parties. In avoiding labor costs, non-compliant shipping companies are able to operate at a lower cost, which not only affects the competitive position of these companies vis-à-vis law-abiding shipping companies, but also unfairly benefits Guatemalan companies that pay lower transportation costs by employing less costly stevedore services to export their products.

129. Finally, Solesa produces natural rubber or “hule” for export.¹⁷⁰ According to Guatemalan government statistics, in 2014 alone Guatemala exported over US\$50 million in natural hule and approximately US\$4.5 million in manufactured hule.¹⁷¹ According to a Guatemalan industry group, Guatemala is the largest rubber exporter in the Americas and the fifth-largest exporter worldwide, including to the CAFTA-DR Parties.¹⁷² For example, over the time period of this dispute, the United States imported natural rubber from Guatemala amounting to over US\$322 million.¹⁷³

130. To the extent that Guatemala fails to compel companies like Solesa to comply with the Guatemalan labor laws cited above, the impunity of those companies has a spillover effect on the entire Guatemalan sector that participates in exports to the United States and other CAFTA-DR Parties. In other words, Guatemala’s inaction with respect to one company may prompt other companies in the sector to likewise try to lower their labor costs to be able to compete, which in turn lowers labor costs sector-wide and unfairly modifies the conditions of competition between Guatemalan industry and competing exporters.

131. Further, Guatemala disregards imports in declaring that trade is “negligible.” As the United States explains above, the text of Article 16.2.1(a) provides no justification for excluding imports from an examination of cross-border exchange of goods and services between CAFTA-DR Parties. Guatemala does not consider a key component of trade between the Parties: specifically, imports into Guatemala that compete with products produced by the nine companies referenced above sold in the domestic market. For instance, U.S. export data show that between July 1, 2006 and December 31, 2014, Guatemala imported over US\$176 million in value of apparel articles from the United States.¹⁷⁴ U.S. export data also demonstrate a significant

¹⁶⁸ Declaration of Mark Ziner, U.S. Customs and Border Protection (executed March 3, 2015) with attachment, table of U.S. import data (USA-198).

¹⁶⁹ Statement of JJJJ (March 23, 2010) (USA-183); Statement of D (May 31, 2014) (USA-4).

¹⁷⁰ Complaint (September 2, 2010) (USA-213).

¹⁷¹ Guatemalan data on 2014 agricultural exports (USA-199), *available at* http://www.banguat.gob.gt/inc/ver.asp?id=/estaeco/comercio/por_producto/prod0207DB001 htm.

¹⁷² Overview of the Guatemalan Natural Rubber Industry, Grupo Agroindustrial Occidente, *available at*: <http://www.grupoagroindustrial.net/index.php/es/proveedores/2-uncategorised/83-situacion-del-caucho-en-guatemala-eng> (USA-159).

¹⁷³ U.S. International Trade Commission Harmonized Tariff Schedule Data on U.S. imports of Natural Rubber (July 1, 2006 to December 31, 2014) (USA-202).

¹⁷⁴ U.S. Census Bureau Declaration (March 10, 2015), pp. 5-14 (USA-200). Further, between 2010 and 2014, U.S. export data show over US\$1 million in textile and apparel exports to Guatemala. U.S. Department of Commerce,

amount of rubber and rubber article exports to Guatemala.¹⁷⁵ Therefore, the Guatemalan apparel and rubber companies cited above—which enjoy reduced labor costs due to Guatemala’s failure to effectively enforce its laws—operate at an advantage when competing with U.S. or other CAFTA-DR companies in these sectors of the Guatemalan market.

132. In sum, as the United States has demonstrated previously, a complaining party need not demonstrate actual trade effects to demonstrate that a responding party’s actions have occurred in a manner affecting trade. Nonetheless, in this case, the United States has amply demonstrated that these companies participate in trade in the CAFTA-DR region, either through exports or export-related activities, or through competition between these companies and imports from other CAFTA-DR Parties. Guatemala’s failure to effectively enforce its labor laws allows these companies to artificially reduce their key production cost of labor, and thereby gain a competitive advantage in the CAFTA-DR market. This unfair advantage thus affects trade between the CAFTA-DR Parties in the relevant products. 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.

133. As a result, Guatemala has failed to rebut the U.S. demonstration that Guatemala’s failures to enforce its labor laws with respect to right of association and the right to collective bargaining have occurred in a manner affecting trade between the Parties to the Agreement.

D. CONCLUSION

134. The United States respectfully requests that the Panel find that Guatemala has acted inconsistently with its obligation under Article 16.2.1(a) by failing to effectively enforce labor laws directly related to the right of association and the right to organize and bargain collectively by not acting to ensure compliance with court orders.

V. GUATEMALA HAS FAILED TO EFFECTIVELY ENFORCE ITS LABOR LAWS BY NOT CONDUCTING INSPECTIONS AS REQUIRED AND BY NOT IMPOSING OBLIGATORY PENALTIES

135. Guatemala misconstrues the U.S. argument in respect of the second group of failures to effectively enforce its labor laws. In the second part of the U.S. Initial Written Submission, the United States demonstrated that Guatemala failed to effectively enforce Labor Code Articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197 and the Inspection Protocol. As discussed in the U.S. Initial Written Submission, these Articles are intended to ensure that workers are provided with safe and appropriate equipment, to limit the length of a work day, to guarantee workers a minimum wage, and to ensure that employers provide certain basic

International Trade Administration, Office of Textiles and Apparel Export Data (USA-201) *available at* <http://otexa.ita.doc.gov/expctry.htm>.

¹⁷⁵ U.S. Census Bureau Declaration (March 10, 2015) (USA-200).

amenities. To achieve this goal, the provisions either impose prohibitions on the employer or provide entitlements to employees.

136. The United States has shown instances of the Ministry of Labor’s failure to conduct appropriate inspections in accordance with its regulatory Inspection Protocol and to bring employers into compliance where violations have been found. Guatemala argues in response that (1) no violation of a labor law has occurred until an inspection takes place; (2) all inspections are carried out in accordance with the law; and (3) sanctions may not have been imposed because there may not have been a violation of the law. However, as explained below, Guatemala’s arguments are untenable because they are not based in the text of the CAFTA-DR nor supported by the evidence Guatemala presents.

A. GUATEMALA HAS FAILED TO EFFECTIVELY ENFORCE LABOR CODE ARTICLES 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, AND 197 AND THE INSPECTION PROTOCOL

137. Although the disputing Parties agree that “effectively enforce” means to “compel compliance with,”¹⁷⁶ the disputing Parties differ as to what a showing of failure to effectively enforce requires in respect of Articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197 of the Labor Code.

138. Guatemala misrepresents the premise of the U.S. claim, and misstates “the elements” that apply to it.¹⁷⁷ The United States reviews below the meaning of “effectively enforce” in this context and reiterates that it has shown a failure to effectively enforce laws directly related to acceptable conditions of work through a course of inaction and ineffective action by presenting evidence of the Ministry of Labor’s failure to respond and delay in responding to inspection requests, ineffective inspections by the General Labor Inspectorate (“GLI”), and failure to act in response to inspection where violations of the law were noted.

1. Effective Enforcement of Articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197, and the Inspection Protocol

139. The Labor Code places the responsibility of enforcing Articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197 on the Ministry of Labor.¹⁷⁸ Because these provisions relate to conditions of the workplace, for the most part ensuring compliance with them requires inspecting the workplace or otherwise investigating the complaint. Guatemala agrees that the GLI is charged with “ensuring that employers, workers and unions comply with labor laws, collective agreements and regulations.”¹⁷⁹

140. The GLI acts to enforce these laws in a number of ways, but one of the “main functions of the GLI is to conduct work site inspections to ensure compliance with minimum labor

¹⁷⁶ U.S. Initial Written Submission, para. 29; Guatemala’s Initial Written Submission, paras. 121-123.

¹⁷⁷ Guatemala’s Initial Written Submission, para. 284.

¹⁷⁸ GLC, Art. 278.

¹⁷⁹ Guatemala’s Initial Written Submission, para. 105.

standards.”¹⁸⁰ The disputing Parties agree that during inspections the GLI inspector must “personally verif[y] that the employer is in compliance with the relevant labor laws.”¹⁸¹ As summarized by Guatemala, if “a breach of the labor law is observed or is suspected,” the inspector will “issue a warning” and provide a “short period” for the employer to come into compliance.¹⁸² The inspector must also return to the premises to verify compliance.¹⁸³ If the employer has failed to comply, the inspector must initiate an action before the labor court for the possible imposition of civil or criminal penalties.¹⁸⁴ In this respect, the Ministry’s authority to conduct an effective inspection is a key tool to achieve compliance with the law.

141. In its Initial Written Submission, the United States demonstrated that Guatemala has failed to effectively enforce its labor laws in two main respects: (1) through not inspecting or through ineffectively inspecting in response to alleged labor law violations, and (2) by not acting to pursue penalties with the labor courts for employers who have not complied with the law. Both actions are central to effective enforcement of the law.

142. Guatemala generally responds to this showing with three points, all of which misunderstand the requirements of Article 16.2.1(a), and confuse the U.S. claims. We will first address these general arguments before moving on to address Guatemala’s arguments regarding each of the factual scenarios at issue.

143. First, Guatemala suggests that, even where the U.S. claim relates to a failure to inspect in response to an *allegation* of labor law violations, the United States must first demonstrate that a labor law violation has in fact occurred to show a failure of effective enforcement.¹⁸⁵ Guatemala’s arguments reflect a misunderstanding of how labor law enforcement works, and would allow a Party to evade its enforcement obligations *in toto* by declining ever to inspect or investigate worker complaints.

144. Article 16.2.1(a) does not permit a Party to look the other way when a violation of its labor laws has been alleged only to claim that there were no violations to address – as Guatemala appears to attempt to do before this Panel. Such behavior would fly in the face of the plain meaning of Article 16.2.1(a), as well as the object and purpose of the CAFTA-DR,¹⁸⁶ by turning this obligation on its head. This provision ensures that the CAFTA-DR Parties take the necessary actions to identify and remediate violations of their respective labor laws. To allow

¹⁸⁰ Guatemala’s Initial Written Submission, para. 106.

¹⁸¹ Guatemala’s Initial Written Submission, para. 107.

¹⁸² Guatemala’s Initial Written Submission, para. 107.

¹⁸³ Guatemala’s Initial Written Submission, para. 107.

¹⁸⁴ Guatemala’s Initial Written Submission, para 107 (citing GLC, Art. 415).

¹⁸⁵ Guatemala’s Initial Written Submission, para. 280.

¹⁸⁶ As the United States discussed in its Initial Written Submission and above, by agreeing under the CAFTA-DR that each Party “shall not fail to effectively enforce” its labor laws, each Party committed to take those actions necessary to compel compliance with its labor laws so as to enforce those laws with substantial effect or result. Ignoring claims of labor violations contravenes the plain meaning of these terms and contravenes the object and purpose of the CAFTA-DR, which as reflected in the preamble, is to “protect, enhance, and enforce basic workers’ rights and strengthen their cooperation on labor matters.”

employers to persist in their bad conduct, turning a blind eye, is precisely what Article 16.2.1(a) is intended to prevent.

145. Without proper inspections, violations will remain undetected. Proper inspections are “one of the more important ways” to enforce the law, according to the Organization for Economic Cooperation and Development, as noted by the United States in its Initial Written Submission.¹⁸⁷ Inspections are also required under Guatemalan law. Articles 281(e) and 419 of the Guatemalan Labor Code require the GLI to intervene in all labor difficulties and to order “verification” of an alleged labor violation “as soon as possible.” The Ministry is bound by the Inspection Protocol to carry out comprehensive and relevant inspections. Other Labor Code provisions discussed above state that the Ministry of Labor has a duty to ensure compliance with its labor laws.¹⁸⁸ Thus, the Ministry has an affirmative obligation to respond to all complaints alleging labor law violations with appropriate inspections.

146. To be sure, not all complaints brought to the Ministry’s attention will reflect actual violations. But as described above, the purpose of the inspection is to determine whether a violation has occurred. Only through such appropriate inspections can a government determine whether there is compliance with the law, and take the necessary actions to remedy those situations where violations are occurring.

147. Second, Guatemala comments that inspectors have appeared at Guatemalan work sites with frequency. The suggestion by Guatemala in advancing this argument is that inspections of any nature, in and of themselves, will necessarily satisfy the requirements of effective enforcement. This is not the case.

148. In several instances, the United States demonstrated a failure to effectively enforce labor laws where inspections failed to adequately investigate alleged violations.¹⁸⁹ In those cases, the issue is not whether inspectors visited certain work sites. Rather, the issue is the sufficiency of those inspections based on the discrepancy between the alleged labor law violations and the inspection of those allegations as performed by the GLI. Where an inspection does not adequately investigate alleged violations, the inspection cannot serve to show that Guatemala is effectively enforcing its labor laws. Rather, effective enforcement requires appropriate steps in the investigation process: first, initiating an investigation in response to a complaint or *sua sponte*; and second, conducting a complete and thorough investigation in accordance with Guatemala’s regulatory Inspection Protocol.¹⁹⁰ As the disputing Parties have agreed, the legal standard is to ensure compliance with the law.

¹⁸⁷ OECD Report, Best Practice Principles for Regulatory Enforcement: Regulatory Enforcement and Inspections (May 2014), available at <http://www.oecd.org/gov/regulatory-policy/enforcement-inspections.htm>, p. 3.

¹⁸⁸ Above all, the GLI “as part of its duty to monitor strict compliance with labor and social welfare laws and regulations” must “urge or carry out the examination and completion of procedures regarding labor offenses reported by labor inspectors and social workers and ensure that the respective penalties are imposed.” GLC, Art. 280.

¹⁸⁹ U.S. Initial Written Submission, paras. 132-177.

¹⁹⁰ Protocol of Best Practices for Inspections in Guatemala, Art. I (USA-91) (“Inspection Protocol”). Under the Inspection Protocol, inspectors are required to attend to a complaint “immediately”; to analyze and detail all

149. The United States has presented numerous inspection reports that reflect incomplete investigative efforts and worker statements confirming that inspectors do not effectively enforce Guatemalan labor laws directly related to acceptable conditions of work. Guatemala’s failures in this respect are further reflected by evidence presented by the United States that unacceptable conditions, in violation of those laws, persist.¹⁹¹

150. Finally, Guatemala argues that “the lack of imposition of penalties cannot lead to the conclusion that there has been a violation of labor laws,” and could instead mean that there has not been a violation.¹⁹² Guatemala again misunderstands the U.S. argument regarding the lack of imposition of penalties. While it is of course possible that the lack of a fine being imposed following an inspection could indicate the lack of a violation, this fact does not assist Guatemala in its defense because the United States is only discussing failures to impose a penalty in instances where the Ministry of Labor has noted a violation such as during an inspection or for non-attendance at a hearing, as confirmed by the Ministry in its reports.¹⁹³ In these cases, Guatemalan authorities have verified a violation but taken no action.

2. Guatemala Has Failed to Effectively Enforce These Labor Laws

151. The United States has shown in its Initial Written Submission that through a course of inaction and ineffective action, Guatemala has failed to effectively enforce its labor laws beginning as early as 2006 and continuing through the present. The U.S. Initial Written Submission catalogs the many places and instances in which Guatemala did not respond to a request for an inspection at a work site or did not enforce appropriate penalties after finding a violation.

152. In response, Guatemala raises a number of occasions when inspectors visited work sites or sanctioned employers for violations. However, the evidence raised by Guatemala is not sufficient to overcome the U.S. *prima facie* case.

153. **Las Delicias & 69 Other Coffee Farms:** The United States demonstrated a course of inaction by the Ministry of Labor within the agricultural sector by showing that the Ministry failed to adequately investigate or impose penalties as required under Guatemalan law in response to complaints by the workers about acceptable conditions of work. Since 2006,

documentation at the work site that is required to verify a complaint – contracts, wage book, communications, files, rules, etc.; to speak with and interview an appropriate cross-section of persons of interest at the work site; and to interview representatives of any union; among other directives.

¹⁹¹ A Guatemalan labor expert has attested that, based on his organization’s research, there are problems with the quality of inspections. Statement of LLLL (March 25, 2010) (USA-175). He notes that the inspectors do not apply the criteria for labor laws and that they do not carry out their inspections using basic techniques of investigation. Thus, in his view, the quality of inspection is deficient. Further, he attests that inspectors do not visit worksites where they know there is a problem.

¹⁹² Guatemala’s Initial Written Submission, para. 285.

¹⁹³ See, e.g., U.S. Initial Written Submission, paras. 143-144 (Las Delicias), 149-150 (Tiki Industries), 157-160 (Fribo), 162 (Alianza), 165 (Mackditex), 171-172 (Koa Modas), 174 (Santa Elena), and 176-177 (Serigrafia).

workers from 70 coffee farms¹⁹⁴ jointly filed more than 80 complaints with the Ministry alleging, among other violations, nonpayment of the minimum wage, mistreatment, and poor health and safety conditions. In response to these claims, the Ministry failed to enforce the relevant labor laws in several respects. The evidence shows that the Ministry delayed in conducting inspections, refused to conduct inspections unless the workers paid, neglected to speak with complaining workers, failed to inspect the relevant work areas, omitted records of conversations in inspection reports, or only interviewed workers in the presence of the employers, contrary to the requirements of Guatemala’s regulatory Inspection Protocol.¹⁹⁵ Additionally, with respect to one coffee farm, Las Delicias, the evidence shows that the GLI found a violation, but that the Ministry neglected to impose the proper sanction on the company. In particular, Las Delicias did not appear for administrative meetings nor did it comply with orders to pay the required minimum wage.¹⁹⁶

154. Guatemala challenges the U.S. claims involving the 70 farms in a number of ways, all of which are unavailing. First, Guatemala attempts to minimize the significance of the U.S. evidence, claiming that the “United States submits only one (1) complaint and not 70” as initially claimed.¹⁹⁷ To clarify Guatemala’s description, the United States put forward one collective complaint, dated August 12, 2008 (USA-95), that notified Guatemala of purported labor violations at 59 coffee farms.¹⁹⁸ The collective complaint was extended to cover eleven additional coffee farms on September 30, 2008.¹⁹⁹ Since 2006, the workers of one farm, Las Delicias, have filed at least 80 labor complaints, often with other farms.²⁰⁰

155. Second, Guatemala reasserts its general objection that statements without personally identifiable information, including the statement presented by the workers of Las Delicias, lack probative value.²⁰¹ A review of the statement by the Las Delicias workers reveals, however, that Guatemala’s concerns are unwarranted. The statements provide specific details such as dates, work schedules, and wage rates for their period of employment, and describe in depth the grievances that they presented to the Ministry of Labor and the labor court.²⁰² The workers signed the document and affirmed that the facts provided are true and correct to the best of their personal knowledge. These details are corroborated by documents created contemporaneously with the events described.²⁰³

¹⁹⁴ Several of the coffee farms identified produce sugar and banana for export in addition to coffee. Statement of FFFF (March 22, 2010), pp. 1, 3 (USA-162).

