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

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE HEARING

NON-CONFIDENTIAL VERSION

June 17, 2015

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

ANSWER:

1. As reflected by the ordinary meaning, in context, of subparagraphs (a) and (b) of Article 16.2.1, the responding Party bears the burden of demonstrating that its course of inaction reflects a reasonable exercise of discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters, or results from a *bona fide* decision regarding the allocation of resources.

2. Subparagraph (a) sets forth the obligations of the Parties with respect to the "Enforcement of Labor Laws."[1] A complaining Party asserting that a responding Party has breached Article 16.2.1(a) needs to establish four elements, namely that: 1) the laws in question are "labor laws" within the meaning of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR"); 2) the responding Party has failed to effectively enforce those laws; 3) the responding Party's failure occurred through a sustained or recurring course of action or inaction; and 4) the failure has occurred in a manner affecting trade between the Parties after the date of entry into force of the CAFTA-DR.

3. Subparagraph (b), on the other hand, affords the responding Party a justification, *i.e.*, an affirmative defense, for why it has failed to carry out the obligations imposed by subparagraph (a). Specifically, the subparagraph provides that a responding 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."

4. The fact that subparagraph (b) constitutes an affirmative defense is also apparent from the context. Subparagraph (b) begins by providing that each Party "retains the right to exercise discretion . . . and to make decisions." Accordingly, the first question under subparagraph (b) is whether a Party has decided to exercise the specified right. Only the responding Party knows whether it has exercised that right and wishes to invoke the exercise of that right in the context of defending a particular course of action or inaction.

5. Interpreting Article 16.2.1(b) as an affirmative defense is not only consistent with the ordinary meaning of the terms in context, but also reflects a reasonable assignment of the burden of proof in light of which Party has access to the relevant information. The responding Party is the Party that knows whether it has exercised discretion with respect to the listed matters or whether it has taken a decision with respect to the allocation of

[1] Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR"), Art. 16.2.

resources. And with respect to a decision on the allocation of resources, it is also the responding Party that is in a position to know whether that decision is based on a determination regarding the priority assigned by that Party to other labor matters.

6. By contrast, the complaining Party cannot be expected to know if the responding Party has exercised the specified discretion or taken the specified decision. Nor can the complaining Party be expected to know what priority the responding Party has assigned different labor matters.

7. If the complaining Party were required to address the elements of subparagraph (b) as part of its *prima facie* case, the complaining Party would have to show an absence of action by the responding Party – in other words, that the responding Party did not exercise its discretion in pursuing the course of action or inaction or did not make a decision regarding the allocation of resources (based on a determination of various priorities) that led to the course of action or inaction. Such a showing would require the complaining Party to prove a negative. All of this indicates that Article 16.2.1(b) should be interpreted as an affirmative defense to be invoked by the responding Party.

8. Pursuant to Rule 66 of the Rules of Procedure for Chapter Twenty of the CAFTA-DR, "a Party asserting that a measure is justified by an affirmative defense under the Agreement shall have the burden of establishing that the defense applies." Accordingly, once the complaining Party has made a showing of the responding Party's course of inaction as part of the prima facie case under subparagraph (a), it would then be for the responding Party to show whether that course of inaction is justified by a reasonable exercise of discretion or resulted from a *bona fide* decision regarding the allocation of resources based on a determination regarding the priority that Party has assigned to various labor matters.

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

ANSWER:

9. Even if the Panel were to determine that the terms of Article 16.2.1(b) were part of the prima facie case for the United States to establish, the United States has met its respective burden. In its submissions, the United States showed that "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."[2]

10. Namely, for each group of failures, there is no evidence that Guatemala has exercised discretion with respect to that group nor is there any evidence that Guatemala has taken a decision with respect to the allocation of resources involving that group, nor even as an initial matter is there any evidence that Guatemala has made a determination with respect to assigning a higher priority to any other particular labor matter.

11. To the contrary, for each group of failures, the United States demonstrated that the central obligations of the Government of Guatemala to enforce its Labor Code are not discretionary. With respect to the first group of failures, as directed by the Labor Code, the labor courts must execute and enforce their judgments.[3] Likewise, for the second group of failures, the obligation of the Ministry of Labor to impose warnings and undertake inspections in response to complaints is not discretionary.[4] Finally, for the third group of failures, the times within which the General Labor Directorate must register unions and in which labor courts must set up conciliation tribunals are also not discretionary.[5] Finally, the United States established that none of the groups of failures by Guatemala reflects a *bona fide* decision regarding the allocation of resources. Guatemala's arguments and evidence fail to rebut this showing.

12. Turning to the first group of failures, Guatemala has raised Article 16.2.1(b) to justify its course of inaction regarding two employers, Alianza and Fribo. For both, Guatemala has failed to take the necessary steps to compel these employers to comply with court orders for the reinstatement of improperly dismissed workers, payment of lost wages, and payment of fines. Guatemala argues that "the decision not to impose additional fines or pursue criminal penalties" for Alianza and Fribo "is entirely consistent with a policy of prioritizing the allocation of resources and with a reasonable exercise of discretion" because the workers purportedly settled their claims with their employers.[6]

13. With respect to the workers of Fribo, Guatemala's arguments are unsubstantiated. On March 17, 2009, Fribo improperly dismissed 24 workers in reprisal for attempting to form a union.[7] The labor court ordered that the workers be reinstated with back pay, and fined the company.[8] Fifteen of the 24 workers were reinstated, but most of these workers were assigned to positions with less pay.[9] None of the workers was paid the back pay or

[2] U.S. Rebuttal Submission, para. 41, n.35.

[3] Guatemalan Labor Code ("GLC"), Arts. 285, 380, 425-428.

[4] GLC, Arts. 274, 278, 280, 281.

[5] GLC, Art. 218.

[6] Guatemala Rebuttal Submission, paras. 150, 168.

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

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

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

benefits mandated by the reinstatement order.[10] On August 21, 2009, Fribo closed its operations and provided all the workers with only a partial payment of severance.[11] The partial severance payment did not include any of the wages or benefits owed to the improperly dismissed workers pursuant to the court order.