¹⁹⁵ U.S. Initial Written Submission, paras. 133-135, 142-144.

¹⁹⁶ U.S. Initial Written Submission, para. 143.

¹⁹⁷ Guatemala’s Initial Written Submission, para. 290.

¹⁹⁸ MSICG Complaint to the Ministry of Labor (August 12, 2008) (USA-95). While USA-95 lists 61 entities, two of those entities are municipalities and not farms. Consequently, this exhibit identifies 59 farms.

¹⁹⁹ MSICG Complaint to the Ministry of Labor (September 30, 2008) (USA-204).

²⁰⁰ Statement of RR, SS, TT, UU, VV (June 30, 2014), p. 3 (USA-26).

²⁰¹ Guatemala’s Initial Written Submission, para. 291.

²⁰² Statement of RR, SS, TT, UU, VV (June 30, 2014), p. 3 (USA-26); Statement of NNNN (March 25, 2010) (USA-176).

²⁰³ MSICG Complaint to the Ministry of Labor (August 12, 2008) (USA-95); MSICG Complaint to the Ministry of Labor (September 30, 2008) (USA-204).

156. Third, Guatemala argues that it did perform inspections in response to the collective complaint advanced by the workers. As evidence, Guatemala provides a table (GTM-5) showing that one inspection had been carried out at 47 farms in the latter half of 2008 in the areas of San Marcos, Suchitepéquez, and Chimaltenango.²⁰⁴ For all but four farms, the table (GTM-5) indicates that the respective farm was in “compliance with the law” or in “compliance with warnings.”²⁰⁵ Guatemala’s summary table is undated. In Guatemala’s view, “these examples demonstrate that the GLI conducted investigations and that labor laws are strictly enforced.”²⁰⁶

157. The inspections reflected in GTM-5 do not rebut the *prima facie* case of the United States. First, Guatemala’s evidence of an employer’s compliance with the law on one particular day does not demonstrate that the employer remained in compliance thereafter or that Guatemala effectively enforced its laws. On September 17, 2008, the Ministry met with the umbrella organization of farm worker unions and federations, Movimiento Sindical, Indígena y Campesino Guatemalteco (“MSICG”), regarding the Ministry’s response to the workers’ collective complaint filed on August 12, 2008.²⁰⁷ The Ministry agreed that, among other things, it would coordinate with MSICG so that MSICG could attend the inspections and that the Ministry would not disclose the dates of the inspections to the farms prior to their occurrence.²⁰⁸ The Ministry, however, did not honor these commitments. The evidence shows that the farms were alerted to the inspections beforehand and that the Ministry did not coordinate the inspections with MSICG.²⁰⁹ The workers complained to the Ministry that informing the farm owners in advance about the inspections put the workers at risk and allowed the employers to prepare for the inspections.²¹⁰

158. The workers complained of labor violations subsequent to the date of the inspections,²¹¹ and the workers continued to press their claims before the Ministry.²¹² In addition to the September 30, 2008 letter extending the workers’ claims of the August 12, 2008 collective complaint to cover 11 additional farms,²¹³ between March and May 2010, three union representatives from the 70 farms confirmed that the employers’ apparent violations continued and that the workers still had not received an official response from the Ministry regarding the

²⁰⁴ Guatemala’s Initial Written Submission, para. 293 (citing GTM-5).

²⁰⁵ Inspection report (GTM-5).

²⁰⁶ Guatemala’s Initial Written Submission, para. 294.

²⁰⁷ MSICG Complaint to the Ministry of Labor (September 30, 2008), p. 1 (USA-204); Statement of HHHH (April 20, 2010), pp. 1-2, (USA-177). *See also* Second Statement of GGG (April 14, 2010) (USA-178); Fourth Statement of HH (May 20, 2010) (USA-179).

²⁰⁸ MSICG Complaint to the Ministry of Labor (September 30, 2008) (USA-204).

²⁰⁹ MSICG Complaint to the Ministry of Labor (September 30, 2008) (USA-204); Statement of HHHH (April 20, 2010), pp. 1-2, (USA-177). *See also* Second Statement of GGG (April 14, 2010) (USA-178); Fourth Statement of HH (May 20, 2010) (USA-179).

²¹⁰ MSICG Complaint to the Ministry of Labor (September 30, 2008), p. 2 (USA-204).

²¹¹ Statement of HHHH (April 20, 2010), p. 2, (USA-177). *See also* Second Statement of GGG (April 14, 2010) (USA-178); Fourth Statement of HH (May 20, 2010) (USA-179).

²¹² MSICG Complaint to the Ministry of Labor (September 30, 2008) (USA-204).

²¹³ MSICG Complaint to the Ministry of Labor (September 30, 2008) (USA-204).

August 12, 2008 collective complaint.²¹⁴ In March 2011, MSICG sent another letter to the Ministry asking for an update on the August 12, 2008 collective complaint.²¹⁵ On August 3, 2011, a union representative again wrote to the Ministry seeking a response to the 2008 collective complaint.²¹⁶ In sum, despite the content of GTM-5, the inspections reflected in that table were insufficient to effectively enforce Articles 61, 103, 116, and 197 with respect to the 70 farms.

159. Guatemala’s claim that the “labor laws are strictly enforced” also rings hollow when compared to reports by the International Labor Organization and United Nations officials indicating that companies in the Guatemalan agricultural sector have consistently violated Guatemala’s labor laws subsequent to 2008. The reports often attribute these ongoing violations to the conduct of the Guatemalan Ministry of Labor. In 2009, the United Nations Special Rapporteur on the Right to Food concluded that “50.1 per cent of [Guatemalan agricultural] workers currently receive a salary that is below the legally established minimum wage.”²¹⁷ In 2011, in reviewing the adequacy of labor inspections in Guatemala, an ILO committee noted “persistent widespread violations of the minimum wage legislation in rural areas.”²¹⁸ Similar trends were observed in 2012. That year, the United Nations High Commissioner for Human Rights found “a tendency by the agro-industry to condition workers’ salaries to their productive outputs, with targets in place that are usually excessive, and without guarantees of earning the minimum wage.”²¹⁹

160. Fourth, Guatemala identifies dates between 2012 and 2014 when inspections occurred at the Las Delicias farm (GTM-36), and then concludes rather vaguely²²⁰ that as a result of hearings and their investigations, “the inspectors identified certain deficiencies at Las Delicias.”²²¹ Guatemala does not provide evidence to show that it took action to bring Las Delicias into compliance after having confirmed the “deficiencies” at the farm.²²² In fact, despite the inspectors’ purported visits to Las Delicias, the lack of inspections and unacceptable conditions of work continued into 2014.²²³ It is clear that the violations by the employers persist through

²¹⁴ Statement of FFFF (March 22, 2010) (USA-162). Fourth Statement of HH (May 20, 2010) (USA-179). Statement of HHHH (April 20, 2010) (USA-177).

²¹⁵ MSICG letter to the Ministry of Labor (March 18, 2011) (USA-205).

²¹⁶ Letter from CUSG to Ministry of Labor (August 3, 2011) (USA-206).

²¹⁷ Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, United Nations Human Rights Council, Doc. A/HRC/13/33/Add.4, paras. 28–30, (January 26, 2010) (USA-207).

²¹⁸ 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).

²¹⁹ Annual Report of the United Nations High Commissioner for Human Rights, Doc. A/HRC/19/21/Add.1, para. 73 (January 30, 2012) (USA-209).

²²⁰ The document that identifies the specific dates for the inspections, GTM-36, does not indicate the results of those inspections, *i.e.*, whether Las Delicias was found to be in compliance with the law and/or whether any violations were remedied.

²²¹ Guatemala’s Initial Written Submission, para. 300.

²²² Guatemala’s Initial Written Submission, para. 300.

²²³ Statement of QQQ (August 10, 2014) (USA-27); Statement of RRR (August 9, 2014) (USA-28); Statement of SSS (July 28, 2014) (USA-29); Statement of WWW, XXX, YYY (August 13, 2014) (USA-33).

the present, and that Guatemala has failed to effectively enforce its labor laws at these workplaces.

161. Finally, Guatemala attempts to refute certain events that occurred during a hearing between the workers and Las Delicias at the labor inspection office on March 25, 2014. In its Initial Written Submission, the United States established that during this hearing the representative for Las Delicias admitted that the company was not paying the workers the minimum wage and that the labor inspector issued warnings to the company.²²⁴ As of October 2014, Las Delicias was still not paying the minimum wage.²²⁵

162. Guatemala attempts to undermine the significance of this hearing, first, by observing that the workers requested the termination of the administrative process, and second, by correcting a prior statement of the United States which suggested that the employer had 30 days to remedy the nonpayment of minimum wage.²²⁶ Both Guatemala's observation and its correction miss the point made by the United States in discussing the March 25, 2014 hearing. The United States discussed the Ministry's handling of this hearing because it clearly demonstrates that workers raised claims before the Ministry, that the Ministry verified the legitimacy of those claims, and that the Ministry failed to take the necessary corrective action to bring the employer into compliance with the law.²²⁷ As reflected in the adjudication report (USA-100), the labor inspector checked the payroll books for Las Delicias to verify whether wage payments were made to the employees.²²⁸ As a result of this review, on February 6, 2014, the Ministry issued a warning to Las Delicias for the non-payment of the minimum wage and benefits.²²⁹

163. The fact that workers chose not to continue the conciliation proceedings did not relieve the Ministry of its obligation to ensure compliance with the labor laws at issue.²³⁰ As Guatemala aptly explains, the "GLI has the authority to bring proceedings for the imposition of penalties to domestic courts in cases of labor law violations."²³¹ These laws apply regardless of whether the inspector is conducting a routine inspection or is engaged in a specialized meeting or hearing involving the employer and its workers, such as the ones that occurred at Las Delicias.²³²

164. Guatemala's arguments that attempt to downplay the significance of the March 25, 2014 hearing do not detract from the broader conclusion that the Ministry took no further action to

²²⁴ U.S. Initial Written Submission, para. 144 (citing Adjudication Report (March 25, 2014) (USA-100)).

²²⁵ Email from RR to U.S. Dept. of Labor (October 15, 2014) (USA-157).

²²⁶ Guatemala's Initial Written Submission, paras. 300, 302. The adjudication report, in fact, noted that the workers had 30 days to pursue relief before the applicable labor court. Adjudication Report (March 25, 2014) (USA-100).

²²⁷ Court Order (December 19, 2005) (USA-210).

²²⁸ Adjudication Report (March 25, 2014) (USA-100).

²²⁹ Adjudication Report (March 25, 2014) (USA-100).

²³⁰ GLC, Arts. 278, 419.

²³¹ Guatemala's Initial Written Submission, para. 105 (citing GLC, Art. 280).

²³² GLC, Art. 278; Inspection Protocol, Art. I (USA-91); and Ministry of Labor Circular No. 02-2011 (February 23, 2011) (USA-211).

enforce the minimum wage laws with respect to Las Delicias, and as of October 2014, Las Delicias was still not paying its workers minimum wage.²³³

165. **Koa Modas:** In its Initial Written Submission, the United States described how inspectors from the Ministry of Labor repeatedly carried out ineffective inspections at the Koa Modas factory and failed to initiate sanction proceedings for the company’s non-appearance at mandatory conciliation meetings.²³⁴ In support, the United States provided statements of workers attesting to the inadequacy of inspections, as well as Ministry of Labor conciliation meeting reports in which the absence of the employer was noted. Guatemala raises three challenges against this U.S. evidence, each of which is unpersuasive.

166. First, Guatemala raises again its concern about the lack of personally identifiable information in the workers’ statements associated with this section of the U.S. Initial Written Submission. As articulated above, the absence of the workers’ identities does not diminish the probative value of the evidence. The workers provided details in their statements that corroborate the evidence. They provided specific details such as dates and other verifiable information about administrative proceedings, and describe in depth their efforts to pursue their rights under Guatemalan labor law. Finally, the workers signed the document and affirmed that the facts provided therein are true and correct to the best of their personal knowledge. The Panel may rely on the workers’ statements as probative evidence of the Ministry’s inaction with respect to Koa Modas.

167. Next, in responding to the evidence presented by the United States of deficient inspections at the Koa Modas factory, Guatemala claims that the workers who were present for the finalization of the inspectors’ reports never “expressed dissatisfaction with the inspectors’ attitude or the way they conducted inspections” and that they were sometimes joined by counsel who also did not speak up.²³⁵ This argument is unpersuasive. First, the inspectors’ obligation to abide by the law in carrying out their inspections is independent of the workers’ feelings or willingness to comment on the quality of the inspectors’ work. Guatemalan law sets out a duty for Guatemala’s inspectors to ensure compliance with Guatemalan labor laws. The rights guaranteed by such labor laws are inalienable under Guatemalan law.²³⁶ The law does not make it the responsibility of workers to evaluate and opine on the quality of inspections.

²³³ Email from RR to U.S. Dept. of Labor (October 15, 2014) (USA-157).

²³⁴ U.S. Initial Written Submission, para 167.

²³⁵ Guatemala’s Initial Written Submission, para. 306.

²³⁶ Political Constitution of the Republic of Guatemala (2002), Art. 106 (USA-124):

Non-waivable labor rights. The rights set forth in this section may not be waived for workers, subject to any enhancement through individual or collective bargaining, and in the manner prescribed by law. For this purpose the State shall promote and protect collective bargaining. Collective or individual contracts with terms involving the waiver, reduction, distortion or restriction of the rights recognized in favor of the workers as set out in the Constitution, law, international treaties ratified by Guatemala, the regulations or other labor provisions are void ipso jure and not will be enforceable against the workers. In case of doubt about the interpretation or scope of laws, regulatory decisions or contractual provisions related to labor issues, they shall be construed in the sense most favorable to the workers.

168. In any event, the fact that such a criticism was not contained in an inspector’s report would not demonstrate that no such criticism existed. A worker may not feel comfortable, or even safe, criticizing the sufficiency of an inspection in front of the inspector, as well as potentially her or his employer. Moreover, were such a criticism raised, the inspector might decline to record it in his or her report. Likewise, the fact that a worker signed the inspectors’ report does not, under Guatemalan law, confirm that the inspectors carried out an inspection in accordance with the law. And, while workers have a right to legal representation before the GLI, the fact that workers are represented by counsel does not make the inspection effective.

169. Guatemala also argues that “[a]s a matter of fact, all inspections are conducted in the presence of the workers.”²³⁷ Guatemala goes on to describe how inspectors always follow the law and do not have time for naps. It is difficult to know on what evidentiary record Guatemala relies to make these arguments; it has presented nothing in its submission beyond mere assertions. And contrary to these assertions, the United States has presented statements by three workers confirming that, on many if not most occasions, inspectors did not conduct inspections in the presence of workers who had filed the complaint.²³⁸ When they did come, it was in the presence of a group of workers selected by the employer.²³⁹

170. Finally, Guatemala takes issue with the U.S. submission that the Ministry of Labor did not take steps pursuant to Article 281(m) to sanction Koa Modas for not sending a representative to seven conciliatory meetings. According to Guatemala, such sanction action would not be seen in the inspectors’ reports.²⁴⁰ The United States does not disagree; the meeting reports show only the inspector’s notation that Koa Modas did not appear.²⁴¹ The United States also has provided a statement by a Koa Modas union leader affirming that: “I have not had knowledge of any sanction proceedings through the courts in practically all of the complaints that have been filed with the Ministry of Labor, including for situations where the company fails to appear at conciliation meetings.”²⁴² Guatemala has not offered any arguments or evidence to undermine the U.S. showing.

171. **Mackditek**: In its Initial Written Submission, the United States put forward documents and statements from Mackditek to demonstrate another instance in which the Ministry failed to take the necessary steps to properly investigate proper labor violations and, where necessary, to bring employers into compliance with the law. The record shows that beginning in September 2011, Mackditek workers advanced several claims of improper dismissals, nonpayment of required wages and benefits, and other labor violations arising in relation to the closing of the

²³⁷ Guatemala’s Initial Written Submission, para. 310.

²³⁸ Statement of DD (June 27, 2014), p. 2 (USA-34); Statement of EE (June 27, 2014), p. 2 (USA-35); Statement of FF (June 27, 2014), p. 2 (USA-36).

²³⁹ Statement of FF (June 27, 2014) (USA-36).

²⁴⁰ Guatemala’s Initial Written Submission, para. 312.

²⁴¹ Ministry of Labor Conciliatory Meeting Reports (March 8, 2013) (USA-117); (April 19, 2013) (USA-118); (April 26, 2013) (USA-119); (June 5, 2013) (USA-120); (June 7, 2013) (USA-121); (December 4, 2013) (USA-122); (December 12, 2013) (USA-123). *See also* U.S. Initial Written Submission, para. 167.

²⁴² Statement of GG (October 13, 2014), p. 7 (USA-37).

factory.²⁴³ The Ministry conducted inspections,²⁴⁴ and in some instances, labor inspectors documented the existence of labor law violations (i.e., the improper dismissals, and nonpayment of wages and benefits).²⁴⁵ Nevertheless, the workers' claims of improper dismissals and nonpayment of required wages and benefits went unresolved.²⁴⁶

172. As discussed in the U.S. Initial Written Submission, on August 31, 2011, Mackditex forced 18 workers to take leave from work, paying them only vacation pay for this period of time as calculated under GLC Article 134.²⁴⁷ On September 1, 2011, the workers filed a complaint with the Ministry of Labor claiming they had been suspended from work without proper pay in violation of GLC Articles 92, 93, and 134.²⁴⁸ On September 16, 2011, the Ministry conducted an inspection of Mackditex and confirmed that the company had violated Articles 92, 93, and 134,²⁴⁹ and yet the Ministry never returned to verify whether the employer remediated these specific violations.²⁵⁰ Approximately three weeks later, between October 6 and 8, 2011, Mackditex dismissed the workers.²⁵¹ On November 21, 2011, a Guatemalan labor court ordered that Mackditex reinstate the workers and pay them their wages and benefits for the period of their dismissal.²⁵² Three years later, the workers were given "a payment" from a U.S. apparel company for which Mackditex supplied merchandise for less than what they were legally owed.²⁵³ Such a payment of course was not a settlement of the dispute between the workers and Mackditex. There has been no settlement agreement between the workers and Mackditex. These facts show the ineffective nature of Guatemala's enforcement actions -- Guatemala verified Mackditex's violation of the Labor Code, and yet, upon the conclusion of Guatemala's involvement, the employer remained out of compliance with the law.

173. Guatemala's response fails to rebut this *prima facie* showing of ineffective enforcement. Guatemala attempts to show that, contrary to the workers' statement, during inspections, the inspectors met with the workers that filed the complaint,²⁵⁴ and that the inspectors "rigorously"

²⁴³ Statement of W and X (June 25, 2014) (USA-18); U.S. Initial Written Submission, para. 165; Examples of administrative and judicial documents, pp. 1-3 (GTM-8).

²⁴⁴ Statement of W and X (June 25, 2014), pp. 2, 4 (USA-18); Guatemala's Initial Written Submission, para. 319 (citing GTM-10); U.S. Initial Written Submission, para. 165.

²⁴⁵ Guatemala's Initial Written Submission para. 319 (citing GTM-10) (the inspection report confirms that Mackditex had violated GLC articles 309, 379, and 380 by dismissing the workers); Adjudication (September 16, 2011) (USA-116) (the report confirms that Mackditex had not paid some workers the wages and benefits that they were owed).

²⁴⁶ Statement of W and X (June 25, 2014), pp. 2, 4 (USA-18).

²⁴⁷ Adjudication (September 1, 2011) (USA-115); Statement of W and X (June 25, 2014), p. 1 (USA-18).

²⁴⁸ Adjudication (September 1, 2011) (USA-115); Statement of W and X (June 25, 2014), p. 1 (USA-18).

²⁴⁹ U.S. Initial Written Submission, para. 165.

²⁵⁰ U.S. Initial Written Submission, para. 165.

²⁵¹ Request for Reinstatement (October 12, 2011) (USA-65); Statement of W and X (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).

²⁵² Reinstatement Order (November 21, 2011) (USA-67).

²⁵³ Statement of W and X (June 25, 2014), p. 3 (USA-18).

²⁵⁴ Guatemala's Initial Written Submission, para. 318.

conducted their inspections.²⁵⁵ Neither of these arguments is persuasive to rebut the U.S. *prima facie* case.

174. Guatemala acknowledges that Mackditex committed verified labor violations,²⁵⁶ and the workers' statement confirms that Guatemala failed to secure Mackditex's compliance with the law. Moreover, contrary to Guatemala's claims of rigorous enforcement, the evidence it puts forward demonstrates the ineffective nature of the Ministry's conduct. Guatemala observes that Mackditex committed labor violations around October 11, 2011, and that "[t]he same inspector then initiated a proceeding before a labor court with the view of imposing penalties to [sic] the employer."²⁵⁷ Yet Guatemala's documents reveal that the court action identified by Guatemala is dated August 17, 2012.²⁵⁸ From the face of GTM-11, there is no indication that this proceeding, initiated nearly a year after the date of the original inspection, was brought on the basis of the same violations.²⁵⁹ Even if it were related to the violations of October 2011, Guatemala's delay of 10 months to begin to pursue penalties against an offending employer cannot be considered effective enforcement.

175. Finally, in response to Guatemala's claim that inspectors met with the workers during inspections that occurred on October 7 and 11, 2011 (GTM-9, 10), the workers confirmed that these interactions occurred.²⁶⁰ However, as the workers further note, these discussions occurred on or after their date of dismissal from the company.²⁶¹ Meeting with workers after their dismissals to discuss their claims of unacceptable working conditions is not an effective use of inspections.

African Palm Oil Companies

176. Guatemala's overarching response to the litany of enforcement issues at the African palm oil company plantations (Tiki Industries, REPSA, NAISA, and Palmas del Ixcán) presented by the United States is to mention that three of the companies have received "international certifications that require . . . strict compliance with labor laws," and that the fourth "is in the process of obtaining that certification as well."²⁶² Regardless of what "certification" the companies may have received – which Guatemala does not identify in its submission – this fact cannot serve as a basis for concluding that no enforcement of labor laws is necessary. Neither this nor any other evidence presented by Guatemala supports its proposition that each of the palm oil companies is in full compliance with Guatemala's labor laws, as Guatemala contends.

²⁵⁵ Guatemala's Initial Written Submission, paras. 318-319.

²⁵⁶ Adjudication (September 16, 2011) (USA-116); Guatemala's Initial Written Submission, para. 319.

²⁵⁷ Guatemala's Initial Written Submission, para. 319.

²⁵⁸ Inspector's request for the imposition of penalties against Mackditex (GTM-11).

²⁵⁹ GTM-11 refers to a "resolución" of July 31, 2012, which may have been attached but which Guatemala did not submit.

²⁶⁰ Email from IIII (March 6, 2015) (USA-180).

²⁶¹ Email from IIII (March 6, 2015) (USA-180).

²⁶² Guatemala's Initial Written Submission, para. 326.

177. To the contrary, workers at the African palm oil plantations continued to report labor violations to Ministry of Labor officials throughout 2012, 2013, and 2014, but limited action was taken in response.²⁶³ As recently as October 2, 2014, workers asked the Ministry to undertake further enforcement efforts.²⁶⁴

178. **Tiki Industries:** Guatemala contends that it took effective enforcement action at Tiki Industries in 2012, 2013, and 2014, as seen in four inspection reports and the initiation of a sanction proceeding prepared by the Ministry of Labor. Guatemala reiterates that, in its view, Tiki Industries is in full compliance with labor laws directly related to acceptable conditions of work.²⁶⁵

179. Guatemala’s arguments with respect to Tiki Industries are unpersuasive, and are contradicted by evidence presented by both the United States and Guatemala, as well as by studies that have been carried out by international organizations working in the region.²⁶⁶

180. First, in contrast to what it describes as “full compliance” by Tiki Industries, Guatemala itself indicates that the Guatemalan authorities “initiated proceeding [sic] before a labor court for labor offenses” regarding Tiki Industries on March 14, 2012.²⁶⁷ The United States understands this statement to indicate that Guatemala acknowledges that there were, in fact, violations of labor laws to be addressed at Tiki Industries. As it has before, however, Guatemala confuses taking action with effective enforcement of its labor laws. Evidence provided by the United States shows that even after these proceedings would have taken place, Tiki Industries remained out of compliance with Guatemalan labor laws relating to acceptable conditions of work.²⁶⁸

181. The United States also notes that it is not clear from the documentation offered by Guatemala that these proceedings fully responded to the complaints cited by the United States in its submission. Remarking on the March 14, 2012 initiation of sanction proceedings to which Guatemala refers, an official from the National Council of Displaced Persons of Guatemala (“CONDEG”) recounts: “The labor inspector only has to relate part of the facts and I have knowledge that this limited story as presented in a request for sanction to the labor court was

²⁶³ CONDEG Email to Ministry of Labor (June 27, 2013) (USA-236); Statement of VVV (October 12, 2014), p. 10 (USA-31) (describing how inspectors did not speak with workers or conduct a complete inspection); Statement of TTT (October 12, 2014), p. 4 (USA-30) (also documenting the failure of inspectors to speak with workers or to conduct a full investigation).

²⁶⁴ Complaint (October 2, 2014) (USA-232).

²⁶⁵ Guatemala’s Initial Written Submission, para. 337.

²⁶⁶ See, e.g., Verite Report, Labor and Human Rights Risk Analysis of the Guatemalan Palm Oil Sector (March 2014), pp.72-73 (USA-214) (reporting a lack of labor law enforcement in the agricultural sector and persistent failure of labor inspectors to conduct investigations on palm oil plantations). The UN High Commissioner for Human Rights in Guatemala, who accompanied the labor inspectors on their visits in February 2012, noted that those inspections were the first inspections carried out at the African Palm companies since they began operating in Sayaché. See 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). See also Email from IIII (April 7, 2014) (USA-231) (referring to documentation received from the Ministry of Labor noting that five of the nine palm companies remain out of compliance with Guatemalan labor laws in some respect).

²⁶⁷ Guatemala’s Initial Written Submission, paras. 327, 329.

²⁶⁸ Statement of AAAA (June 26, 2014) (USA-40). Second Statement of AAAA (February 25, 2015) (USA-181).

without having expounded all the facts that happened that day.”²⁶⁹ In other words, the fact that this enforcement action was brought does not alone demonstrate that all the workers’ complaints regarding acceptable conditions of work were either addressed or resolved by Guatemalan authorities. Guatemala provides no indication of any action taken by the labor court in response to the March 14, 2012 sanction process initiated by the Ministry of Labor.

182. In response to documentation offered by the United States showing that the Ministry itself found continued non-compliance with Guatemalan law as of March 2014, Guatemala provides four inspection reports from visits inspectors made to the company plantation that Guatemala claims confirm Tiki Industries’ compliance with Guatemalan labor law.²⁷⁰ The record shows that these four inspection reports do not paint an accurate picture of the responses, or lack thereof, to the numerous complaints raised by workers at Tiki Industries and the other palm plantations. As CONDEG notes, the inspections are not comprehensive and the inspectors do not speak with the workers in the field,²⁷¹ contrary to the requirements of the Inspection Protocol. Tiki Industries workers have maintained that they rarely see inspectors after complaints about working conditions have been filed with the Ministry of Labor.²⁷²

183. **La Reforestadora de Palma (REPSA):** In response to the U.S. challenge with regard to the REPSA plantation, Guatemala presents inspection reports from certain occasions in 2012 and 2013.²⁷³ However, as the United States has already demonstrated in its Initial Written Submission, workers have attested that these inspections, the reports for which they have requested from the Ministry for nearly two years without having received them,²⁷⁴ were ineffective and did not follow the practices required by law.²⁷⁵ Thus, these inspections do not rebut the U.S. showing that inspectors were not effectively enforcing the law, given their deficient inspections.

184. Guatemala also wrongly asserts that the United States has developed its claim based on events occurring “on a single day.”²⁷⁶ In its Initial Written Submission, the United States described how, after seeing no changes to their working conditions as a result of the efforts made in February and March 2012, workers sought more effective enforcement. Twelve thousand palm plantation workers from REPSA, NAISA, Tiki Industries, Palmas del Ixcán and other companies took to the streets in protest in response to the lack of effective enforcement of labor laws.²⁷⁷ This overwhelming demonstration prompted the initiation of an alternative conciliation

²⁶⁹ Second Statement of AAAA (February 25, 2015), p. 3 (USA-181).

²⁷⁰ Guatemala’s Initial Written Submission, para. 332.

²⁷¹ Second Statement of AAAA (February 25, 2015), p. 3 (USA-181).

²⁷² Second Statement of AAAA (February 25, 2015), p. 5 (USA-181).

²⁷³ GTM-17; GTM-18; GTM-19; GTM-20; GTM-21.

²⁷⁴ Statement of AAAA (June 26, 2014) (USA-40). CONDEG Letter to the Ministry of Labor (March 13, 2014) (USA-233).

²⁷⁵ Second Statement of AAAA (February 25, 2015) (USA-181). Inspection Protocol, Art. I (USA-91).

²⁷⁶ Guatemala’s Initial Written Submission, para. 341.

²⁷⁷ See U.S. Initial Written Submission, para. 155, footnote 204.

effort known as “mesas de diálogo” or dialogue tables:²⁷⁸ meetings convened by the Ministry of Labor at which worker and employer representatives are present.

185. Among the several difficulties with the dialogue tables is that, despite the fact that an employer may admit to non-compliance during the dialogue sessions, no action is taken by Ministry officials to sanction the employers or bring employers into compliance with the law; as some organizations and labor lawyers have commented, the dialogue tables have been used to subvert, rather than enhance, the Ministry’s responsibility to enforce the law.²⁷⁹ The dialogue tables have been replicated throughout the country and across all sectors. In the case of the African palm plantations, as with most sectors, agreements coming out of the dialogue tables are rare and when reached, are rarely honored.²⁸⁰ In effect, the dialogue tables conducted with REPSA and the other palm plantation companies, which have continued since 2013 through 2014, have not served as a mechanism for effective enforcement.²⁸¹

186. **Nacional Agroindustrial (NAISA):** Without providing any evidentiary support, Guatemala asserts that it “conducted several inspections” at NAISA between November 2012 and November 2013.²⁸² Guatemala further maintains that “in those inspections, the inspectors interviewed the workers and verified that NAISA was in full compliance with Guatemalan labor laws.”²⁸³ Guatemala’s assertions are directly contradicted by a representative from CONDEG who has attested that inspections that were conducted were done in violation of the regulatory Inspection Protocol as the inspectors neglected to speak with the workers in the field.²⁸⁴ In the absence of effective enforcement efforts by the government, the workers have maintained their concerns and sought further government action as of October 2014.²⁸⁵

187. **Fribo:** Workers at the Fribo factory complained of labor law violations by their employer in September 2007. When the labor inspectors visited the work site and the employer was uncooperative, the inspectors warned the employer that its lack of cooperation was a violation of the law.²⁸⁶ The inspectors returned again and still the violations continued.²⁸⁷ Despite having acknowledged that Fribo had violated Articles 129 and 134 of the Labor Code, the Ministry did not take effective enforcement action to put an end to the company’s non-

²⁷⁸ U.S. Initial Written Submission, para. 155, footnote 204.

²⁷⁹ MSICG Declaration (February 16, 2015), p. 16 (USA-164) (“the duty of supervision of the labor inspectors has been replaced by the duty of conciliation and that it is common for inspectors to impose conciliation, a practice which has fostered impunity and weakened the effectiveness of the legislation, the application of which pertains to labor inspectors”); Second Statement of RR (July 23, 2010) (USA-235); Complaint (October 2, 2014) (USA-232).

²⁸⁰ Letter to the President of Guatemala (October 28, 2013) (USA-234); Second Statement of AAAA (February 25, 2015), p. 5 (USA-181).

²⁸¹ Statement of AAAA (June 26, 2014), pp. 1, 4 (USA-40); Letter to the President of Guatemala (October 28, 2013) (USA-234); Statement of MMMM (July 20, 2010) (USA-171).

²⁸² Guatemala’s Initial Written Submission, para. 351.

²⁸³ Guatemala’s Initial Written Submission, para. 351.

²⁸⁴ Second Statement of AAAA (February 25, 2015) (USA-181); Statement of AAAA (June 26, 2014) (USA-40).

²⁸⁵ Second Statement of AAAA (February 25, 2015) (USA-181); Statement of AAAA (June 26, 2014) (USA-40); Complaint (October 2, 2014) (USA-232).

²⁸⁶ U.S. Initial Written Submission, paras. 157-158.

²⁸⁷ U.S. Initial Written Submission, paras. 157-158.

compliance.²⁸⁸ Two years later, inspectors again failed to ensure compliance with the warnings they issued about violations of the law.²⁸⁹

188. The United States has shown the lack of action on the part of Guatemala by providing documents that indicated the Ministry had found that the company was in violation of Guatemalan labor laws and by presenting statements from workers at the company who attest that the company never corrected its illegal behavior.²⁹⁰ It is for Guatemala to rebut that evidence with a demonstration of action, which it has not done.

189. Guatemala responds to the facts presented by the United States regarding the violations by the Fribo company in 2007 and 2009 by asserting that “inspectors’ reports cannot serve the purpose of demonstrating the lack of any action for the imposition of sanctions.”²⁹¹ Certainly, inspectors’ reports, if accurate, can show what was done and found and what was not done or found during the inspection. But in any event, the point is that the inspectors’ statements show that there were violations and the issue then becomes whether there was effective enforcement of the law in response to those violations. There was not, as demonstrated by statements by workers with personal knowledge as to the later conditions of work.²⁹² Guatemala attempts to discredit these statements based on the removal of personal identifying information, but as the United States has demonstrated above, Guatemala’s arguments are not sufficient to rebut the *prima facie* case established by this evidence.

190. Guatemala also raises issues with the content of certain of the inspection reports presented by the United States. These arguments are unavailing, however, and do not support Guatemala’s arguments. Guatemala first refers to the July 10, 2009 inspection report, and argues that this document shows that the Ministry— and the workers in some instances – gave the company more time to remedy its violations than was suggested by the United States in its Initial Written Submission.²⁹³ Guatemala misrepresents the U.S arguments, as well as the inspection report on which it relies.

191. Guatemala is mistaken in its contention that the time periods to which the United States referred in its submission were not accurate. The United States presented an inspector’s report which found four types of infractions by the Fribo company.²⁹⁴ The inspector gave the company a different deadline to remedy each of the four classes: for the workers’ reinstatement, the employer was to act immediately; for the repayment of lost wages, the employer was to act within 10 days; for the changes to the physical plant, the employer was given 30 days; and, for the submission of employment documents, the employer was given five days. Therefore, contrary to Guatemala’s explanation, the re-inspection of July 22 (8 working days) was not

²⁸⁸ U.S. Initial Written Submission, para. 159.