14. Guatemala has presented no evidence to demonstrate that the partial payment was a settlement of the workers' legal claims under the reinstatement order, and the statements of the workers reflect that they did not view this partial payment as a settlement. The workers explain that they informed the Ministry during a site visit on August 21, 2009, that they had not received the full amount of back wages owed to them from Fribo.[12] Despite this notification of a violation of the law, the inspector advised the workers that they should accept a lower amount than what was due to them under the law.[13] As reflected in U.S. Exhibit 11, specifically the second to last paragraph on page 3, the workers do not state that, as result of the partial payment, they no longer wished to pursue their claims for the outstanding amounts.[14]

15. To the contrary, in statements provided on March 20, 2010, approximately five months after the alleged settlement, workers P, Q, and R indicate quite the opposite.[15] The statements reflect that the workers did not wish to abandon their claims.[16] Therefore, the record does not indicate that the workers settled their legal claims such that no action was required on the part of the Government of Guatemala. Consequently, the record does not support that the course of inaction that included Guatemala's failure to take the necessary enforcement actions to ensure Fribo fully complied with the order of the court was the result of a reasonable exercise of discretion or a *bona fide* decision regarding the allocation of resources.

16. Even if the partial payments had been intended to constitute legal settlements, those settlements would not have been legal. Pursuant to Article 12 of the Labor Code and Article 106 of the Guatemalan Constitution, workers and employers may not negotiate away the rights or protections imparted to workers under the Labor Code. Specifically, "[c]ollective or individual contracts with terms involving the waiver, reduction, distortion or restriction of the rights recognized in favor of the workers as set out in the

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

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

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

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

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

[15] Statements of P, Q, R (March 20, 2010) (USA-12, USA-13, USA-14), in particular, the third section of USA-12.

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

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."[17]

17. In the context of settlements involving the conciliation of a collective conflict, the General Labor Inspectorate ("GLI") is obligated to "ensure that such agreements do not violate legal provisions protecting employees" among other requirements.[18]

18. Thus, because the purported settlement agreement between the workers and Fribo was for an amount less than that awarded by the labor court, the agreement was void and non-enforceable, and any approval or acceptance of this agreement by the labor court would have been a failure by the court to enforce the Labor Code.

19. With respect to the workers of Alianza, Guatemala's arguments are not supported by the law. On March 26, 2010, Alianza improperly dismissed 33 workers in reprisal for undertaking a conciliation to resolve a collective conflict with the company.[19] The labor court ordered Alianza to reinstate the improperly dismissed workers and issued a fine.[20] Alianza did not reinstate any of the 33 workers.[21] After approximately two years of inaction, thirty of the workers signed settlements with the employer for less compensation than had been ordered by the court.[22]

20. Because the purported settlement agreement between the workers and Alianza was for an amount less than that awarded by the labor court, the agreement did not constitute a valid settlement of the workers' claims.

21. Given that the settlement agreement was contrary to Guatemalan law,[23] Guatemala cannot show that its failure to enforce here was pursuant to a "reasonable" exercise of discretion, or to a *bona fide* decision regarding the allocation of resources.[24] Further, Guatemala's argument overlooks the labor court's failure to execute the order in the two years subsequent to the issuance of the order. This two-year period is an instance of a failure by Guatemala to effectively enforce its labor laws even apart from the issue of the

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

[18] GLC, Article 375.

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

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

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

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

[23] GLC, Art. 12; Guatemalan Constitution, Art. 106.

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

settlement and there is no evidence that this failure resulted from a reasonable exercise of discretion or a *bona fide* decision regarding this group of failures.

22. With respect to the third group of failures, Guatemala has argued that the number of unions registered in 2011 and 2012 was high compared to the preceding and subsequent years and that this volume excuses its failure pursuant to Article 16.2.1(b). But this explanation does not indicate any *bona fide* decision to allocate resources to any particular higher priority labor matter that made it impossible to meet the statutory timeline for union registration. Guatemala has not given any indication that there was a decision not to allocate resources (human capital, here) to process these applications. Furthermore, as seen in the submissions of both the United States and Guatemala, the Government of Guatemala was in fact engaging with these applicants repeatedly, and at various points during those years. Contrary to Guatemala's claims, Guatemala appears to have allocated sufficient resources to these applications to review and respond to the applicants on multiple occasions, asking them to make small changes or to rephrase text in a different way in their proposed by-laws. These facts suggest not a resource allocation decision, but rather an obstruction of the registration process.

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

ANSWER:

23. To demonstrate that a failure to effectively enforce labor laws occurs "in a manner affecting trade between the Parties" a complaining Party must present evidence demonstrating: 1) that there is trade between the Parties; and 2) that based on the responding Party's failure to effectively enforce its labor laws, there has been a modification to the conditions of competition.

24. Regarding the first prong, the United States has demonstrated that a significant amount of trade is occurring between the Parties in the relevant sectors.[25] Guatemala has not successfully refuted this evidence, but rather challenges the presentation of certain data on exports from Guatemala to the United States as insufficient because the data cover the aggregate time period of this dispute and therefore may not be compared with the individual instances of inaction.[26] In response, the United States presents below a depiction of the annual data provided in the Declaration of U.S. Customs and Border Protection (U.S. Exhibit 198), which reveals that trade was indeed occurring at the times the instances of inaction occurred for each of the companies referenced therein.

[25] U.S. Initial Written Submission, paras. 104-110, 184-190, 249-253; U.S. Rebuttal Submission, paras. 123-133, 217-228, 280-287.

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

Annual Summary Data on Imports into the United States from Guatemala July 1, 2006 – December 31, 2014
(approximate values USD)

Year	Alianza Fashion (aka Industria D&B, Modas Alianza)	Avandia	Fribo (aka Modas Dae Hang)	Koa Modas	Mackditex	FEFLOSA (Empresa Plantaciones De Café El Ferrol, La Florida y Santa Elena)
7/2006-12/2006	$8.834.857	$7.795.691	$2.691.265	--	--	--
2007	$14.439.654	$7.824.306	$2.581.717	$858.455	--	$345.510
2008	$31.549.724	$683.313	$129.144	$4.100.859	--	--
2009	$28.473.882	$3.264	$1.688.561	$285.789	$9.891.602	$231.000
2010	$29.765.661	$1.494	--	$5.942.750	$9.561.784	$589.050
2011	$20.787.229	$707.345	--	$14.721.617	$11.693.667	$849.750
2012	$13.334.340	--	--	$7.234.748	$1.448.988	$623.026
2013	$1.932.419	--	--	$14.551.683	--	$725.358
2014	--	--	--	$15.029.142	--	$479.622
Total approx. value	**$ 149.117.766**	**$17.015.413**	**$7.090.687**	**$62.725.043**	**$32.596.041**	**$3.843.316**