²⁸⁹ U.S. Initial Written Submission, paras. 160-161.

²⁹⁰ See, e.g., Adjudication (September 3 and 5, 2007) (USA-111), Adjudication (September 24, 2007) (USA-112), Adjudication (July 10, 2009) (USA-61).

²⁹¹ Guatemala’s Initial Written Submission, para. 361.

²⁹² Statement of K, L, M, N, O (June 24, 2014) (USA-11).

²⁹³ Guatemala’s Initial Written Submission, paras. 362-363.

²⁹⁴ Adjudication (July 10, 2009) (USA-61).

inappropriate to verify compliance by the company through reinstatements and submission of documents. The re-inspection of July 27 (10 working days later) to which Guatemala refers would have been appropriate for verifying compliance for the reinstatements, document submission, and repayment of wages.

192. In suggesting that the Fribo workers themselves requested that the company’s compliance with each infraction be verified only after 30 working days had passed for compliance with the physical plant requirements, Guatemala misrepresents the inspection report text.²⁹⁵ The statement quoted by Guatemala does not indicate that the workers asked the inspectors to stop checking on the company’s compliance with the relevant obligations before the end of the 30 days. It merely demonstrates that the workers requested verification of the warnings “in their entirety” on the last day. Read in context, it is not even clear to which violations the worker is referring or who is making the request.

Mr. [redacted] also states that they changed his working conditions since he was previously hired to [redacted] and at this time is performing the functions of a [redacted]. He also states that they lowered his salary so they requested the intervention of the General Labor Office so the retribution will not continue, and they request that the warnings be recorded in their entirety on the last date to comply with them, with the goal and spirit of thus finding a solution to the present conflict and seeking for the company to comply with these measures.²⁹⁶

193. Based on the foregoing, Guatemala has failed to rebut the *prima facie* case made by the United States in its Initial Written Submission. Despite the arguments raised by Guatemala, the evidence shows that inspections at that facility were inadequate to address the concerns raised, and that Guatemala failed to take action to compel compliance with labor laws when violations were identified. Guatemala has therefore failed to effectively enforce its labor laws with respect to the Fribo company.

194. **Alianza:** In its Initial Written Submission, the United States demonstrated that Guatemala failed to effectively enforce its laws by not taking action against the Alianza apparel manufacturing company for not attending a mandatory conciliatory meeting. Guatemala argues, in response, that the United States has not presented the proper evidence to demonstrate that the GLI failed to take action against the company. Guatemala again remarks that “inspection reports are not the legal instrument by which the GLI takes action for the imposition of penalties.”²⁹⁷ While inspection reports may not be the legal instruments by which Guatemala takes action, this misses the point. The point is that the inspector’s report shows that Alianza failed to comply with the law since it did not attend the meeting, as required by law.

195. Guatemala also argues that there is no evidence that Guatemala failed to take action in response to the inspector’s report. The United States again notes that it is unlikely that the lack of government action would be memorialized by any official record. The United States has,

²⁹⁵ Guatemala’s Initial Written Submission, para. 365.

²⁹⁶ Adjudication (July 27, 2009), p. 2 (USA-114).

²⁹⁷ Guatemala’s Initial Written Submission, para. 370. Guatemala does not indicate what documentary evidence would confirm that penalties were taken by Guatemalan authorities against the company nor does it provide any.

however, provided a statement by individuals with personal knowledge of the Ministry’s inaction. Those lawyers attest:

[T]he Ministry cited the company to attend conciliation meetings. The owner never appeared at these meetings. In some cases, the Ministry presented motions of failure to appear, but in the end, Alianza did not pay any of them. Once the company changed names, the Court determined that there was nobody to serve. The Court did not take any action for not having paid. It is an obligation to send an official letter, but they did not.²⁹⁸

196. None of the three documents presented by Guatemala demonstrates Guatemala taking action against the company for not attending the March 2013 meeting. Guatemala presents two documents dated November 29, 2012 and December 10, 2012, long before the March 2013 meeting.²⁹⁹ Guatemala also submits a document that speaks to the seizure of the company’s assets to pay the workers back pay they were owed. This action, if enforced, would reflect a positive development for the workers involved, but it is not relevant to the issue. The U.S. claim with respect to Alianza concerns Guatemala’s failure to penalize that company for lack of appearance at a mandatory meeting.

197. The evidence offered by Guatemala is not sufficient to rebut the U.S. showing that Guatemala has failed to enforce its labor laws in this regard with respect to Alianza.

198. **Santa Elena & El Ferrol Farms (FEFLOSA, S.A.):** In its Initial Written Submission, the United States presented evidence of inadequate inspections by Guatemalan labor inspectors, as well as health and safety violations by the coffee company FEFLOSA, S.A. at its Santa Elena and El Ferrol farms noted by other Guatemalan authorities.³⁰⁰ To date, Guatemala has not compelled compliance. In 2014, Guatemala took steps to set up a conciliation dialogue table (“mesa de diálogo”), but that action failed to remedy the violations at issue.³⁰¹

199. Guatemala argues that it took action in the weeks after these violations were found, and that the workers and the employer reached an agreement that resolved any violation issues at the farms. Guatemala is mistaken in suggesting that the points agreed to by the employer and workers cancelled its enforcement obligations.

200. On June 5, 2014, the workers at Santa Elena & El Ferrol submitted a complaint to the Ministry of Labor (USA-126). On June 6, 2014, inspectors visited the farms, but did not visit the fumigation areas at issue in the worker complaints.³⁰² A further inspection was held on June 16,

²⁹⁸ Statement of BB, CC (July 2, 2014), p. 3 (USA-21).

²⁹⁹ Inspector’s report (GTM-22). Inspector’s request for the imposition of penalties against D&B (GTM-23).

³⁰⁰ U.S. Initial Written Submission, paras. 173-174.

³⁰¹ Second Statement of FFF (March 9, 2015), p. 3 (USA-182). *See also* Third Statement of HH (August 5, 2014), p. 2 (USA-167).

³⁰² While Guatemala suggests that the inspectors did not visit the relevant area of the farm “because the workers requested the intervention of a health and safety officer,” (Guatemala’s Initial Written Submission, para. 377), this is neither relevant nor supported by the evidence. The purported reason does not change the fact that the areas were not visited. Furthermore, nothing in the text of the inspection report indicates that the inspectors declined to visit

2014, and a health and safety officer was present at this inspection. The United States demonstrated that the health and safety officer made over 25 findings regarding necessary improvements to the worksite,³⁰³ showing that the farms were in violation of Articles 61 and 197 of the Guatemalan Labor Code. The inspection report shows that one of the participants in the meeting refused to sign the report and that, “for that reason, a second follow-up visit is requested for July 8, 2014 . . . to verify compliance.”³⁰⁴ The report also indicates that a separate follow-up meeting was scheduled for June 25, 2014 to discuss the company’s other citation for wrongfully dismissing workers.³⁰⁵

201. According to Guatemala, the July 8, 2014 follow-up inspection had to be rescheduled “because the employer excused himself and submitted a medical certificate.”³⁰⁶ However, the document submitted by Guatemala states that an individual needed to be excused from the June 25, 2014 meeting, not the July 8 inspection.

202. Guatemala also comments that a follow-up inspection took place on July 22, 2014, in place of that scheduled for July 8, 2014.³⁰⁷ The document submitted by Guatemala from that inspection shows that the company was found to be out of compliance on certain health and safety issues.³⁰⁸ The employer, workers, and inspector arranged another meeting for August 7, 2014 to continue reviewing the situation. The culmination of the follow-up meetings is memorialized in documents from September 2014,³⁰⁹ including in an agreement to which Guatemala also refers.³¹⁰ Throughout this period, the Ministry took no action to commence sanction proceedings against the company after having noted violations of Guatemalan labor law.³¹¹

203. The agreement to which Guatemala refers was an arrangement between the employer and the workers’ union reached through another “mesas de diálogo”/dialogue table process.³¹² The document provided by Guatemala is the second of two reports issued at these coffee farms in short succession as part of the dialogue table process. The first report, dated September 26,

these areas *because* the workers requested a health and safety officer, or that the inspectors had otherwise planned to inspect the worksite. Adjudication (June 6, 2014) (USA-126), which appears to be the same document as GTM-25. Tellingly, the inspection report shows how, after confirming a violation by the employer, the inspectors indicate they will return for a “conciliation hearing” rather than inspection and verification as set out in the Labor Code. Thus, these records further demonstrate how, as a matter of course, inspectors encourage conciliation toward settlement rather than enforcement.

³⁰³ Report, Department of Hygiene and Occupational Safety (June 16, 2014) (USA-128).

³⁰⁴ Adjudication (June 16, 2014) (USA-127).

³⁰⁵ Adjudication (June 16, 2014) (USA-127).

³⁰⁶ Guatemala’s Initial Written Submission, para. 380.

³⁰⁷ Guatemala’s Initial Written Submission, para. 380.

³⁰⁸ Inspector’s report (July 22, 2014) (GTM-27).

³⁰⁹ Meeting Minutes (September 26, 2014) (USA-212); Inspector’s report (September 30, 2014) (GTM-28).

³¹⁰ Inspector’s report (September 30, 2014) (GTM-28).

³¹¹ Third Statement of HH (August 5, 2014) (USA-167) (noting that the government officials present encouraged the workers to accept unlawful conditions of work).

³¹² Guatemala’s Initial Written Submission, para. 380. The United States has explained the “dialogue tables” in its Initial Written Submission (para. 155, footnote 204), and in this submission at paras. 184-185, *supra*.

2014, specifies the details behind the complaint brought by the workers related to anti-union discrimination, unacceptable conditions of work, breach of collective agreement, among others.³¹³ The employer admits to its various labor law violations pertaining to making discriminatory dismissals, non-payment of wages and benefits, and unacceptable conditions of work.³¹⁴ The employer then proposes a resolution that in effect offers the workers fewer rights than that to which they are legally entitled.³¹⁵

204. Despite the employer's admissions regarding its violation of Guatemalan labor laws, the Minister of Labor and Vice Minister of Labor, present at the meeting, took no action to ensure the resolution reached complied with Guatemalan labor laws. Under the Labor Code, these officials have a duty to intervene upon the employer's admissions of labor violations.³¹⁶ The proposed understanding between the employer and the workers runs contrary to the officials' duty to prevent apparent violations of labor laws³¹⁷ and fails to result in the legally prescribed investigation and sanction process. By allowing this agreement to be advanced on such terms, the Ministry essentially provides the employer with a free pass – both for past violations of the law, and for future violations, given that the agreement provides for salaries set at below the minimum wage. This incident is a further manifestation of Guatemala's failure to effectively enforce its labor laws.

205. At the request of the workers seeking to resolve the conflict, the September 26 dialogue table meeting was adjourned and a follow-up meeting was scheduled for October 1.³¹⁸ The dialogue in fact re-convened on September 30. The September 30, 2014 meeting report goes on to the same effect: the finalization of an agreement in which the Minister of Labor authorizes the payment of some workers but not others (members of the Executive Committee) without explanation,³¹⁹ and which, instead of addressing the health and safety violations with appropriate sanctions, culminates with the authorities providing advisory assistance on the issues. Again, the Ministry officials from the highest level disregarded the established procedures for labor inspections and sanction.³²⁰ This meeting report shows once more the failure by the Ministry to effectively enforce, among others, Article 197, regarding acceptable conditions of work, of the Labor Code.

206. Moreover, the violations by the employer persist. Inspectors have visited the farm on two occasions since the September 30, 2014 agreement.³²¹ On these occasions, a worker observed that the inspectors met with the employer behind closed doors: "The inspectors talked with the

³¹³ Meeting Minutes (September 26, 2014) (USA-212).

³¹⁴ Meeting Minutes (September 26, 2014) (USA-212).

³¹⁵ Meeting Minutes (September 26, 2014) (USA-212).

³¹⁶ GLC, Art. 281.

³¹⁷ GLC, Art. 273.

³¹⁸ Meeting Minutes (September 26, 2014) (USA-212).

³¹⁹ Inspector's report (September 30, 2014) (GTM-28).

³²⁰ GLC, Arts. 281(l), 419.

³²¹ Guatemala notes that an inspection in response to the July 2014 report regarding violations issued by the health and safety inspector was scheduled to take place in January 2015, six months later and notably after the United States drew attention to the lack of follow-up inspection in its November 2014 Initial Written Submission.

employer in a private room. They did not carry out a complete inspection.”³²² These inspections violated the regulatory Inspection Protocol.³²³ In the absence of effective inspections, the unacceptable conditions of work have continued³²⁴ and FEFLOSA remains out of compliance with the law.

207. **Serigrafía Seok Hwa (Serigrafía):** Guatemala has also not rebutted evidence demonstrating that it failed to effectively enforce its labor laws with respect to Serigrafía Seok Hwa, S.A (“Serigrafía”). The United States showed that the company violated the Labor Code by not appearing at seven conciliation meetings.³²⁵ The company’s participation in the meetings was mandatory under Guatemalan law. Those meetings were intended to address concerns by workers about acceptable conditions of work, ineffective inspections, and reprisals against workers for trying to form a union. Rather than attempting to demonstrate that Serigrafía was penalized or that the illegal conduct was corrected, Guatemala’s defense relies almost entirely on challenging the credibility of the workers who confirm the claim. As the United States has previously discussed however,³²⁶ these arguments are unavailing.

208. Tellingly, Guatemala submits only one meeting report, dated February 11, 2013,³²⁷ to counter the showing made by the United States.³²⁸ According to Guatemala, this report demonstrates that the employer did engage with workers when required and that “the good faith and willingness of the workers and the employer to find mutually agreed solutions prevailed.”³²⁹ The document presented by Guatemala is irrelevant, however, given that the facts presented by the United States speak of ineffective inspections and unattended meetings that took place in June and July 2012, over seven months earlier. Moreover, this meeting report does not show agreed solutions. This document shows that a meeting was held in which the workers and employer exchanged proposals for settlement. The meeting ends with the employer requesting time to consider its options. On the basis of this document, no agreement was reached. Thus, the document does not demonstrate “mutually agreed solutions” as claimed by Guatemala.³³⁰

209. Even if the workers and employer later reached an agreement, a worker’s decision to agree to a lesser payment than what he or she is owed cannot be an excuse for not enforcing the law. Reaching “mutually agreed solutions” is irrelevant in respect of the Ministry’s failure to take appropriate sanctions where Serigrafía violated Guatemalan labor laws. Whether workers agreed to a settlement of the wages owed to them did not relieve the Ministry of its obligation to investigate violations and, where necessary, to take the necessary actions to bring the company into compliance with Guatemalan labor laws.

³²² Second Statement of FFF (March 9, 2015), p. 3 (USA-182).

³²³ Inspection Protocol, Art. I (2008) (USA-91).

³²⁴ Second Statement of FFF (March 9, 2015), p. 3 (USA-182).

³²⁵ U.S. Initial Written Submission, para. 176.

³²⁶ See supra Part II.

³²⁷ Inspector’s report (February 11, 2013) (GTM-30).

³²⁸ Inspector’s report (February 11, 2013) (GTM-30).

³²⁹ Guatemala’s Initial Written Submission, para. 387.

³³⁰ Guatemala’s Initial Written Submission, paras. 387, 388.

210. The ILO has observed similar evidence of inaction by the Ministry of Labor with respect to bringing employers who fail to remedy labor violations into compliance.³³¹

211. The evidence presented by the United States confirms that Guatemala has failed to effectively enforce its labor laws directly related to acceptable conditions of work by not carrying out investigations as required by Guatemalan law and by not imposing penalties upon having found violations of its laws. The limited evidence presented by Guatemala does not disprove that on at least 197 occasions, Guatemala failed to effectively enforce its laws at these 80 work sites. Accordingly, Guatemala has failed to rebut the *prima facie* case of the United States.

B. GUATEMALA FAILED THROUGH A SUSTAINED AND RECURRING COURSE OF INACTION

212. The United States explained in its Initial Written Submission how the evidence it presented showed a sustained course of inaction in that Guatemala continually and repeatedly failed to enforce Articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197 beginning in 2006 and continuing through 2014. The evidence also demonstrated a recurring course of inaction in that Guatemala has failed to effectively enforce these provisions not just with respect to one worker or one company, or in isolated instances, but with ten companies and 70 coffee farms over the course of eight years.

213. In response, Guatemala relies on its mischaracterization of the legal standard for the “sustained or recurring” requirement, a mischaracterization that the United States has addressed above and therefore will only briefly summarize here. Contrary to Guatemala’s assertion, and as can be seen with the disjunctive “or” in the phrase, Article 16.2.1(a) does not require that the lack of effective enforcement be both sustained and recurring, which is a higher standard than that set forth in Article 16.2.1(a). Article 16.2.1(a) likewise does not require instances of inaction at specific companies to constitute a “compound act.” Rather, the subject of evaluation for the “sustained or recurring” element is the measure at issue; that is, the failure to effectively enforce its labor laws. Finally, Guatemala’s arguments with respect to the invented requirement to show a “deliberate government policy” are also misguided for the reasons discussed above.

214. The only fact-specific argument Guatemala makes with respect to the “sustained or recurring” requirement for the second group of enforcement failures is that the U.S. claim concerns failures at “only 9 companies” between 2006 and 2014, amounting to “less than one example of alleged omissions per year.”³³² Guatemala seems to imply that it is insufficient for

³³¹ See, e.g., ILO Technical Memorandum, Diagnosis of the Status of Labor Inspections in Guatemala (October 1, 2009), p. 18, available in Spanish at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_119251.pdf. (“As noted above, in accordance with Article 271(e) of the Labor Code, in addition to payment of the penalties imposed, the offender is obliged to remedy the deficiency in the final deadline in the same resolution, which certified to the General Labor Inspectorate to verify compliance copy is sent. However, in practice this provision is not enforced.”)