Source: U.S. Customs and Border Protection
Office of International Trade
Trade Statistics & Demographics Division
Automated Commercial System (ACS)
Date of search: February 13, 2015

25. Regarding the second prong, a complaining Party must show that the failure to effectively enforce its labor laws modifies the conditions of competition that exist with respect to cross-border trade between the Parties. This interpretation is supported by the findings of other trade dispute settlement tribunals established under trade agreements that have interpreted the word "affecting". For example, the World Trade Organization (WTO) Appellate Body, in commenting on the phrase "affecting trade" in Article 1.1 of the *General Agreement on Trade in Services* 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." This finding echoes numerous statements by WTO panels in the context of Article III:4 of the *General Agreement on Tariffs and Trade* ("GATT") 1994, which also requires that the measure at issue be "affecting" trade – in the case of Article III:4 by affecting the internal sale, offering for sale, purchase, transportation, distribution or use of the product. Beginning in 1958, the term "affecting" in Article III:4 has been interpreted with broad scope. Together with the reference to trade, the phrase has been understood to cover "not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws

or regulations which might adversely modify the *conditions of competition* between the domestic and imported products on the internal market."[27] The CAFTA-DR Parties were aware of this long-standing interpretation when negotiating the text of the CAFTA-DR.

26. In this regard, it is instructive to note that Article 16.2.1(a) of the CAFTA-DR requires only that there be *an* effect on trade between the Parties and does not specify that the failure have any particular kind of effect on trade, such as providing less favorable treatment to the products of the complaining Party. In contrast, Article III:4 of the GATT 1994 and Articles XVI and XVII of the GATS require a demonstration of less favorable treatment to the products of the complaining Party. Thus, because Article 16.2.1(a) does not require a specific kind of effect on trade, it makes little sense for Guatemala to argue that the standard under the CAFTA-DR requires more of a showing than under the GATT 1994 and the GATS – where it *is* necessary to show a specific kind of effect, i.e., less favorable treatment. This suggests that the conditions of competition analysis is appropriate in the current circumstances.

27. Furthermore, WTO panels and the Appellate Body have concluded that evidence of particular trade effects is not necessary to show a breach of an obligation. They have reasoned that WTO Members (and their traders) have a right to the expectation of no less favorable conditions of competition in another Member's market. Where a Member acts in a way that might alter those conditions, it does not matter that the measure of the Member has not resulted in observable trade effects.[28] Rather, what matters is that the competitive conditions are modified as a result of the measure – therein lies the breach. While actual trade effects may be consulted to support a Member's argument that the conditions of competition have been altered, such effects are not necessary to demonstrate a breach.

28. The focus is on the measure itself, and whether it operates in a manner that would affect trade, i.e., modify the conditions of competition between the Parties. Here, the measure at issue is Guatemala's failure to effectively enforce its labor laws with respect to 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. Specifically, these groups of inaction involve a failure to require employers to reinstate illegally dismissed workers or to pay them the back wages and other compensation due; a failure to inspect sufficiently in response to worker complaints or to impose a penalty after identifying a violation; and a failure to register unions or initiate conciliation tribunals in a timely manner. In each of these scenarios, it is evident

[27] Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833-7S/60, adopted October 23, 1958, para. 12 (emphasis added). *See also, e.g.*, Appellate Body Report, *United States – Foreign Sales Corporations (21.5 – EC)*, WT/DS108/AB/RW, para. 210.

[28] *See, e.g.*, Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, para. 10.78 (finding that the proposition that a measure must be shown to have an actual impact on trade regarding the sourcing of products is difficult to reconcile with the concept that Article III:4 is an obligation addressed to governments to ensure effective equality of competitive opportunities and the principle that a showing of trade effects is not necessary to establish a violation of this obligation).

from the nature of the labor laws in question that not enforcing them would result in an alteration of the conditions of competition because the lack of enforcement reduces marginal costs for Guatemalan enterprises. How these results occur for each group of failures is described in further detail in response to Question 5, below.

29. Guatemala argues that the United States must demonstrate actual trade effects, such as reduced market prices, to prevail on a claim under Article 16.2.1(a). For the reasons described above, such a showing is not necessary for establishment of a breach. But such a showing is also not reasonable or feasible in the context of labor disputes under the CAFTA-DR. The United States does not have access to the internal books and records of Guatemalan companies. Therefore, even if a reduction in the market price for a good could be identified, it would be impossible for the complaining Party to demonstrate that this change was caused by Guatemala's failure to effectively enforce its labor laws. The United States would have to show, for example, that the particular Guatemalan entities in question lowered their sales prices for the product, and were able to do so because of reduced costs. This showing would require documentation of the entities' cost and sales data – confidential commercial information which the United States cannot feasibly obtain.

30. In the context of certain WTO disputes dealing with subsidization and in domestic trade remedies investigations where a showing of price effects or other actual trade effects is required, the relevant WTO Agreement[29] and domestic laws expressly provide mechanisms for obtaining the data necessary to make such a showing. For example, in the case of anti-dumping or countervailing duty investigations, a domestic authority issues questionnaires to both domestic and foreign companies to obtain the relevant cost, sales and other data needed. If the company chooses not to provide such data, the domestic authority may base its findings on other information to which it has access or knowledge, such as the data of similarly situated companies that have supplied the necessary data. These mechanisms for gathering information and making the relevant determinations are necessary because of the nature of the obligations and remedies at issue. For anti-dumping investigations, each company may receive an individual dumping margin applied to offset the effects of its own depressed prices in the relevant market. That is, a specific trade effect must be identified for the application of anti-dumping duties.

31. Similarly, under the WTO *Agreement on Subsidies and Countervailing Measures*, special procedures are expressly provided for the gathering of information where specific trade effects must be shown. Annex V of that Agreement states that the Members "shall cooperate in the development of evidence to be examined by the panel", and that a procedure shall be initiated upon request "to obtain such information from the government of the subsidizing Member as necessary to establish the existence and

[29] *See, e.g.*, WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"); WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product."[30]

32. These types of disputes raise issues, and therefore require evidentiary showings, that clearly are very different from the issues raised and showing required in a dispute under Article 16.2.1(a). Instead of requiring a showing of specific trade effects resulting from a breach, therefore, the phrase "in a manner affecting trade" serves to delineate the scope of the types of failures that fall within the purview of the effective enforcement obligation. That is, the obligation does not apply to enforcement failures that have no effect on trade between the parties, such as labor enforcement issues relating to government workers or civil servants whose work does not involve the production of goods or the provision of services entering cross-border commerce.