³³² Guatemala’s Initial Written Submission, para. 396.

instances of failure to occur within a one-year time frame; however, there is no basis in the text of Article 16.2.1(a) to support Guatemala’s contention that a particular rate of inaction is required to establish a breach of that provision. As the United States articulates above, Article 16.2.1(a) sets forth no unit of time by which to measure a sustained or recurring course of inaction. Rather, each challenge under Article 16.2.1(a) must be assessed on a case-by-case basis. Depending on the factual circumstances and relevant laws involved, the action or inaction sufficient to demonstrate a breach may occur more or less frequently.

215. Here, the United States has described circumstances in which Guatemala has repeatedly, and over a period of years in many cases, failed to respond to complaints by performing inadequate inspections of worksites; and where violations have been identified, the government has repeatedly, and sometimes for years, neglected to take actions to bring the relevant companies into compliance. Since 2006, workers throughout the agricultural sector have regularly lodged complaints with, at best, intermittent responses from the Ministry of Labor.³³³ When inspectors do visit the farms, they often do not conduct inspections in accordance with the regulatory Inspection Protocol. Thousands of palm oil workers have taken to the streets to protest Guatemala’s neglect of their situation and the Ministry’s lack of response to their complaints.³³⁴ Where Guatemalan authorities have found violations, they have not taken steps to ensure compliance with the law. These facts are sufficient to demonstrate both a sustained and a recurring course of inaction on the part of the Guatemalan government.

216. In sum, Guatemala’s arguments are insufficient to rebut the *prima facie* case established by the United States. The United States has demonstrated that Guatemala has failed to effectively enforce Articles 27, 61, 92-93, 103, 116- 118, 121-122, 126-130, 134, and 197 of its Labor Code and the Inspection Protocol through both a sustained course of inaction and ineffective action and a recurring course of inaction and ineffective action, within the meaning of Article 16.2.1(a).

C. GUATEMALA FAILED IN A MANNER AFFECTING TRADE

217. In its Initial Written Submission, the United States demonstrates that Guatemala’s second group of enforcement failures occurred in a manner affecting trade. Each of the ten companies and additional 69 farms discussed above produce goods traded between the CAFTA-DR Parties. These entities engage in trade in at least one of two ways: (1) by producing goods exported to CAFTA-DR Parties; and (2) by competing with imports from CAFTA-DR Parties in Guatemala.

218. Referring to the U.S. Initial Written Submission,³³⁵ Guatemala takes issue with the sector-level data presented by the United States.³³⁶ According to Guatemala, none of the companies cited above exports to other CAFTA-DR Parties.³³⁷

³³³ Statement of RR, SS, TT, UU, VV (June 30, 2014), p. 3 (USA-26).

³³⁴ U.S. Initial Written Submission, para. 155, footnote 204.

³³⁵ U.S. Initial Written Submission, paras. 184–190.

³³⁶ Guatemala’s Initial Written Submission, para. 463.

³³⁷ Guatemala’s Initial Written Submission, para. 471.

219. As explained above, the United States need not demonstrate actual trade effects for each individual company to demonstrate that Guatemala’s labor law enforcement failure has occurred in a manner affecting trade. While not necessary, evidence of actual trade nonetheless may be relevant to support a claim under Article 16.2.1(a). All the companies or sectors cited by the United States with respect to Guatemala’s second group of enforcement failures are engaged in cross-border trade between the CAFTA-DR Parties, through either exports to CAFTA-DR Parties or competition with imported goods from CAFTA-DR Parties.

220. Contrary to Guatemala’s assertion of negligible trade, U.S. import data indicate that four of the five apparel companies cited above engaged in export activities such that their products were exported to the United States in the amount of over US\$249 million between July 1, 2006 and December 31, 2014.³³⁸ As referenced above, products from Fribo, Mackditex, and Alianza were brought into the United States at a value of at least US\$7 million, US\$32 million, and US\$148 million, respectively.³³⁹ Additionally, Koa Modas products valued at US\$62 million were imported into the United States over this time period.³⁴⁰

221. With respect to the four companies that produce African palm oil, a burgeoning Guatemalan export commodity,³⁴¹ they are among a small handful of five or six companies control the entire production chain for palm oil in Guatemala.³⁴² Palmas del Ixcan is projected to be the second-largest palm oil company in Guatemala.³⁴³ Palm oil is an input in numerous products manufactured by industries ranging from beauty and cosmetics to pharmaceuticals to processed foods and beverages.³⁴⁴ For example, in foodstuffs, palm oil may be used directly for cooking or as an input in processed products like breads, ice cream, soups, dressing, and other prepackaged foods.³⁴⁵ Global demand for palm oil is also growing as it is used in production of biofuels.³⁴⁶

222. In 2010 and 2011, Guatemala was rated the ninth-largest palm oil-exporting country worldwide, and the second-largest in Latin America behind Ecuador.³⁴⁷ Of the palm oil produced in Guatemala, approximately 85 percent is ultimately exported outside of

³³⁸ Declaration of Mark Ziner, U.S. Customs and Border Protection (executed March 3, 2015) with attachment, table of U.S. import data (USA-198).

³³⁹ Declaration of Mark Ziner, U.S. Customs and Border Protection (executed March 3, 2015) with attachment, table of U.S. import data (USA-198).

³⁴⁰ Declaration of Mark Ziner, U.S. Customs and Border Protection (executed March 3, 2015) with attachment, table of U.S. import data (USA-198).

³⁴¹ Guatemalan palm oil exports have increased rapidly since 2000; between 2000-2009, Guatemala’s export revenues from palm oil increased by 587 percent. Verite Report, Labor and Human Rights Risk Analysis of the Guatemalan Palm Oil Sector (March 2014), p. 28 (USA-214).

³⁴² The Power of Oil Palm, Oxfam America (2013), p. 13 (USA-215).

³⁴³ The Power of Oil Palm, Oxfam America (2013), p. 13 (USA-215).

³⁴⁴ The Power of Oil Palm, Oxfam America (2013), p. 13 (USA-215).

³⁴⁵ The Power of Oil Palm, Oxfam America (2013), p. 13 (USA-215). The oil may also be used to process textiles, soaps, detergents, and candles.

³⁴⁶ The Power of Oil Palm, Oxfam America (2013), p. 13 (USA-215).

³⁴⁷ The Power of Oil Palm, Oxfam America (2013), p. 13 (USA-215).

Guatemala.³⁴⁸ In 2012, a representative of the Guatemalan Palm Producers’ Guild reported that 70 percent of Guatemalan palm oil was exported, mainly to other Central American countries, Mexico, the United States, and Europe.³⁴⁹ Guatemala exports raw palm oil to other CAFTA-DR Parties, including Nicaragua, El Salvador, Honduras, and the United States.³⁵⁰ In 2012, 22 percent of Guatemalan palm oil exports were to CAFTA-DR Parties.³⁵¹ Between 2012-2014, the United States imported over US\$184,000 in palm oil from Guatemala.³⁵² Further, according to NGO reports, goods produced with Guatemalan palm oil are exported to the United States.³⁵³ As such, Guatemala’s inaction with respect to the four palm oil companies cited above modified the conditions of competition by unfairly reducing labor costs for these companies vis- à-vis their CAFTA-DR competitors.

223. Moreover, for the coffee company FEFLOSA, and the dozens of other farms cited above, Guatemala is mistaken that negligible trade is occurring between the Parties. U.S. customs data indicate that nearly US\$4 million in coffee produced by FEFLOSA, the owner of the Santa Elena and El Ferrol farms, was imported into the United States between July 1, 2006 and December 31, 2014.³⁵⁴

224. The farms (“fincas”) referenced above are involved in export activity within the CAFTA-DR region. Finca San Francisco and Finca Blanca Flor are members of the Guatemalan National Coffee Association (ANACAFÉ), a coffee export association that links coffee farms with exporters. According to ANACAFÉ data, in 2013 and 2014, 43 percent of member exports were to the United States.³⁵⁵ ANACAFÉ also auctions Guatemalan coffee, including coffee from Finca La Esperanza, under its Guatemalan Coffees brand.³⁵⁶ Finca El Faro supplies a major U.S. coffee retail chain.³⁵⁷ According to the farm’s website, it produces coffee exclusively to supply this particular U.S. company.³⁵⁸ Transcafe, S.A., a Guatemalan green coffee export company, is supplied by Finca El Pacayal, Finca Nueva Granada, and Finca Las Nubes.³⁵⁹ Coffee from El Pacayal and Nueva Granada enters the United States, as evidenced by supplier listings on the

³⁴⁸ The Power of Oil Palm, Oxfam America (2013), p. 13 (USA-215).

³⁴⁹ Verite Report, Labor and Human Rights Risk Analysis of the Guatemalan Palm Oil Sector (March 2014), at 28–29 (USA-214).

³⁵⁰ The Power of Oil Palm, Oxfam America (2013), p. 13 (USA-215).

³⁵¹ Verite Report, Labor and Human Rights Risk Analysis of the Guatemalan Palm Oil Sector (March 2014), at 29 (USA-214).

³⁵² U.S. International Trade Commission Harmonized Tariff Schedule Data on U.S. Imports of Palm Oil (January 1, 2012 to December 31, 2014) (USA-203).

³⁵³ Verite Report, Labor and Human Rights Risk Analysis of the Guatemalan Palm Oil Sector (March 2014), at 28–29 (USA-214).

³⁵⁴ Declaration of Mark Ziner, U.S. Customs and Border Protection (executed March 3, 2015) with attachment, table of U.S. import data (USA-198).

³⁵⁵ Guatemala National Coffee Association (ANACAFÉ), Exports by Destination 2013-2014 (USA-216).

³⁵⁶ Guatemala National Coffee Association (ANACAFÉ), List of 2013 Coffees for Export (USA-217).

³⁵⁷ Guatemala National Coffee Association (ANACAFÉ), Article on Finca El Faro (August 18, 2014) (USA-218).

³⁵⁸ Finca El Faro website (USA-219), available at <http://www.elfaroestate.com/default.php>.

³⁵⁹ Transcafe, S.A. website (USA-220), available at <http://www.transcafe.com.gt/products.html> (date of access February 27, 2015).

websites of U.S. coffee importing companies.³⁶⁰ The websites of other U.S. coffee import and retail companies offer coffee from Finca Santa Cecilia and Finca La Soledad.³⁶¹

225. Coffee is a major Guatemalan export commodity. As noted in the U.S. Initial Written Submission, between 2007 and 2013, Guatemala exported an average of US\$1 billion per year in coffee, of which 35 percent went to the CAFTA-DR region. Of this, 34 percent went to the United States.³⁶² In 2014, according to Guatemalan government statistics, Guatemala exported over US\$182 million in coffee products.³⁶³

226. Trade in coffee is occurring between the Parties, involving both the coffee companies and farms cited above and the Guatemalan coffee industry as a whole. Guatemala’s failure to compel compliance with its laws related to acceptable working conditions unfairly modified the conditions of competition by improperly decreasing labor costs for the Guatemalan industry in competition with other coffee exporters.

227. Further, Guatemala imported apparel from the United States between July 1, 2006 and December 31, 2014.³⁶⁴ U.S. export data show that Guatemala imported over US\$176 million in value of apparel articles from the United States over this time period.³⁶⁵ Therefore, the Guatemalan apparel, palm oil, and coffee companies and farms cited above—which enjoy reduced labor costs—operate at an advantage over U.S. companies competing in these sectors of the Guatemalan market.

228. In not complying with the relevant labor laws, the ten companies and 70 farms discussed above evaded the costs of compliance with labor laws related to acceptable conditions of work to their economic benefit, which unfairly modified their competitive position in the CAFTA-DR marketplace. 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.

D. CONCLUSION

229. Based on the foregoing, Guatemala’s arguments are insufficient to rebut the *prima facie* case established by the United States. The United States respectfully requests that the Panel find

³⁶⁰ U.S. Coffee Import Company Listing for Finca El Pacayal of Chimaltenango, Guatemala (USA-221).

³⁶¹ InterAmerican Coffee Importers Website (Finca Santa Cecilia) (USA-223); Demitasse Café Website (Finca la Soledad) (USA-224).

³⁶² HTS2 chapter 9. Data retrieved from Global Trade Information Services (“GTIS”) database, <http://www.gtis.com>, last visited on October 28, 2014. GTIS publishes monthly updates of official merchandise trade data of over 80 countries/regions.

³⁶³ Guatemalan data on 2014 agricultural exports (USA-199), *available at* http://www.banguat.gob.gt/inc/ver.asp?id=estaeco/comercio/por_producto/prod0207DB001 htm.

³⁶⁴ U.S. Census Bureau Declaration (March 10, 2015) (USA-200).

³⁶⁵ U.S. Census Bureau Declaration (March 10, 2015) (USA-200). Further, U.S. export data show over US\$1 million in textile and apparel exports to Guatemala, between 2010 and 2014. U.S. Department of Commerce, International Trade Administration, Office of Textiles and Apparel Export Data (USA-201), *available at* <http://otexa.ita.doc.gov/expctry.htm>.

that Guatemala has acted inconsistently with its obligation under Article 16.2.1(a). Guatemala has failed to effectively enforce labor laws directly related to acceptable conditions of work by not undertaking effective inspections or imposing penalties when violations of the law were found.

VI. GUATEMALA HAS FAILED TO EFFECTIVELY ENFORCE ITS LABOR LAWS BY NOT REGISTERING UNIONS IN A TIMELY FASHION OR INSTITUTING CONCILIATION PROCESSES

230. The United States has demonstrated in its Initial Written Submission that Guatemala is failing to effectively enforce its labor laws by not registering unions and by not setting up conciliation tribunals in the time required by the Guatemalan Labor Code.

231. In response to the U.S. showing, Guatemala makes several arguments. First, it argues that enforcement by the courts with respect to the set-up of conciliation tribunals is irrelevant to the CAFTA-DR standard. Second, to the extent there have been delays in union registration or in setting up conciliation tribunals, Guatemala contends that these failures do not rise to the level of effective enforcement failures. Guatemala then criticizes the factual basis of the U.S. showing principally by attempting to attribute the delays in union registration and the failure to set-up conciliation tribunals to the workers themselves. Finally, Guatemala argues that the failures adduced by the United States do not reflect “a sustained or recurring course” occurring “in a manner affecting trade between the Parties.”

232. The United States has addressed the first argument above in Part III. Guatemala is simply incorrect to suggest that Article 16.2.1(a) exempts it from the obligation to effectively enforce its labor laws based on the entity that has failed to act. As we demonstrate above, such a reading cannot be found in the text of that provision, and is inconsistent with the object and purpose of the CAFTA-DR. Guatemala is responsible for action or inaction attributable to Guatemala. Where that failure has been by its labor courts, that failure is still attributable to Guatemala since the labor courts are part of the government of Guatemala.

233. We address Guatemala’s remaining arguments in the sections that follow.

A. REGISTRATION OF UNIONS

1. Guatemala’s Duty to Effectively Enforce Its Labor Laws Includes the Enforcement of Articles 61, 103, 116-118, 121-122, 126-130, 197, 211, 217-219

234. Under Guatemalan law, unions cannot begin their activities until they are registered by the General Labor Directorate (“GLD”) in the Public Registry of Unions and Associations.³⁶⁶ Article 218 of the Guatemalan Labor Code requires the Ministry of Labor, specifically the GLD, to register a union within 10 business days of receiving an application, highlighting Guatemala’s

³⁶⁶ GLC, Art. 217.

emphasis, in law, on expediency with respect to union creation. As the United States discussed in its Initial Written Submission, union registration is important to enforcing both (1) the laws protecting and guaranteeing union formation (as reflected in Articles 211 and 217-219 of the Guatemalan Labor Code); and (2) the laws providing for acceptable conditions of work (as provided in Articles 61, 103, 116-118, 121-122, 126-130, 197 of the Code).

235. The timely registration and formation of unions is central to the ability of workers to exercise the right of association and the right to bargain collectively, particularly to advocate for acceptable conditions of work guaranteed to them under the law. The Guatemalan Labor Code recognizes the important role that unions can play in supporting the Ministry of Labor’s role in enforcing Guatemala’s labor laws, as seen in Articles 49 and 214(a), which provide that unions exist in part to “regulat[e] the conditions under which work is to be performed,” Article 211 directing the implementation of “a policy for defense and development of unionism,” and in the regulatory Inspection Protocol.³⁶⁷

236. Guatemala contends that a failure to timely register a union cannot prejudice the workers’ rights, because (1) all the unions discussed were eventually registered and (2) “the exercise of workers’ collective rights is not necessarily subject to the union having been registered.”³⁶⁸ These arguments are unpersuasive. By delaying registering the unions beyond the statutory time limit, Guatemala prevents each union from obtaining legal personality and therefore from being able to engage in collective bargaining or to represent workers before the labor courts and other fora on behalf of its members. Guatemala emphasizes that it took several actions to move each of the applications forward and that they were eventually registered. That the unions were eventually registered months or years after they applied for recognition does not constitute effective enforcement during the long periods when the GLD placed demands on the workers regarding “errors” not specified in any statute or regulation that the GLD said it found in the union’s applications, or the longer still periods of silence when the GLD simply took no action.

237. International organizations have commented on the problems associated with delays in registering unions in Guatemala for many years.³⁶⁹ Delays in the registration of unions are emblematic of the general resistance experienced by workers when they attempt to unionize in Guatemala. In addition to the obstacles caused by the government itself, violence against union members has precipitated a decline in the number of unions overall in recent years, as

³⁶⁷ The Inspection Protocol (USA-91) gives union leaders a role in speaking with inspectors during inspections (Arts. I & II).

³⁶⁸ Guatemala’s Initial Written Submission, para. 404-405.