33. In attempting to frame Article 16.2.1(a) as an obligation requiring a showing of adverse trade effects, Guatemala attempts to read into Article 16.2.1(a) words that are not there. Guatemala's efforts in this respect should be rejected, and Article 16.2.1(a) should be interpreted based on the text of the obligation, in its context, and in light of the object and purpose of the CAFTA-DR.

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

ANSWER:

34. For each of the three groups of failures presented in the U.S. submissions, the United States has demonstrated either direct or indirect cost savings resulting from Guatemala's failures to effectively enforce its labor laws. The United States will review each of these three groups in turn, but would first note that Guatemala in its Rebuttal Submission does not appear to dispute the fact that cross-border trade is occurring between Guatemala and the United States or other CAFTA-DR Parties involving the industries or sectors cited in this dispute.

35. With respect to Guatemala's failure to enforce court orders for the reinstatement of wrongfully dismissed workers and the payment of compensation due, and for the payment of a fine by the relevant company, the United States has presented the court orders and other records of 191 workers requiring that they be reinstated to their positions

[30] SCM Agreement, Annex V, paragraphs 1 and 2.

and paid back wages and other missed benefit payments.[31] The United States has also presented evidence, including workers' statements, attesting that the relevant employers did not comply with the court orders.[32] This evidence demonstrates that, in cases where workers were never reinstated, the company directly avoided the financial obligation of reinstating the workers and paying them the required back wages and benefits owed. In cases where workers were reinstated to lesser paying positions, companies were directly relieved of the difference in cost between wages earned in these positions. In cases where the worker was reinstated but did not receive the back pay or benefits ordered, the company directly saved these same costs. Where the record shows that Guatemala did not impose the additional fines required by law for failure to comply with a court order, the relevant entities also avoided these costs.

36. Further, where workers were improperly terminated for participating in union activities, the companies indirectly incurred savings by avoiding the costs associated with having a functioning union or a collective labor agreement in the workplace. It is for this very reason that the employers terminated the workers attempting to organize[33] – that is, to avoid the perceived cost of workers negotiating for higher wages or for improved working conditions, for example. Therefore, concerning the first group of failures, the United States has shown that the measure at issue – Guatemala's failure to effectively enforce its labor laws relating to the right of association and to the right to organize and bargain collectively – resulted in direct and indirect cost-savings to those entities whose compliance with the law was not enforced, modifying the conditions of competition between the Guatemalan entities and CAFTA-DR competitors.

37. The same types of effects can be seen with respect to the second group of failures – Guatemala's failure to conduct adequate worksite inspections or impose penalties for known labor law violations. In cases of failure to inspect at all or failure to inspect adequately, in the absence of proper inspections, it is impossible to definitively determine whether a violation has occurred. Proper inspections are an inherent and fundamental element of effective enforcement.[34] Without such proper inspections, violations remain

[31] Statement of K, L, M, N, O (June 24, 2014) (USA-11); 14 reinstatement orders (February 19, 2008) (USA-55); Letter from the Ministry of Labor with attached information regarding the union confederation UNSITRAGUA to B (January 21, 2009) (USA-56); 40 reinstatement orders (February 19, 2008) (USA-57); 11 reinstatement orders (June 24, 2008, and August 25, 2008) (USA-59); Reinstatement Order, Labor Court of First Instance (April 1, 2009) (Replacement USA-60); 12 reinstatement orders (August 19, 23, 25, 2010) (USA-62); Reinstatement Order (November 21, 2011) (USA-67); Reinstatement Order (March 26, 2010) (USA-69); Reinstatement Order (November 22, 2006) (USA-74); Reinstatement Order (August 8, 2007) (USA-75); CIDH Complaint (July 27, 2012) (USA-79); Complaint (March 8, 2011) (USA-82); Second Statement of B with table (March 5, 2015) (USA-161); Reinstatement Order (July 7, 2008) (USA-186); Reinstatement Order (July 11, 2008) (USA-187).

[32] *See*, *e.g.*, Workers Statements (USA-1-13, 15-25, 169, 174, 183); Email communication from NNN, Coordinators' Committee, UNSITRAGUA Histórica (October 15, 2014) (USA-58); Email from counsel for the union to the U.S. Department of Labor (April 4, 2014) (USA-84).

[33] *See* USA-55, 57, 59, 60, 186, 187 (court orders for the reinstatement of workers wrongfully terminated in retaliation for their participation in forming a union pursuant to Article 209 of the Code).

[34] *See* U.S. Initial Written Submission, para. 124 (citing to recognition of the importance of inspections by the Organization for Economic Cooperation and Development and the World Bank).

undetected by the authorities and the law is not enforced. Given the inability to detect violations, a failure to inspect or to adequately conduct an inspection allows violations to continue undetected, thereby allowing companies to avoid the cost of compliance with the law and resulting fines. For instance, where the General Labor Inspectorate did not inspect, and the employer was violating the law, the employer obviously may have continued to avoid such costs as paying the minimum wage or providing the legally required safety equipment. Having not been detected by the authorities, the employer also avoids any fines or other penalties associated with these violations. To the extent that Guatemala failed to impose penalties for known labor law violations, offending companies directly avoided both the cost of coming into compliance with the law, such as paying for proper sanitation and safety equipment or the minimum wage, as well as the cost of penalties.[35]

38. With respect to the third group of failures by Guatemala, namely the failure to timely register unions and institute conciliation tribunals, companies have incurred cost savings. Companies avoid costs where there is delay in establishing conciliation tribunals; namely, companies avoid the cost of addressing workers' grievances including those concerning payment of the minimum wage and improvements in working conditions.[36] For example, in 2001 workers of the coffee farm Las Delicias submitted a list of grievances to a labor court requesting that the employer pay the legally required minimum wage, provide workers with adequate tools to perform their jobs, improve the conditions of work, and improve medical conditions.[37] The court failed to take any action to advance the conciliation process or sanction the company for failure to participate and, as of 2014, no action had been taken with respect to the workers' requests.[38] As such, over a period of 13 years, Las Delicias avoided the costs of paying workers the minimum wage, paying for adequate tools, providing medical assistance, and paying for other improvements to the conditions of work at the farm. Then, as discussed above regarding the first group of failures, failure to timely register unions inhibits workers' ability to advocate for wages that meet or exceed the statutory minimum and to ensure that they are afforded all appropriate working conditions required by law. In the absence of an organized union, the employer avoids these costs. This is borne out by the examples of Mackditex and Koa Modas, where the workers were simultaneously seeking to realize their right to acceptable conditions of work while they were forming the union.[39]

[35] *See* U.S. Initial Written Submission, paras. 141-177 (documenting Guatemala's failure to impose penalties for known labor law violations on 70 coffee farms, three African palm oil plantations, and five apparel companies).

[36] *See* U.S. Initial Written Submission, paras. 225-240; U.S. Rebuttal Submission, paras. 251-273.

[37] *See* U.S. Initial Written Submission, para. 225; Statement of RR, SS, TT, UU, VV (June 30, 2014) (USA-26).

[38] Statement of RR, SS, TT, UU, VV (June 30, 2014) (USA-26).

[39] *See* U.S. Initial Written Submission, paras. 136-139, 164-172, 202-211.

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

ANSWER:

39. As noted in the U.S. Initial Written Submission, proper inspections are an inherent and fundamental element of effective enforcement.[40] Inspections serve not only to detect violations at the individual enterprises inspected, but also to deter other companies from failing to comply with their legal obligations.[41]

40. The perception of companies towards the inspecting agency and the effectiveness of its enforcement powers is critical. As recognized by the OECD Report cited in the U.S. Initial Written Submission, insufficient or badly implemented inspections result in "low credibility" of the inspecting authority or regulatory system.[42] The failure to inspect appropriately signals to other companies in the industry or geographic area that inspections will not occur or will fail to detect violations. The World Bank Guidelines on Good Practices for Regulatory Enforcement observe that a good inspection system maximizes compliance by detecting and deterring non-compliance.[43] In the context of sanctions, the Guidelines observe that "the deterrent effect of sanctions will depend on their certainty, severity, celerity, and uniformity."[44]

41. Paragraph 285 of the U.S. Rebuttal Submission recognizes this deterrent effect of inspections and resulting fines. Where inspections and fines lack certainty, the mechanism for enforcing the law loses credibility and fails to achieve the effect of deterring non-compliance. Such is the case demonstrated by the United States regarding Guatemala's second group of failures.

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[40] *See* U.S. Initial Written Submission, para. 124 (citing to recognition of the importance of inspections by the Organization for Economic Cooperation and Development and the World Bank).

[41] *See* World Bank Group, Good Practices for Regulatory Inspections: Guidelines for Reformers (December 2005) (USA-97), p. 4.

[42] *See* 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. 38.

[43] *See* World Bank Group, Good Practices for Regulatory Inspections: Guidelines for Reformers (December 2005) (USA-97), p. 4.

[44] World Bank Group, Good Practices for Regulatory Inspections: Guidelines for Reformers (December 2005) (USA-97), pages 36-37.

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

ANSWER:

42. The disputing Parties agree that the term "course" in Article 16.2.1(a) means "conduct" or "a person's method of proceeding," or "the way in which something progresses or develops."[45] The inactions presented by the United States can be distinguished from groups or collections of inactions that do not constitute a course in that the groups presented by the United States are related in two ways. The instances of failures by Guatemala are connected because they each relate to the same type of government action or inaction, and because they each relate to the failure to enforce a law or provisions of a law directly related to the same internationally recognized labor right or rights. These are not isolated or unrelated events.

43. For the first group of failures, each instance identified by the United States involves a failure to ensure that a worker who was wrongfully dismissed was reinstated and provided payment under Articles 209, 379, or 380 of the Guatemalan Labor Code – provisions of the Code directly related to the right of association or right to organize and bargain collectively.

44. For the second group, each instance involves a failure to carry out a sufficient inspection or to take action after citing an employer for its violation of the Labor Code. The inactions in those contexts are failures to effectively enforce the same provisions of the Labor Code (Articles 27, 61, 92-93, 103, 116-118, 121-122, 126-130, 134, and 197) and regulatory Protocol on inspections directly related to acceptable conditions of work.

45. For the third group, each instance involves a failure to register a union or set up a conciliation tribunal in a timely fashion as required by the Labor Code. These instances of inaction are failures to effectively enforce provisions of the Labor Code directly related to the right of association and right to organize and bargain collectively (Articles 206-225 and 377-396). They further inhibit workers from realizing their respective rights to acceptable conditions of work as described in greater detail in response to Question 11 below.

46. In an interpretation wholly unsupported by the text of the agreement, Guatemala takes the term "course" to imply "a deliberate policy of action or inaction adopted by the relevant party."[46] Nothing in the ordinary meaning of the word "course" or in the context of Article 16.2.1(a) invites such an interpretation, which would read into the provision a requirement of bad faith and would be contrary to the customary rules of treaty interpretation.

[45] U.S. Initial Written Submission, para. 87; Guatemala's Initial Written Submission, para. 134.

[46] Guatemala's Rebuttal Submission, para. 107.

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

ANSWER:

47. By the ordinary meaning of the term "recurring," a course of action or inaction must involve more than one occurrence.

48. The precise contours of the "sustained or recurring" standard will depend on the factual circumstances at issue and must be evaluated on a case-by-case basis. In other words, depending on the type of labor violation or enforcement action at issue, one might expect to see a higher or lower frequency of conduct.

49. For example, in the first group of failures submitted by the United States, the United States has demonstrated that Guatemala failed with respect to 191 workers at nine companies over eight years. These several instances across sectors and time support a finding of a recurring course.

50. For an action that naturally occurs less frequently such as union registration or the constitution of a conciliation tribunal, however, a recurring course of inaction could be substantiated with fewer instances than might be appropriate for other failures, given that fewer instances precipitating the relevant enforcement action may arise. Thus, with respect to the third group of failures, the United States has shown that Guatemala failed on at least nine occasions affecting hundreds of workers at six companies over six years. The evidence presented supports a finding of a recurring course for failures of this kind.

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

ANSWER:

51. As with "recurring," an assessment of whether a course of action or inaction is "sustained" must be evaluated on a case-by-case basis depending on the particular factual scenario. A course of action or inaction could be "sustained" over any period of time – a few months, a year, or more. The courses presented by the United States are each sustained over several years – between 2006 or 2007 and the panel request date, August 9, 2011, and have continued to be sustained beyond that date.

52. The United States has shown, in the case of inspections for example, that Guatemala consistently failed to respond appropriately to hundreds of complaints between 2007 and 2015. The examples in the record demonstrate failures in each year during that period. At no time was there a break to the course of inaction presented.