³⁶⁹ In 2012, the ILO Committee of Experts on the Application of Standards and Recommendations (CEACR) noted that, in the last several observations regarding Guatemala’s compliance with the Freedom of Association and Protection of the Right to Organise Convention (1948) (“C087”), it highlighted “delays in the registration of trade unions, or the [Government’s] refusal to register them.” ILO CEACR Observation regarding Guatemala’s compliance with the Freedom of Association and Protection of the Right to Organise Convention (1948) (“C087”), adopted 2012, published 102nd ILC Session 2013, *available in English at* http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3084277,en:NO; *available in Spanish at* http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3084277,es:NO.

acknowledged by Guatemala³⁷⁰ and noted by the International Labor Organization in observations issued in 2011 and 2013.³⁷¹ Given the gravity of the situation, government support – including through the timely registration of workers’ unions – is critical to the enforcement of Guatemala’s laws relating to right of association and the right to collective bargaining more generally. As is clear from these international reviews, Guatemala’s actions with respect to the enforcement of these labor laws affects many more workers than are discussed in the U.S. submission, as it includes those that may have been discouraged from even attempting to form or register a union.³⁷² Guatemala’s suggestion that these issues are not sufficiently serious to warrant examination by the Panel should be rejected outright.

2. By Not Registering Unions in a Timely Fashion, Guatemala Has Failed to Effectively Enforce its Labor Laws Directly Related to Union Formation and Acceptable Conditions of Work

238. As the United States has emphasized, evidence that Guatemala has taken some action with respect to union registration is not sufficient to rebut a *prima facie* case of a breach of Article 16.2.1(a). With respect to the union formation processes presented by the United States, Guatemala blames the workers themselves, attributing numerous delays to failures on the part of the workers to comply with administrative procedures or other technicalities.

239. Contrary to Guatemala’s arguments, however, in the instances described below, failures by the government – not the workers – clearly impeded the registration process. Such actions

³⁷⁰ In 2013, Guatemala acknowledged that there were only four unions remaining in the maquila sector. ILO Interim Report No. 368 (June 2013), para. 494, Case. No. 2609 (Guatemala), *available in English at* http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3128115; *available in Spanish at* http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO::P50002_COMPLAINT_TEXT_ID,P50002_LANG_CODE:3128115,es:NO. The rate of private sector unionization has slowed to nearly a halt and workers’ exercise of their right of association is at a historic low. See MSICG Declaration (February 16, 2015), pages 14-15 (USA-164).

³⁷¹ Ministry of Labor Letter regarding Union Registrations (May 22, 2014) (USA-225). Further, in 2011, the ILO noted with concern that there were only six unions in the textiles sector. The ILO observed: “based on meetings with trade union federations, which are very concerned at the low level of unionization in the maquila, that training activities on freedom of association and collective bargaining should be intensified in the maquila sector and it encourages the Government to have recourse to ILO technical assistance in this respect.” ILO CEACR Observation regarding Guatemala’s compliance with the Freedom of Association and Protection of the Right to Organise Convention (1948) (“C087”), adopted 2012, published 102nd ILC Session 2013, *available in English at* http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3084277,en:NO; *available in Spanish at* http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:3084277,es:NO.

³⁷² Delay in registering unions allows employers to learn the identities of workers and to take retaliatory action to halt union formation. Failing to enforce laws protecting unionists has created an environment where employers operate with impunity and has precipitated a decline in the number of unions overall in recent years. The result is a small number of unions in Guatemala. For example, according to one report submitted for purposes of a United Nations study, there are only three unions in the large maquila sector. Alternative Report to the Third Periodic Report of the State of Guatemala about the Application of International Protocol of Economic, Social and Cultural Rights (PIDESC) (March 21, 2014), *available in Spanish at* http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/GTM/INT_CESCR_NGO_GTM_16821_S.pdf.

cannot constitute evidence of having met the obligation of Article 16.2.1(a). This problem has persisted over the course of several years, with respect to numerous companies, and across various sectors. Taken as a whole, the evidence presented by the United States substantiates a sustained and recurring course of inaction with respect to enforcement of laws directly related to the right to organize and bargain collectively, and to acceptable conditions of work.

240. **Mackditex:** In its Initial Written Submission, the United States demonstrated that workers from Mackditex faced significant delays registering their union, despite attempts to engage with the GLD to ensure that their constituting documents were in compliance.³⁷³ The United States has presented a document showing the GLD received the workers' application on November 24, 2010, as well as supplementary documentation a union representative provided to the GLD on January 19, 2011.³⁷⁴

241. In Guatemala's view, a first request to register the union was not submitted to the GLD until July 22, 2011. Guatemala then refers to two corrections that the GLD requested of the prospective union in July 2011 and November 2011. According to Guatemala, a fully correct application was not submitted by the workers until March 29, 2012. Guatemala asserts that the union registration was delayed because the workers took 3 months and 5 months to resubmit their application to correct the deficiencies identified by the GLD.³⁷⁵ The record indicates, however, that the union's registration took place on June 21, 2012. Guatemala has not explained why the GLD took three months – instead of the required 10 days -- to approve the corrected application. Guatemala does not dispute this fact in its Initial Written Submission. Even assuming the rejections of the earlier union registration applications were based on legitimate concerns on the part of the GLD, taking three months to register a union application when the statutory requirement is to do so within 10 business days cannot be considered effective enforcement of the law.

242. We note that Guatemala also suggests that "it was not possible for the union to have submitted an application for registration on November 18, 2010" because the application submitted by the union states that the union was "constituted on June 3, 2011."³⁷⁶ The United States would note that the November 2010 application bears the stamp of receipt of the Guatemalan Ministry of Labor with the date of November 24, 2010. The phrase on which Guatemala relies in its GTM-37, a document which appears to have been authored by the union and submitted to the GLD dated July 22, 2011, refers to a "constitutive act" of "June 3, 2011." This appears to be a typographical error on the part of the author. The union's draft constitution is dated June 3, 2010 and is submitted with this rebuttal submission.³⁷⁷

243. **Koa Modas:** The United States has shown that the workers from the Koa Modas factory organized in December 2011 and filed materials with the GLD on December 20, 2011 for registration of the union. The GLD requested that the workers make changes to the application

³⁷³ U.S. Initial Written Submission, paras. 202-206.

³⁷⁴ Petition (November 24, 2010) (USA-140); Complaint (January 19, 2011) (USA-141).

³⁷⁵ Guatemala's Initial Written Submission, paras. 411-412.

³⁷⁶ Guatemala's Initial Written Submission, para. 411, footnote 223.

³⁷⁷ Union Draft By-Laws (June 3, 2010) (USA-226).

on December 22, 2011,³⁷⁸ January 17, 2012,³⁷⁹ February 2, 2012,³⁸⁰ and March 7, 2012.³⁸¹ More than two months after submission of the final application, the GLD registered the union in the official register on May 18, 2012.

244. Even if the GLD's rejections of the workers' application on those dates were legally permissible, from the date that the workers submitted their final paperwork to their union's registration in the official register, 59 days had passed, nearly six times the time period permitted under Guatemalan statute. Guatemala does not dispute these facts³⁸² and provides nothing to rebut the U.S. showing that Guatemalan authorities neglected to take action as required by law to effectively enforce Articles 211, 217-219 (providing for union formation) and Articles 61, 103, 116-118, 121-122, 126-130, and 197 (concerning acceptable conditions of work) of the Guatemalan Labor Code.

245. **Serigrafía:** The United States further illustrated the GLD's course of inaction by establishing its delay in registering the union for the workers of Serigrafía. As the U.S. exhibits reflect, on August 8, 2012, the workers presented their union formation documents to the GLD. It was not until September 20, 2012, that the GLD registered the union, and not until November 15, 2012, that the Ministry published the relevant documentation in the official gazette. The GLD failed to effectively enforce its labor laws related to the right of association and acceptable conditions of work by failing to complete the union registration process within the timeframe required under Guatemalan law.

246. In response, Guatemala again attempts to shift the blame for the Ministry's delay to the workers themselves. Guatemala argues that on August 17, 2012, the union's executive committee withdrew and then re-filed its registration application, and that part of the Ministry's delay is attributable to this new filing. Guatemala's argument, however, fails to rebut the U.S. claim: inaction by the Ministry delays the workers' access to the rights afforded to them under the law, most importantly the right to union representation in administrative proceedings before the Ministry and other enforcement actions. Even accounting for the application filed on August 17, the Ministry required 34 days to register the union, well beyond the 10-day statutory limit imposed by GLC Article 218. Guatemala does not dispute this fact. Accordingly, the Ministry exceeded the statutory time limit for registering the union for the Serigrafía workers, and Guatemala therefore has failed to rebut the U.S. *prima facie* case showing that this constitutes a failure to effectively enforce Guatemala's laws related to the right of association and the right to acceptable conditions of work.

³⁷⁸ Providencia (December 22, 2011) (GTM-31).

³⁷⁹ Memorial from SITRAKOAMODASSA presenting amended constituting act and bylaws to the Ministry of Labor, stamped received January 20, 2012 (USA-144). Guatemala omits the January 17 communication in making its assertion that the workers' delayed submission of their materials by over two months.

³⁸⁰ Memorial from the National Department of Workers Protection (February 2, 2012) (USA-145).

³⁸¹ Memorial from the National Department of Workers Protection, Guatemala (March 7, 2012) (USA-155).

³⁸² Further, Guatemala asserts that Koa Modas' union application was withdrawn, but GTM-39 does not support that allegation; instead, it speaks to the approval of the registration. It does not refute the United States' assertion that the registration was delayed.

B. CONCILIATION TRIBUNALS

1. Guatemala’s Duty to Effectively Enforce Its Labor Laws Includes the Enforcement of Articles 377-396 (protecting the right to conciliate labor disputes) and Articles 61, 103, 116-118, 121-122, 126-130, and 197 (ensuring acceptable conditions of work)

247. The United States has explained that the conciliation process is a means for workers to exercise their right to organize and bargain collectively and to pursue labor grievances related to, among other things, acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. By filing a petition for conciliation with a list of grievances (a “pliego” in the Labor Code), workers seek special dispute resolution tribunal³⁸³ in which to resolve their grievances with the employer, which may include complaints regarding acceptable conditions of work, as in the cases presented by the United States, or other issues. These petitions are filed by a collective of workers to avoid a strike or work stoppage, which is why the Labor Code requires that a labor court take immediate action, within a matter of hours, to set up the tribunal: the consequences of non-enforcement are serious, with substantial economic interests at stake for both workers and employers. Under these circumstances, promptly established conciliation tribunals ensure that workers are not denied the rights to which they are entitled under Guatemala’s labor laws.

248. Guatemala argues that, despite delays or failures to constitute conciliation tribunals, workers were not left unprotected or prevented from pursuing their grievances collectively.³⁸⁴ To the extent Guatemalan intends to suggest that, theoretically, there were other avenues for enforcement in the factual circumstances at issue, the United States does not disagree. The Ministry of Labor could have taken immediate steps on its own initiative to correct the employers’ non-compliance and alleviate the need for the conciliation tribunal altogether. Such steps were not taken, however, and the United States therefore cannot agree that Guatemala’s failure to constitute conciliation tribunals in a timely manner did not obstruct the enforcement of Guatemala’s labor laws.

249. There is no doubt that the labor court’s inaction in the face of requests for the establishment of a conciliation tribunal obstructs enforcement of the law.³⁸⁵ Given the circumstances under which such a tribunal is requested, the labor court’s failure to act directly impedes the collective bargaining process and delays the workers’ ability to elicit corrective

³⁸³ These tribunals provide a forum that allows groups of workers to bargain collectively with their employer and reach a binding agreement through a court-administered process. The tribunals are known as “conciliation tribunals.” See U.S. Initial Written Submission, paras. 217-223.

³⁸⁴ Guatemala’s Initial Written Submission, para. 402.

³⁸⁵ This detrimental conduct has been noted by the ILO Committee of Experts on the Application of Standards and Recommendations (CEACR) in its four most recent observations on Guatemala’s compliance with the Right to Organise and Collective Bargaining Convention (1949) (“C098”). See, e.g., Observation (CEACR) adopted 2011, published 101st ILC Session 2012 (“courts do not discharge their functions adequately in relation to the exercise of the right to collective bargaining”), available in English at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:2698935:NO; available in Spanish at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:2698935,es:NO.

action from the employer. Recognizing these concerns, the Labor Code requires swift action from the labor court and the conciliation tribunal itself. The cases described below demonstrate how workers brought complaints regarding violations of the Labor Code and the labor courts failed to take action that would have led to the verification and enforcement of Guatemala’s labor laws.

250. Guatemala further complains that the United States has not shown how “failure to constitute a conciliation tribunal resulted in the violation of each of the provisions of the Labor Code to which it refers.”³⁸⁶ Like above, Guatemala’s inaction to verify whether a violation has occurred or is occurring is part of its enforcement failure. When an allegation of a violation is made, Guatemala has a duty to enforce the law by applying it as appropriate. Here, when the labor courts took no action, they turned a blind eye to a possible violation of Guatemala’s labor laws by impeding its conciliated resolution. This course of inaction constitutes a breach of Article 16.2.1(a) of the CAFTA-DR.

2. By Failing to Establish Conciliation Tribunals in Accordance with the Law, Guatemala Has Failed to Effectively Enforce its Labor Laws Directly Related to the Right to Organize and Bargain Collectively and Acceptable Conditions of Work

251. The Labor Code provides an expedited time frame for the establishment and resolution of collective conflicts. Upon the workers’ filing of the list of grievances with the labor court, the labor court is required by Article 378 of the Labor Code to issue a decision acknowledging receipt of the list and order notification to the opposing party no later than the day after receipt.³⁸⁷ Following a labor court’s receipt of the list of grievances, the court is required to proceed with the formation of a conciliation tribunal within 12 hours.³⁸⁸ Once the worker and employer delegations are selected and all jurisdictional issues are resolved (such as a “legal impediment or cause for recusal” for the tribunal members³⁸⁹), the conciliation tribunal must summon both delegations to appear within 36 hours.³⁹⁰ The conciliation process must be completed³⁹¹ in 15 or fewer days from the time the labor court receives the list of grievances.³⁹²

252. As discussed in the U.S. initial submission, delay or inaction beyond this timeframe deprives workers of finality for their conflict. Where their claims are validated, the court’s inaction prevents the enforcement of laws protecting wages and acceptable conditions of work to which they are entitled. In this respect, delay or inaction by the court during conciliation is a failure to effectively enforce GLC Articles 377-396 (the right to conciliate labor disputes),

³⁸⁶ Guatemala’s Initial Written Submission, para 403.

³⁸⁷ GLC, Art. 378.

³⁸⁸ GLC, Arts. 377, 382.

³⁸⁹ GLC, Art. 383, 384.

³⁹⁰ GLC, Art. 384, 385.

³⁹¹ The conciliation process may result in settlement, arbitration, or, if settlement and arbitration are unable to resolve the conflict, a party can request the labor court to rule on the legality of the matter. GLC, Arts. 386, 391, 397(1)(a), 394. No workers or employer may proceed with a strike or a lock-out without first obtaining a ruling from the court. GLC, Art. 394.

³⁹² GLC, Art. 393.

Article 61 (general obligations of employers), Article 103 (minimum wage), Articles 116-118 (limitations on work schedules), 121-122 (overtime pay and limitations on hours of work), Articles 126-130 (weekly day of rest; holidays; vacations), and Article 197 (minimum mandatory measures for employers regarding safety and health).

253. Guatemala responds to the U.S. showing by either shifting the blame to the workers for the court's delay or in action, or claiming that the facts do not demonstrate a deviation from the above legal framework. Both of these arguments are without merit.

254. **Las Delicias:** The United States has shown that Guatemala has failed to effectively enforce Articles 61, 103, 197, and 377-396 of the Labor Code by not forming a conciliation tribunal over 13 years after the workers filed their petition seeking conciliation.³⁹³ During those 13 years, the workers at Las Delicias farm have lacked a mechanism to advocate collectively to improve the working conditions at the farm, and to bring the company into compliance with Guatemalan labor law. Guatemala has not provided any evidence to rebut this showing.

255. Guatemala complains that the lack of effective enforcement presented by the United States dates back to 2001, before the CAFTA-DR came into force. The fact that the workers filed their collective conflict documents before the entry into force of the Agreement is immaterial to the claim of the United States that since 2006, Guatemala has not taken action to enforce its laws as required by the workers' filing, as described above.

256. Guatemala does not dispute the facts presented by the United States, but rather contends that the United States must submit the workers' petition to prove its claim.³⁹⁴ Guatemala is mistaken. The United States has offered a statement by five workers who attest that "pliego de peticiones" (list of grievances) was made in 2001, and that since that time, no action has been taken by Guatemala in response. Guatemala comments that it is not clear that the "pliego" included a request to set up a conciliation tribunal.³⁹⁵ This concern is misplaced as the word "pliego de peticiones" is a defined term in the Guatemalan Labor Code that is only used in conjunction with conciliation tribunal requests.³⁹⁶ This is the term used by the workers in their statement.³⁹⁷ In any event, the United States was able to locate a copy of a court document acknowledging receipt of the list of grievances.³⁹⁸ This document further supports the claim made by the United States as part of its *prima facie* case in the U.S. Initial Written Submission.

257. **Avandia:** In its Initial Written Submission, the United States identified three separate instances in which the labor court failed to establish a conciliation tribunal in response to grievances filed by the Avandia workers in the timeframe and manner required by the Labor Code.³⁹⁹ Specifically, for the first list of grievances the workers filed on November 13, 2006, the

³⁹³ U.S. Initial Written Submission, paras. 225-227.

³⁹⁴ Guatemala's Initial Written Submission, para. 427.

³⁹⁵ Guatemala's Initial Written Submission, para. 426.

³⁹⁶ GLC, Art. 377.

³⁹⁷ Statement by RR, SS, TT, UU, VV (June 30, 2014), p. 2 (USA-26).

³⁹⁸ Adjudication (March 29, 2001) (USA-227).

³⁹⁹ U.S. Initial Written Submission, paras. 228-234.

second filed on August 29, 2007, and the third filed on September 4, 2009, the labor court failed to constitute the conciliation tribunal within 12 hours and ensure that the dispute was resolved within 15 days. Guatemala responds by suggesting that the workers' rendering of these proceedings is incorrect and that the labor court complied with its obligations. However, a closer review of the exhibits reveals that it is Guatemala's rendering of the facts that is incorrect, not the workers'.