53. As is true for a "recurring" course, a sustained course of inaction could be substantiated under certain circumstances with fewer instances than might be appropriate for other failures, given that fewer instances precipitating the relevant enforcement action may arise. Again, however, with respect to the third group of failures, the United States has shown a sustained course of inaction by presenting failures that occurred through the delayed processing of these applications every year between 2007 and 2013.

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

ANSWER:

54. A sustained or recurring course of action or inaction does not need to be representative of a Party's conduct. Nor is it an effective defense to argue that a sustained or recurring course is exceptional. Article 16.2.1(a) requires the presentation of failure through a sustained or recurring course. A complaining Party need only show that a course is either sustained or recurring. The United States notes again that, while the standard for each is the same in all cases, the amount and type of evidence needed for a particular claim will vary depending on the underlying facts and circumstances as described in response to Questions 8 and 9.

55. Guatemala incorrectly suggests that the United States must demonstrate a certain percentage of failures to effectively enforce out of the total number of instances requiring enforcement action in Guatemala.[47] However, Article 16.2.1(a) does not require a showing that any minimum percentage of cases concerned instances of the same actions or inactions. Nothing in the text indicates a comparative exercise, such that the complaining Party must demonstrate that such failures occurred in the majority of cases, or that the course at issue reflects the predominant course of action. Article 16.2.1(a) requires that the complaining Party demonstrate *a* sustained or recurring course of action or inaction.

56. Similarly, Article 16.2.1(a) is not concerned with *all* commercial entities in Guatemala. Rather, Article 16.2.1(a) is concerned with entities engaging, or potentially engaging, in

[47] *See, e.g.*, Guatemala's Rebuttal Submission, paras. 349-358.

trade with other CAFTA-DR Parties, including by producing goods that compete with imports in the domestic market.

57. To be sure, the inaction documented by the United States is not exceptional. Rather, it is reflective of a systemic problem in Guatemala as can be seen through the multiple failures across several sectors and several years. Guatemala's own statistics and public information bear out this conclusion. For example, according to Guatemala, between August 1, 2012, and September 4, 2014, employers failed to comply with court orders to pay minimum wages and benefits on 1,571 occasions.[48] Likewise, intergovernmental organizations have confirmed that Guatemala's failures such as those documented by the United States are representative of a widespread problem. The International Labor Organization, for one, has commented on the persistent labor violations that have gone unaddressed in Guatemala on multiple occasions as noted by the United States in its prior submissions.[49]

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

ANSWER:

58. The third group of failures identified by the United States constitutes a sustained and recurring course of inaction by Guatemala because these failures are of the same type and are related to the failure to effectively enforce many of the same provisions of the Guatemalan Labor Code. Both types of failures the Panel has indicated in its question are failures to enforce Labor Code provisions directly related to the right of association and right to organize and bargain collectively, including Articles 206-225 and 377-396. In this case, both types of failures also reflect a failure to enforce Code provisions directly related to acceptable conditions of work, including Articles 61, 116-118, and 197.

59. Union registration and the setting up of conciliation tribunals are both ways through which workers organize, and which are intended, as seen in the Labor Code, to be expeditious and to operate on strict timelines.[50] The Guatemalan General Labor Directorate and labor courts are required under the Labor Code to administer the relevant provisions within the times specified therein. Causing unnecessary delay by inaction or creating impediments in the administration of these mechanisms is a failure to effectively

[48] U.S. Rebuttal Submission, para. 114, citing 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).

[49] *See, e.g.*, U.S. Rebuttal Submission, paras. 159, 210, and 237.

[50] GLC, Arts. 218; 377-396.

enforce these laws.

60. The workers attempting to organize in these ways also were denied access to realize their right to acceptable conditions of work, as evidenced by the record. At Fribo, for example, the record shows the workers lodged complaints with the Ministry of Labor in August and September 2007 regarding acceptable conditions of work to which the Ministry did not respond by inspecting or otherwise compelling compliance with the law.[51] It was at this same time that the workers sought to set up a conciliation tribunal to resolve these issues.[52] The content of the lists of grievances replicates the workers' complaints in this area (reprisals against workers for their organizing efforts and payment of less than the minimum wage).[53] The same is true for the workers of Serigrafía Seok Hwa who in the summer of 2012 both sought assistance from the Ministry of Labor with respect to acceptable conditions of work at the factory and sought to form a union.[54] Thus, on the occasions presented in the record on which workers pursued union registration or a conciliation tribunal, they did so in an attempt to secure acceptable conditions of work.

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

ANSWER:

61. In the context of WTO dispute settlement, the Appellate Body has explained that the general international law principle of good faith requires that disputing parties seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member and to the panel so that corrections may be made to resolve disputes.[55]

62. For example, in *United States—Tax Treatment for "Foreign Sales Corporations" ("US—FSC")*, the Appellate Body rejected a procedural challenge to a request for consultations on the basis that the responding party had failed to timely object.[56] The Appellate Body reasoned that by engaging in consultations on three separate occasions over a five-year period, and not raising any objection in two Dispute Settlement Body meetings at which the request for establishment of a panel was on the agenda, the responding party acted as

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

[52] Collective Conflict (August 18, 2007) (USA-136).

[53] Collective Conflict (August 18, 2007) (USA-136).

[54] *Cf.* Statement of II (June 26, 2014) (USA-43); Statement of JJ (June 26, 2014) (USA-44); Statement of KK (June 26, 2014) (USA-45) *with* Constituting Document of Union (August 8, 2012) (USA-152).

[55] *See, e.g.*, Appellate Body Report, *US—Tax Treatment for "Foreign Sales Corporations"* [hereinafter "*US—FSC*"], WT/DS108/AB/R, adopted 20 March 2000, para. 166.

[56] Appellate Body Report, *US—FSC*, para. 166.

if it had accepted the establishment of a panel as well as the preceding consultations. As a result, the Appellate Body refused to consider the substance of the objections to the request or to reverse the findings of the panel.[57]

63. The Appellate Body explained that: "This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law."[58] The Appellate Body further explained that: "The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[59]

64. Similarly, the Appellate Body has explained that "in the interests of due process, parties should bring alleged procedural deficiencies to the attention of a panel at the earliest possible opportunity."[60]

65. Guatemala has invoked both the principles of good faith and due process in these proceedings to complain about various aspects of these panel proceedings. However, the United States is not requesting that the Panel find that Guatemala's request was not timely filed. Rather, it is not necessary to reach that issue since Guatemala's actions and statements[61] demonstrate that Guatemala itself did not consider that the U.S. panel request was deficient, and Guatemala's Request for a Preliminary Procedural Ruling ("PRR") can be dismissed because it lacks merit and is not persuasive.

66. As the United States articulated at the hearing, Guatemala has been presented with ample

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[57] Appellate Body Report, *US—FSC*, paras. 165-166.

[58] Appellate Body Report, *US—FSC*, para. 166 (*citing* Appellate Body Report, *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 158).

[59] Appellate Body Report, *US—FSC*, para. 166.

[60] Appellate Body Report, *US—Carbon Steel*, WT/DS213/AB/R, adopted 19 December 2002, para. 123, citing to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, WT/DS132/AB/RW, adopted 21 November 2001, para. 50 ("When a Member wishes to raise an objection in dispute settlement proceedings, it is always incumbent on that Member to do so promptly."); Appellate Body Report, *US – FSC*, para. 166; and Appellate Body Report, *US – 1916 Act*, WT/DS136/AB/R, adopted 26 September 2000, para. 54 ("An objection to jurisdiction should be raised as early as possible and panels must ensure that the requirements of due process are met."). Note that in *Mexico – Corn Syrup (Article 21.5 – US)*, para. 49, the Appellate Body also explained: "We note, in this regard that Mexico was aware of all the facts on which it now relies in arguing that the Panel had no authority to deal with and dispose of the matter as soon as the United States submitted its communication seeking recourse to Article 21.5 of the DSU on 12 October 2000. Yet Mexico mentioned these alleged deficiencies, for the first time, more than four months later, at the meeting with the Panel on 20 February 2000. Mexico did not take advantage of the opportunities it had to raise the issues at the DSB meeting of 23 October 2000, or in either of its written submissions to the Panel."

[61] *See* for example paragraphs 15-18 of Guatemala's Initial Written Submission, in which Guatemala indicates it was able to understand and take steps to address the U.S. concerns specified in the consultations request, request for a Free Trade Commission meeting, and panel request.

opportunity to present the objections to the U.S. panel request of August 9, 2011 that are contained in its PRR prior to the filing of that request on October 10, 2014, over three years later. However, Guatemala failed to use any of these opportunities. The U.S. panel request was filed on August 9, 2011, and the Panel was composed in November 2012. The Parties agreed to suspend the Panel proceedings in letters dated November 30, 2012; January 29, 2013; February 25, 2013; April 5, 2013; April 19, 2013; April 26, 2013; October 26, 2013; April 25, 2014; and August 21, 2014. The Panel proceedings were not suspended between February 9, 2013 and February 25, 2013, as well as from March 8, 2013 to April 5, 2013. Guatemala could have used these opportunities to raise those objections. Furthermore, Guatemala had the ability to ask the Panel to terminate the suspension of proceedings for Guatemala to present its concerns with the panel request. Guatemala failed to take advantage of any of these opportunities.

67. Rather than objecting on any of these occasions, Guatemala agreed that the Panel proceedings should be suspended. Guatemala's own actions therefore indicate that Guatemala accepted that there was a validly constituted panel with valid terms of reference on which to proceed. Otherwise there would have been no reason to agree to suspend the proceedings since, for Guatemala, there would be no matter on which to have proceedings. Guatemala's actions with respect to the panel request are at odds with the arguments it is now making that the panel request was unclear. Those actions therefore undermine Guatemala's objections and indicate that the PRR should be rejected.

68. It is telling that Guatemala suggests that the result of its procedural objection to the panel request would be the United States "seeking consultations again with Guatemala under Chapter 16 of the CAFTA-DR and requesting again the establishment of an Arbitral Panel in due course, after fulfilling all its procedural obligations."[62] However, Guatemala's years-long extended delay in presenting its concerns has also delayed any opportunity for the United States to have taken that course of action and denied the United States the chance to address Guatemala's objections in a timely manner. As a result, Guatemala's actions can only be understood as an attempt to delay any panel proceedings against it, rather than genuine concerns with the panel request.

69. It is precisely this type of approach that the Appellate Body has criticized as being contrary to good faith and due process.

70. The result is that the PRR should be understood in context as not representing genuine confusion on the part of Guatemala with respect to the matter at issue as presented in the panel request, and Guatemala's PRR should be rejected.

[62] Guatemala Request for a Preliminary Procedural Ruling, para. 128.

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

ANSWER:

71. The purpose of the qualifying phrase in the definition of "statutes or regulations" is to identify which statutes or regulations are included among those that may be considered to be labor laws, also defined in Article 16.8. In particular, the qualification means that a statute or regulation that is not enforceable by action of the executive body would not be a labor law even if it met the other conditions in the definitions. For example, a statute or regulation that was enforceable by a court but not by action of the executive body would be excluded from the definition, even where that statute or regulation was directly related to one of the enumerated internationally recognized labor rights.[63]

72. As the United States has demonstrated, the Guatemalan Labor Code, by its own terms, is enforceable by the executive body.[64] Guatemala has not disputed this; nor has it disputed that the Labor Code, in whole and in its relevant parts, is directly related to the enumerated rights set out in the definition of "labor laws."[65] Instead, Guatemala has argued that the same statute or regulation changes from being a labor law to not being a labor law and back again depending on whether the particular enforcement action needed at a particular point in time is action by the executive body. For Guatemala, certain provisions of the Labor Code should not, in a particular instance, be considered provisions of a "labor law" for purposes of Article 16.2.1(a) because in that instance a government entity other than the executive body was responsible for the relevant aspect of enforcement.

73. However, this interpretation is not supported by the text of Article 16.2.1(a). Indeed, Guatemala is reading into the definition of "statutes or regulations" words that are not there.

74. Once a statute or regulation has been identified as enforceable by the executive body, that statute or regulation would be within the definition of "statutes or regulations." The analysis regarding the effective enforcement of those laws is a different question. It is at that point no longer a question of whether a measure is a statute or regulation, but rather whether the labor law is being effectively enforced. And that question encompasses all aspects of a law's enforcement.

75. Almost all laws, labor or otherwise, are enforceable by multiple government actors. Here, Article 16.2.1(a) refers to the obligation of a "Party" to ensure effective enforcement of labor laws without distinguishing among the government actors involved.

[63] The United States understands that Guatemala agrees with this distinction. Transcript, pp. 94-95.

[64] U.S. Initial Written Submission, para. 23; U.S. Rebuttal Submission, para. 35.

[65] Guatemala's Request for a Preliminary Procedural Ruling, para. 93, fn. 45 (October 10, 2014); Guatemala's Rebuttal Submission, para. 264.