258. Guatemala attempts to dismiss the U.S. evidence relating to the first list of grievances, which concerned complaints under Articles 61(c), 116-118, and 121 (prohibition of abuse; limitations on work schedule; and payment of overtime) of the Labor Code, by arguing that the court document submitted is incomplete, and therefore cannot substantiate the U.S. allegation.⁴⁰⁰ The United States submits with this rebuttal a complete copy of USA-72 which contained, among other documents, a copy of the court order accepting the list of grievances. The second page, which regrettably had been omitted due to a clerical error, confirms that the labor court did not take action to set up the conciliation tribunal upon receipt of the petition to do so.

259. With respect to the second petition, the United States established that the labor court failed to constitute a conciliation tribunal for a list of grievances filed on August 29, 2007. In this petition, the workers sought redress for violations of Articles 116-118 (limitations on work schedules) and Article 197 (mandatory measures for occupational safety and health). Guatemala purports to refute this claim based on a document created by the labor court summarizing the proceedings for Avandia (GTM-44). However, a closer review of this document demonstrates that the U.S. claims are well founded.

260. First, despite Guatemala's representation, nowhere in GTM-44 does the labor court indicate that the conciliation tribunal was constituted in response to the August 29, 2007 collective conflict petition. Rather, as the document reflects, the labor court's consideration of the petition languished for approximately a year and a half. Specifically, the first delay was created on September 3, 2007, when the labor court requested that the workers provide supplemental information regarding its list of grievances. On November 7, 2007, the labor court determined that the workers remedied this request. The second delay of significance occurred in late 2008 and early 2009, when the labor court repeatedly asked Avandia to designate its representative at the proceedings. In frustration at Avandia's lack of cooperation, itself a violation of the Labor Code,⁴⁰¹ on April 22, 2009, the labor court instructed the workers to designate Avandia's representative on Avandia's behalf.

261. The treatment of this collective conflict illustrates the labor court's disregard for the timeframes imposed by the Code for the establishment of conciliation tribunals. Upon receiving the list of grievances, the labor court is obligated under Articles 382 and 393 to form the

⁴⁰⁰ Guatemala's Initial Written Submission, para. 430.

⁴⁰¹ GLC, Art. 280(m) ("In order to carry out their functions, labor inspectors and social workers may summon employers and workers to their offices, and such individuals are required to appear, provided that each summons expressly indicates the purpose of the proceeding. Failure to appear in response to any such summons constitutes a violation of the labor laws and shall be punished by the General Labor Inspectorate as established in Article 272(g) of this Code.")

conciliation tribunal within 12 hours and completely resolve the collective conflict within 15 days. Further, if the workers' list of grievances does not fulfill the legal requirements, under GLC Article 381, the court is obligated to correct it *sua sponte* and make a record of that fact. The Code then requires the labor court to process the petition immediately. The labor court's year and half consideration of the workers' list of grievances is contrary to this expedited timeframe.

262. When the workers filed a third petition on September 4, 2009, to address the employer's violations of Articles 116-118 (limitations on work schedules) and 197 (occupational safety and health), the labor court again failed to set up the conciliation tribunal within 12 hours or acknowledge receipt of the list within one day, as is required by Articles 378 and 382 of the Labor Code. With regard to this occasion, Guatemala claims that the delay is attributed to the workers filing the collective conflict with the wrong court. Guatemala claims that ultimately the court constituted the conciliation tribunal and that a collective agreement was signed between the workers and Avandia.⁴⁰²

263. However, upon comparing the relevant exhibits, USA-135 and GTM-33, Guatemala appears to have mistaken the September 4, 2009 collective conflict for another proceeding. The court number for the proceeding reflected in USA-135 differs from the court number for the proceeding reflected in GTM-33.⁴⁰³ The last page of GTM-33 appears to relate to the original proceedings filed by the Avandia workers on September 4, 2009, but this page does not exhibit any relation to the pages that precede it under a different court number. Accordingly, Guatemala has mistaken the September 4, 2009 collective conflict for another proceeding. Therefore, Guatemala has submitted no evidence to rebut the U.S. showing that the labor court failed to establish a conciliation tribunal in response to the workers' list of grievances.

264. Based on the foregoing, the United States has demonstrated the Guatemala has failed to effectively enforce its laws with respect to the right of association and acceptable conditions of work by failing to establish conciliation tribunals in accordance with the law. This obstruction of the conciliation process deprives workers of their ability to challenge illegal labor practices, and to protect the rights granted to them under the law. Guatemala's Initial Written Submission does little to respond to this pervasive failure by the labor courts, including with respect to workers at Avandia, as just described.

265. **Fribo:** The United States has shown in its Initial Written Submission that Guatemala failed to effectively enforce Articles 121 (compensation for overtime) and 197 (occupational safety and health), as well as Articles 377-396 (procedures for conciliation) of the Labor Code as they pertain to the workers of Fribo by failing to take proper conciliation measures in response to the filing of a list of grievances with the labor court. Specifically, the labor court failed to constitute the conciliation tribunal within 12 hours and ensure that the dispute was resolved within 15 days.

⁴⁰² Guatemala's Initial Written Submission, para. 431.

⁴⁰³ See Declaration of the ICSID Secretary-General (March 11, 2015) (USA-170).

266. Guatemala argues that the Fribo workers were responsible for any delay in setting up a conciliation tribunal in response to their list of grievances, received by the labor court on August 24, 2007, because they did not provide the “place of notification of the employer” as required by Article 293 of the Labor Code.⁴⁰⁴ In fact, Article 293 of the Labor Code discusses the “essential purpose” of the conciliation tribunal and says nothing about the requirements for a list of grievances. Article 381 of the Labor Code, on the other hand, speaks to the requirements for a petition and it provides: “If the petition submitted does not fulfill the legal requirements, the court shall correct it *sua sponte* and make a record of that fact. The petition shall be processed immediately.” This provision suggests that the labor court was required to advance the constitution of the tribunal despite any missing information from the workers. To suggest without more that the workers were responsible for the delay is contrary to Article 381, which requires the court to resolve any issue and move forward with the establishment of the tribunal immediately.

267. In challenging the labor court’s failure to comply with Guatemalan law, the United States is not “second-guessing” the labor court’s decision, as Guatemala suggests.⁴⁰⁵ The United States does not argue that the court was wrong to issue the decision it did. Rather, the failure is the fact that the court took no additional action to move forward with the setting up of the conciliation tribunal in a timely manner. Guatemala has not rebutted this inaction, and in fact has confirmed that the labor court did not constitute the conciliation tribunal requested. Therefore, Guatemala’s arguments are insufficient to rebut the *prima facie* case established by the United States in the case of the Fribo workers.

268. **Ternium:** In its Initial Written Submission, the United States demonstrated that Guatemala failed to effectively enforce Articles 61, 116, 117, 118, and 130 at the Ternium steel worksite by not constituting the conciliation tribunal within 12 hours or ensuring that the dispute was resolved within 15 days.

269. For its part, Guatemala repeats its two-fold defense. Guatemala claims the U.S. exhibits lack probative value as the identities of the workers who experienced the labor abuses were not submitted, and second, the workers are the individuals who bear the responsibility for the court’s delay, not the court itself. On this latter point, Guatemala claims that the workers’ list of grievances purportedly omitted the number of workers supporting the list and the total number of workers at the company, and that on this basis, the labor court could not establish the conciliation tribunal.

270. Guatemala’s response fails on several bases. First, as explained above, the absence of the workers’ identities does not diminish the credibility or the probative value of the workers’ documents. The court order for the collective conflict (USA-138) and the workers’ written summary of the facts (USA-139) bear several markers that establish the authenticity of the documents irrespective of the workers’ identities. For example, USA-138 bears the official stamp of the court and the names of both the judge and the secretary of the court. Similarly, USA-139 bears the official stamp of the Ternium union and meticulously details the workers’

⁴⁰⁴ Guatemala’s Initial Written Submission, para. 437.

⁴⁰⁵ Guatemala’s Initial Written Submission, para. 438.

experiences with specific facts such as dates, locations, and number of workers involved for the relevant events. Together, the documents provide a full and authentic picture of the labor court's course of inaction that allowed the workers' grievances to persist.

271. Second, Guatemala's response misses the mark as it improperly shifts the obligation to establish a conciliation tribunal from the labor court, the institution established to resolve employment disputes, to the workers themselves. The Ternium workers filed the collective conflict referenced in the U.S. initial submission on March 5, 2012.⁴⁰⁶ The United States has submitted this document with its Initial Written Submission as USA-138, though the U.S. Initial Written Submission erroneously identified the workers' list of grievances as being filed on March 6, 2012. Both the workers' list of grievances dated March 5⁴⁰⁷ and the workers' statements describing the facts⁴⁰⁸ reflect the nature of the workers' grievances and the number of workers supporting the collective conflict. Yet as Guatemala notes, upon receiving the workers' list of grievances, the labor court requested the workers to supplement their petition with the number of workers supporting the list and the number of workers employed at the location where the dispute arose. On March 14, 2012, the workers provided the court with the supplemental information.⁴⁰⁹ Despite the supplementation, the labor court nullified the conciliation process on March 26, 2012, finding that the workers failed to comply with required administrative steps, and making no mention of the paperwork the workers filed on March 14.⁴¹⁰

272. Guatemala's argument that "the labor court could not establish the conciliation tribunal until all of the requirements set out in the Labor Code had been fulfilled"⁴¹¹ is unpersuasive. Upon receiving the list of grievances, the labor court is obligated under Articles 382 and 393 to form the conciliation tribunal within 12 hours and completely resolve the collective conflict within 15 days. Further, if the workers' list of grievances does not fulfill the legal requirements, under GLC Article 381 the court is obligated to correct it *sua sponte* and make a record of that fact. The Code then requires the labor court to process the list immediately. Here, instead, the labor court failed to constitute the conciliation tribunal and delayed 20 days prior to nullifying the workers' petition.

273. Based on the foregoing, the labor court's inaction in administering the conciliation process was inconsistent with Guatemalan law, and obstructed the resolution of the workers' grievances and the enforcement of the relevant labor law. Therefore, Guatemala's arguments are insufficient to rebut the U.S. showing that Guatemala has failed to effectively enforce its labor laws directly related to the right to association and to acceptable conditions of work with respect to the workers at the Ternium steel plant.

⁴⁰⁶ For further clarification, USA-138 is the labor court's acceptance of this list of grievances.

⁴⁰⁷ Collective Conflict, List of Grievances (March 5, 2012) (USA-228).

⁴⁰⁸ Summary of facts provided by the workers (USA-139).

⁴⁰⁹ Petition from LL, MM, and DDDD (March 14, 2012) (USA-229).

⁴¹⁰ Adjudication (March 26, 2012) (USA-230).

⁴¹¹ Guatemala's Initial Written Submission, para. 442.

C. GUATEMALA FAILED THROUGH A SUSTAINED AND RECURRING COURSE OF INACTION

274. In its Initial Written Submission, the United States demonstrated that Guatemala has failed to effectively enforce the laws protecting the right to form a union (Articles 211, 217-219), protecting the right to conciliate labor disputes (Articles 377-396), and guaranteeing acceptable conditions of work (Article 61, 103, 116-118, 121-122, 126-130, and 197) through both a sustained course of inaction and a recurring course of inaction.

275. With respect to the failure to register unions in a timely fashion, Guatemala argues that the United States has not shown these occurred over a “prolonged” period of time. Guatemala recognizes, however, that the failures identified by the United States regarding registration processes occurred during a span of more than eight years, the time during which the CAFTA-DR has been in effect in Guatemala, which certainly must qualify as a prolonged period, and in any event is also sustained.⁴¹²

276. Guatemala also raises the irrelevant point that the delays lasted “only a few weeks.”⁴¹³ In so doing, Guatemala acknowledges that it has failed to enforce its laws related to union registration. But this argument also reveals Guatemala’s fundamental misunderstanding of the legal requirements at issue. Article 16.2.1(a) does not require that each of the government’s actions or inactions “last” any particular amount of time. Rather, Article 16.2.1(a) requires that the government’s *course* of action or inaction be sustained or recurring. As the United States has shown, by not registering the union within 10 days as required, Guatemala failed to effectively enforce its laws. The United States has further shown that Guatemala’s inaction in this respect recurred across at least three companies over the course of eight years.⁴¹⁴ In this sense, the United States has demonstrated Guatemala’s course of inaction in breach of Article 16.2.1(a) has continued.

277. With respect to the failure to properly institute conciliation proceedings, Guatemala argues that “four unrelated instances in which a judge allegedly failed to constitute a conciliation tribunal in a span of over 8 years cannot constitute either consistent conduct over a prolonged period of time or repetition of related occurrences.”⁴¹⁵ Again, Article 16.2.1(a) does not require that instances of inaction be connected or “related” beyond Guatemala’s failure to enforce its labor laws. That series constitutes a course. Moreover, Guatemala is incorrect in stating that there are only four instances of inaction regarding conciliation. The United States documents at least 17 instances at four companies.⁴¹⁶ Therefore, the United States has amply documented the failure to institute conciliation processes on a consistent and repeated basis.

⁴¹² Guatemala’s Initial Written Submission, para. 447.

⁴¹³ Guatemala’s Initial Written Submission, para. 447.

⁴¹⁴ The United States notes that because workers take these administrative actions with less frequency, by extension, any evidence of Government failure with respect to the administration of these events will also occur with less frequency. Further, given the risk of retaliation and reported violence discussed earlier in this submission, it is not surprising that the number of unions in Guatemala has declined in recent years.

⁴¹⁵ Guatemala’s Initial Written Submission, para. 448.

⁴¹⁶ U.S. Initial Written Submission, paras. 243-247.

278. Even under Guatemala’s proposed heightened standard, the facts put forward by the United States concerning Guatemala’s failure to register unions in a timely fashion or institute the conciliation process demonstrate a consistent and repeated series of related acts or omissions over a prolonged period of time. The text of the CAFTA-DR requires only that a complaining party demonstrate a continuing or repeated course of action or inaction. The United States has shown both for this claim.

279. In sum, Guatemala’s arguments are insufficient to rebut the U.S. *prima facie* case. The United States has demonstrated that Guatemala has failed to effectively enforce the laws protecting the right to form a union (Articles 211, 217-219), protecting the right to conciliate labor disputes (Articles 377-396), and guaranteeing acceptable conditions of work (Articles 61, 103, 116-118, 121-122, 126-130 and 197) through both a sustained course of inaction and a recurring course of inaction, within the meaning of Article 16.2.1(a).

D. GUATEMALA FAILED IN A MANNER AFFECTING TRADE

280. In its Initial Written Submission, the United States demonstrates that Guatemala’s third group of enforcement failures occurred in a manner affecting trade. Each of the seven companies discussed above produce goods that are traded between the CAFTA-DR Parties. These entities engage in trade in at least one of two ways: (1) by producing goods for export to other CAFTA-DR Parties; or (2) by competing with imports from CAFTA-DR Parties in Guatemala.

281. Guatemala takes issue with the sector-level data presented by the United States.⁴¹⁷ According to Guatemala, the United States does not demonstrate any modification to the conditions of competition between the Parties as only one of the 16 companies cited in the U.S. Initial Written Submission exports to other CAFTA-DR Parties.⁴¹⁸

282. As clarified above, the United States need not demonstrate actual trade effects of each individual company’s non-compliance to show that Guatemala’s enforcement failures have occurred in a manner affecting trade. Such an econometric analysis would be an unnecessary and speculative exercise beyond what is required by the text of Article 16.2.1(a). Rather, it is sufficient to show that the companies or sectors in which the government has failed to effectively enforce its laws are engaged in cross-border trade between CAFTA-DR Parties. In this case, all the companies or sectors cited by the United States fall into one of these two categories.

283. As was discussed above, while evidence of actual trade is not necessary, it may be relevant and can be used to support a claim under Article 16.2.1(a). Guatemala acknowledges that between 2011 and 2014, the steel company Ternium exported steel products to the CAFTA-DR Parties of an approximate value of US\$60,000.⁴¹⁹ Despite Guatemala’s contention that this

⁴¹⁷ Guatemala’s Initial Written Submission, para. 463.

⁴¹⁸ Guatemala’s Initial Written Submission, para. 471.

⁴¹⁹ Report by the Superintendencia de Administración Tributaria – SAT – January 27, 2015 (GTM-35). The United States further notes that the time period searched by Guatemala does not reflect the full period relevant for the purposes of this dispute, that is July 1, 2006 to present.

trade is “negligible”, the customs data presented by Guatemala nonetheless show trade in steel between the United States and Guatemala. Article 16.2.1(a) does not contain any quantitative threshold for trade between the Parties. As a result, Guatemala’s failure to effectively enforce its labor laws has allowed companies like Ternium to maintain improperly low labor costs, altering the conditions of competition between those companies and other producers competing in the CAFTA-DR marketplace.

284. Further, five of the seven companies cited with respect to Guatemala’s third group of enforcement failures produce apparel. Between July 1, 2006 and December 31, 2014, goods produced by four of these five companies were imported into the United States at an aggregate value of at least \$US118 million.⁴²⁰ As the United States references above, over this time period apparel products were brought into the United States from Fribo, Mackditec, Avandia, and Koa Modas at total values of at least US\$7 million, US\$32 million, US\$17 million, and US\$62 million, respectively. This information directly contradicts Guatemala’s contention of negligible trade in apparel between the Parties.⁴²¹ The above-referenced apparel companies are able to avoid a key input cost—namely, labor—which in turn allows them to gain an unfair competitive advantage vis-à-vis their law-abiding competitors in the CAFTA-DR market.

285. With respect to the final company cited above, the coffee farm Las Delicias, Guatemala does not provide any evidence that trade is not occurring. In conducting its customs data search, Guatemala simply did not include Las Delicias.⁴²² As documented in the U.S. Initial Written Submission, coffee is a significant export commodity for Guatemala. Between 2007 and 2013, Guatemalan coffee exports averaged US\$1 billion per year, of which 35% went to CAFTA-DR Parties.⁴²³ Guatemalan government statistics on agricultural exports show that in 2014, Guatemala exported over US\$182 million in coffee to the United States.⁴²⁴ Thus, there is trade in coffee occurring between Guatemala and the other CAFTA-DR Parties. 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.

286. The United States further notes that, as discussed above, Guatemala imports apparel and steel from the United States. Between July 1, 2006 and December 31, 2014, Guatemala imported over US\$176 million in value of apparel articles from the United States.⁴²⁵ Guatemala also imported large quantities of iron and steel, amounting to a total value of over US\$455 million.⁴²⁶ The same unfair competitive advantage would apply to apparel and steel imports competing with Guatemalan companies which unfairly gain a competitive advantage due to reduced labor input costs.

⁴²⁰ Declaration of Mark Ziner, U.S. Customs and Border Protection (executed March 3, 2015) with attachment, table of U.S. import data (USA-198).

⁴²¹ Guatemala’s Initial Written Submission, para. 471.

⁴²² See Report by the Superintendencia de Administración Tributaria – SAT – January 27, 2015 (GTM-35).

⁴²³ HS6 codes 151110 and 151190. Data retrieved from GTIS database, <http://www.gtis.com>, last visited on October 28, 2014.

⁴²⁴ Guatemalan data on 2014 agricultural exports (USA-199), available at http://www.banguat.gob.gt/inc/ver.asp?id=/estaeco/comercio/por_producto/prod0207DB001 htm.

⁴²⁵ U.S. Census Bureau Declaration (March 10, 2015) (USA-200).

⁴²⁶ U.S. Census Bureau Declaration (March 10, 2015) (USA-200).

287. Based on the foregoing, Guatemala has failed to rebut the U.S. *prima facie* case. The United States has demonstrated that Guatemala’s failures to register unions in a timely fashion and institute conciliation proceedings have occurred in a manner affecting trade between the Parties.

E. CONCLUSION

288. Guatemala’s arguments are insufficient to rebut the *prima facie* case established by the United States. The United States respectfully requests that the Panel find that Guatemala has acted inconsistently with its obligation under Article 16.2.1(a) by failing to effectively enforce labor laws directly related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work by not registering or setting up conciliation tribunals unions in the time required by its law.

VII. THE U.S. PANEL REQUEST CONFORMS TO THE CAFTA-DR REQUIREMENTS

289. The United States has responded in the U.S. Initial Written Submission to Guatemala’s request for a “preliminary procedural ruling” regarding the sufficiency of the U.S. panel request. In short, the United States explained that the U.S. panel request identifies the measure or other matter at issue (Guatemala’s failure, through a sustained or recurring course of action or inaction, to effectively enforce its labor laws related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work) and indicates the legal basis for the complaint (Article 16.2.1(a)).

290. Guatemala’s arguments in its Initial Written Submission do not change the fact that Guatemala’s challenge to the U.S. panel request is without merit. Guatemala continues to read into the text of Article 20.6.1 of the CAFTA-DR additional requirements that simply are not there, and Guatemala mischaracterizes the arguments in the U.S. Initial Written Submission.

291. Article 20.6.1 provides that a Party requesting the establishment of an arbitral panel “shall set out the reasons for the request, including identification of the measure or other matter at issue and an indication of the legal basis for the complaint.”

292. Therefore, by its plain meaning, Article 20.6.1 requires a Party to include in its panel request two components: 1) an “identification of the measure or other matter at issue”; and 2) “an indication of the legal basis for the complaint.” The United States included both of these components in its panel request.

A. THE U.S. PANEL REQUEST IDENTIFIES THE MEASURE OR OTHER MATTER AT ISSUE

293. The U.S. panel request identifies the measure at issue as the failure by Guatemala to enforce its labor laws related to the right of association, the right to organize and bargain

collectively, and acceptable conditions of work. The U.S. panel request further elaborates by identifying three examples of types of inaction, listing: “(i) the failure of Guatemala’s Ministry of Labor to investigate alleged labor law violations; (ii) the failure of the Ministry of Labor to take enforcement action after identifying labor law violations; and (iii) the failure of Guatemala’s courts to enforce labor court orders in cases involving labor law violations.” The panel request then goes on to explain that these “failures constitute a sustained or recurring course of action or inaction by the Government of Guatemala.”

294. Guatemala complains that the panel request does not identify the “measure” at issue because the U.S. panel request does not use the word “measure” but instead uses the term “matter at issue.”⁴²⁷ Guatemala’s argument is formalistic and unfounded. Nowhere in Article 20.6.1 is there any requirement to use specific words in a panel request, let alone a requirement that a panel request use the word “measure.”

295. Furthermore, as the United States articulated in its Initial Written Submission, Article 20.6.1 refers to “the measure *or* other matter at issue.”⁴²⁸ The use of the term “other” makes clear that a measure is a “matter at issue.” Accordingly, Guatemala need not “speculate” as to why the United States should choose to use one term or the other.

296. The Parties agree that a failure to act may be the subject matter of a dispute under Article 20.6.1.⁴²⁹ The arbitral panel in *Costa Rica v. El Salvador*, the first CAFTA-DR Chapter 20 panel to issue a report, likewise confirmed that under Article 20.6.1 of the CAFTA-DR an omission or the failure to act may be a measure or other matter at issue.⁴³⁰

297. Guatemala also attempts to add to the requirement for a panel request to “identify the measure or other matter at issue” by arguing that requests invoking Article 16.2.1(a) require a “different description” for identifying the subject matter of the dispute when read in conjunction with Article 20.6.1. In particular, Guatemala argues that the panel request must specify the labor laws not being enforced.⁴³¹ Guatemala reaches this conclusion on the basis that, otherwise, a Chapter 16 claim would “merely require paraphrasing” Article 16.2.1(a).⁴³²

298. Guatemala appears to have abandoned its earlier position that the measure at issue would be the labor laws that are not being enforced.⁴³³ Indeed, Guatemala affirms that these proceedings do not involve any claim that any of those laws are in breach of the CAFTA-DR.⁴³⁴ As a result, it is not clear on what basis Guatemala insists that a panel request must specify the particular laws not being enforced. If those laws are not the “measure or other matter” at issue, then Article 20.6.1 would not require that they be specified in a panel request.

⁴²⁷ Guatemala’s Initial Written Submission, para. 34.

⁴²⁸ Emphasis added.

⁴²⁹ Guatemala’s Initial Written Submission, paras. 31, 140; U.S. Initial Written Submission, para. 267.

⁴³⁰ Final Arbitral Panel Report, *Costa Rica v. El Salvador—Tariff Treatment*, para. 4.40.

⁴³¹ Guatemala’s Initial Written Submission, para. 32.

⁴³² Guatemala’s Initial Written Submission, para. 32.

⁴³³ Guatemala’s Preliminary Ruling Request, para. 63.

⁴³⁴ Guatemala’s Initial Written Submission, para. 83.

299. The arbitral panel in *Costa Rica v. El Salvador* found that Costa Rica’s panel request sufficiently identified the measure at issue as “the failure of El Salvador to apply the CAFTA-DR tariff elimination program.”⁴³⁵ From this description, the panel reasoned that it was able to understand that the dispute concerned a lack of commitment by El Salvador to applying the tariff elimination program.⁴³⁶ Although this dispute did not concern Article 16.2.1(a), the panel found a simple, straightforward statement of the subject matter of the dispute to be of sufficient particularity to satisfy the obligations of Article 20.6.1.

300. Guatemala assigns no significance to the fact that the U.S. panel request identifies three specific areas in which Guatemala fails to effectively enforce its laws, arguing that identification of specific laws is required. Yet, the three identified areas correspond with the definition of labor laws in Chapter 16 as laws related to five internationally recognized labor rights. Interestingly, in describing its legal framework in its Initial Written Submission, Guatemala specifies its legislation according to these internationally recognized labor rights.⁴³⁷ Why Guatemala finds it is able to identify the laws related to these rights in this section of its submission, while articulating that it cannot do so in the section regarding its request for a preliminary procedural ruling, is unclear.

301. Moreover, as noted in the U.S. Initial Written Submission, one would expect Guatemala to have identified its domestic laws that met the definition of “labor laws” for the purposes of Article 16.8 as part of becoming a Party to the CAFTA-DR.⁴³⁸

302. Guatemala also fails to consider the U.S. panel request as a whole by ignoring the three examples of types of inaction. The arbitral panel in *Costa Rica v. El Salvador*, as well as WTO dispute settlement panels, have emphasized that a panel request must be considered as a whole.⁴³⁹ As the United States has stated previously, the examples of failures that it included in its panel request provided further identification of the failures at issue and the government entities involved.⁴⁴⁰

303. With respect to Guatemala’s argument that the U.S. panel request includes an open-ended list of failures, this is a question of the evidence involved rather than the identification of the measure or other matter at issue.

B. THE U.S. PANEL REQUEST INDICATES THE LEGAL BASIS FOR THE COMPLAINT

304. Guatemala also claims that the U.S. panel request fails to meet the second requirement of Article 20.6.1 to indicate the legal basis for the complaint. Guatemala provides no pertinent

⁴³⁵ Final Arbitral Panel Report, *Costa Rica v. El Salvador—Tariff Treatment*, para. 4.46.

⁴³⁶ Final Arbitral Panel Report, *Costa Rica v. El Salvador—Tariff Treatment*, para. 4.46.

⁴³⁷ Guatemala’s Initial Written Submission, para. 84.

⁴³⁸ U.S. Initial Written Submission, para. 272.

⁴³⁹ See Final Arbitral Panel Report, *Costa Rica v. El Salvador—Tariff Treatment*, para. 4.41; Appellate Body Report, *US—Countervailing and Anti-Dumping Measures (China)*, WT/DS449/AB/R, adopted 22 July 2014, para. 4.8; Appellate Body Report, *US—Carbon Steel*, WT/DS213/AB/R, adopted 19 December 2002, para. 127.

⁴⁴⁰ U.S. Initial Written Submission, para. 273.

legal support for its claim that to sufficiently indicate the legal basis, the U.S. panel request was required to do more than refer to Article 16.2.1(a) of the CAFTA-DR.

305. The U.S. panel request clearly indicates that the legal basis for the complaint is Guatemala’s breach of Article 16.2.1(a). Article 16.2.1(a) does not contain multiple or distinct legal obligations, but rather a single legal obligation that a Party shall not fail to effectively enforce its labor laws. Thus, the panel request on its face plainly connects the challenged measure to the legal basis for the complaint – the obligation set out in Article 16.2.1(a).

306. The arbitral panel in *Costa Rica v. El Salvador* found that where Costa Rica’s panel request cited to a legal provision containing only one legal obligation, the request sufficiently indicated the legal basis of the complaint as required by Article 20.6.1.⁴⁴¹ Guatemala seeks to expand the obligation set forth in Article 20.6.1 beyond this interpretation.

307. Although the language of Article 20.6.1 does not precisely mirror Article 6.2 of the *WTO Dispute Settlement Understanding*,⁴⁴² it may be helpful to consult prior WTO dispute settlement reports regarding the sufficiency of panel requests to the extent that the two provisions have certain requirements in common.

308. Guatemala cites the WTO Appellate Body report in *US—Countervailing and Anti-Dumping Measures (China)*⁴⁴³ for the proposition that listing a legal provision may not be sufficient to indicate the legal basis of the complaint. This reference is unhelpful to Guatemala. The panel in that dispute considered whether the panel request plainly connected the measures at issue to the multiple legal provisions claimed to have been infringed, some of which contained more than one legal obligation.⁴⁴⁴ The Appellate Body confirmed its past approach: “There may be situations, however, where such listing may not be ‘sufficient to present the problem clearly’, as in instances where the articles contain multiple and/or distinct obligations.”⁴⁴⁵

309. The Appellate Body report thus supports that the U.S. panel request in this dispute satisfies the requirements of Article 20.6.1 since, as articulated in the U.S. Initial Written Submission, Article 16.2.1(a) contains one legal obligation, not multiple and/or distinct obligations.⁴⁴⁶ As a result, Article 20.6.1 does not require that a more detailed articulation of the legal basis for the complaint be indicated in a panel request.

⁴⁴¹ Final Arbitral Panel Report, *Costa Rica v. El Salvador—Tariff Treatment*, paras. 4.86, 4.88, 4.95, 4.97.

⁴⁴² For example, Article 20.6.1 requires an “indication of the legal basis for the complaint,” whereas the *Understanding on Rules and Procedures Governing the Settlement of Disputes* requires a “brief summary of the legal basis of the complaint sufficient to present the problem clearly.” Guatemala in its Initial Written Submission agrees that an indication is a lesser requirement than a summary (para. 48).

⁴⁴³ Appellate Body Report, *US—Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

⁴⁴⁴ Appellate Body Report, *US—Countervailing and Anti-Dumping Measures (China)*, para. 4.52.

⁴⁴⁵ Appellate Body Report, *US—Countervailing and Anti-Dumping Measures (China)*, para. 4.8 (emphasis added).

⁴⁴⁶ U.S. Initial Written Submission, para. 278.

C. GUATEMALA MISCOMPREHENDS THE ROLE OF DUE PROCESS AND PREJUDICE CONSIDERATIONS

310. In its request for a preliminary procedural ruling, Guatemala argued that it would be a violation of its due process rights to respond to the U.S. panel request. The U.S. Initial Written Submission responded to these due process concerns, clarifying that due process is protected *through* the requirements of Article 20.6.1, which notify a Party of the nature of the claims against it.

311. Guatemala in its Initial Written Submission misapprehends the U.S. arguments concerning the role of due process and prejudice in evaluating a panel request.

312. Guatemala is mistaken in stating that the United States interprets the WTO Appellate Body report in *China—Raw Materials* to support the contention that a respondent’s ability to defend itself means the panel request complied with procedural requirements.⁴⁴⁷ Nowhere does the United States make such an argument.

313. Rather, the United States cites *China—Raw Materials* as support that a panel request must be evaluated on its face for consistency with the requirements of Article 20.6.1.⁴⁴⁸ The disputing Parties are in agreement that compliance with the obligations of Article 20.6.1 must be demonstrated on the face of the panel request.⁴⁴⁹

314. Contrary to Guatemala’s mischaracterization, the passage Guatemala quotes from *China—Raw Materials* does in fact support the U.S. position that the Appellate Body declined to impose a prejudice test.⁴⁵⁰ The Appellate Body found it troubling that the Panel reserved decision until after the respondent filed its initial submission to consider whether the respondent was in fact prejudiced.⁴⁵¹ Therefore, the Appellate Body rejected the idea that evaluation of a panel request requires an inquiry into whether a respondent is ultimately prejudiced in preparing its submission, by reference to its initial written submission.

315. To reiterate, the sufficiency of a panel request must be evaluated on its face and as a whole.⁴⁵² The United States does not make any argument to the contrary.

316. Guatemala also asserts that “the United States tacitly acknowledged that its panel request failed to comply with the minimum procedural requirements required under Article 20.6.1.”⁴⁵³ Of course, the United States did not “tacitly acknowledge” any such thing. Guatemala relies on a passage in the October 15, 2014 letter of the United States in which the United States explained that: “[t]he Panel would be in a better position to assess Guatemala’s request after having the

⁴⁴⁷ Guatemala’s Initial Written Submission, para. 53.

⁴⁴⁸ U.S. Initial Written Submission, paras. 288-289.

⁴⁴⁹ Guatemala’s Initial Written Submission, para. 50; U.S. Initial Written Submission, para. 288.

⁴⁵⁰ Guatemala’s Initial Written Submission, paras. 51-52.

⁴⁵¹ Appellate Body Report, *China—Raw Materials*, WT/DS394/AB/R, adopted 22 February 2012, para. 233.

⁴⁵² Final Arbitral Panel Report, *Costa Rica v. El Salvador—Tariff Treatment*, para. 4.57.

⁴⁵³ Guatemala’s Initial Written Submission, para. 26.

opportunity to read the U.S. initial written submission.” Yet, at the same time, Guatemala cites with approval to the Appellate Body report in *US – Carbon Steel* in which the Appellate Body explains that: “in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted to confirm the meaning of the words used in the panel request.”⁴⁵⁴ Furthermore, in the letter of October 15, 2014, the United States had already explained that:

Any response to or examination of Guatemala’s request for a preliminary procedural ruling would require a discussion of the issues that will be addressed in the U.S. first written submission. Requiring the United States to present part of its first written submission earlier and out of context would not be consistent with due process considerations as reflected in the Rules. A discussion of the issues relevant to Guatemala’s request would be best addressed in the Parties’ initial submissions where they can be placed in context and in a coherent presentation.

317. As a result, Guatemala’s view is in error that the cited sentence constituted any such “tacit acknowledgment” by the United States.

D. GUATEMALA’S REQUEST SHOULD BE REJECTED

318. The U.S. panel request satisfies the obligations of Article 20.6.1 of the CAFTA-DR. The request identifies the measure at issue and indicates the legal basis for the complaint. Therefore, the United States respectfully requests the Panel to reject Guatemala’s request that the Panel “find that it does not have the authority nor the jurisdiction to consider the complaint of the United States.”⁴⁵⁵

VIII. CONCLUSION

319. Guatemala has failed to rebut the *prima facie* case demonstrated by the United States in the U.S. Initial Written Submission. As the record shows, Guatemala has failed to effectively enforce its labor laws through a sustained and recurring course of inaction in a manner affecting trade. Therefore, the United States respectfully requests that the Panel find that Guatemala has breached its obligations under Article 16.2.1(a) of the CAFTA-DR.

⁴⁵⁴ Final Arbitral Panel Report, *Costa Rica v. El Salvador—Tariff Treatment*, para. 127.

⁴⁵⁵ Guatemala’s Initial Written Submission, para. 22.