In other words, a "Party" to the CAFTA-DR must not fail to effectively enforce statutes or provisions thereof as a general matter – engaging whatever agencies may be required to compel compliance. A dereliction of that duty, as the United States has shown here by Guatemala, is a breach of Article 16.2.1(a).

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

ANSWER:

76. Article 20.17.2 sets forth the factors a panel must take into consideration in determining the monetary assessment to be imposed on a responding Party for a breach of Article 16.2.1(a). Article 20.17.2 provides relevant context as a provision of the CAFTA-DR Dispute Settlement Chapter applicable specifically to non-implementation in the case of Labor Chapter disputes under Article 16.2.1(a).

77. As the United States articulated at the hearing, the Panel's determination of whether Guatemala has breached its obligation under Article 16.2.1(a) is a separate exercise from any future determination of a monetary assessment pursuant to Article 20.17.2. That is, while the assessment under Article 20.17.2 will be based in part on the breach found by a panel in its report, nothing in Article 16.2.1(a) refers to Article 20.17.2 such that a panel would be required to make findings regarding the factors listed in that article in its final report. For while certain of the factors in Article 20.17.2 are related to the obligation in Article 16.2.1(a), they are not the same. Therefore, the inclusion of a factor in the Article 20.17.2 list does not indicate that a finding must have been made in the underlying report with respect to that factor for a monetary assessment to be imposed. Nor does its inclusion in that list indicate that the absence of facts going to the factor would preclude the imposition of a monetary assessment.

78. For example, subparagraph (a) refers to "the bilateral trade effects" of the responding Party's breach. The panel's final report may or may not include findings with respect to actual trade effects. If it did, or if the complaining Party demonstrates such effects in the context of an Article 20.17.2 proceeding, then those effects must be taken into account for the imposition of a monetary assessment. However, nothing in Article 20.17.2 indicates that a lack of bilateral trade effects would preclude the imposition of a monetary assessment. Therefore, nothing in Article 20.17.2 could suggest by way of context that actual trade effects would be necessary for a finding of breach under Article 16.2.1(a). Rather, the panel must "take into account" any bilateral trade effects just as it must take into account all other relevant factors.

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

ANSWER:

79. The nonappearance of a worker does not alter the obligation of Guatemala to execute a labor court order. Pursuant to Labor Code Articles 285, 380 and 425, judges are obligated to "execute" the judgments that they issue. Labor Code Articles 380, 426-428 provide procedures for executing judgments. Execution begins with a writ of enforcement. This is a judicial order wherein the judge orders compliance with the directives of his or her decision and appoints an executor to execute, or carry out, the order.

80. There is no statutory provision that allows the court to vacate or suspend the order or close the proceedings in favor of the employer should the worker not appear for reinstatement. Rather, the order remains in place, and the labor court's enforcement obligations to execute the order pursuant to Articles 285, 380, and 425 continue. Consequently, if a worker fails to appear for reinstatement on one occasion, the court must order the executor to attempt execution of the order again at a later time. If a worker fails to appear for reinstatement, the court may summon the worker to appear before the court for an explanation and, if after adequate warning and good cause exists, the court may fine the worker.[66]

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

ANSWER:

81. Yes, certain liabilities to employees survive a company closure or bankruptcy. An employer's obligations and liabilities to its employees are defined by the worker's individual labor contract,[67] any collective agreements,[68] the Guatemalan Constitution, the Labor Code, and related laws.[69]

[66] GLC, Arts. 270-272.

[67] GLC, Art. 18 (defining an individual labor contract).

[68] GLC, Arts. 38-48 (providing for collective bargaining agreements); GLC, Arts. 49-56 (providing for collective agreements on working conditions).

[69] GLC, Art. 22 (individual labor contracts include the minimum rights afforded to workers under the Guatemalan Constitution, Labor Code, its regulations and other labor or social security laws); GLC, Art. 20.

82. Guatemala raised the issue of company closure with respect to two factual scenarios before the Panel regarding the failure of Guatemala to compel compliance with reinstatement orders. In the case of Fribo, the company closed after failing to reinstate workers or pay back wages or fines. In the case of Avandia, the company failed to reinstate workers or pay wages due after reorganizing under a different name.

83. Under Guatemalan law, the obligations and liabilities of the employer toward the workers it dismisses depend in part on whether "good cause" existed for the termination of the worker's contract.[70] Where no good cause exists, the employer is liable to the worker for the "compensation set forth in [the] Labor Code" and for "the wages the employee has lost from the time of the discharge until compensation is paid, up to a maximum of twelve months' wages, plus court costs."[71]

84. As reflected in Article 77 of the Labor Code, an employer's voluntary closure of the business is not one of the conditions that merits a finding of good cause.[72] Consequently, the voluntary closure of a company does not alter the employer's obligations to pay workers for the wages and benefits to which they are entitled under the Code.[73]

85. Pursuant to Article 85 of the Labor Code, "insolvency, bankruptcy, or liquidation of the company" constitutes good cause for terminating a labor contract "without prejudice to the right of the employee . . . to demand pursuant to the Code and obtain payment of any benefits or compensation to which they may be entitled pursuant to this Code."[74] This rule applies even when the insolvency, bankruptcy, or liquidation of the company "inevitably make it absolutely impossible [for the employer] to fulfill the contract."[75]

86. These provisions make clear that, as in the case of Fribo, whether closure is voluntary or the result of bankruptcy, the company is obligated to pay workers' severance or damages in addition to the wages and benefits owed to the workers under the court order and the Labor Code.

87. Turning to the record in this case, on March 17, 2009, Fribo improperly dismissed 24 workers in reprisal for the workers forming a union.[76] The labor court ordered that the workers be reinstated with back pay, and fined the company.[77] Fifteen of the 24 workers were reinstated, but most of these workers were assigned to positions with less pay.[78]

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[70] GLC, Art. 77.

[71] GLC, Art. 78.

[72] GLC, Art. 77.

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

[74] GLC, Art. 85(b).

[75] GLC, Art. 85(b).

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

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

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

None of the workers was paid the back pay or benefits mandated by the reinstatement order.[79] On August 21, 2009, Fribo closed its operations and provided all the workers with only a partial payment of severance.[80] The partial severance payment did not include any of the wages or benefits owed to the improperly dismissed workers pursuant to the Court order.

88. At the hearing, Guatemala argued that the U.S. claim that nine workers were not reinstated ignores the reality that Fribo closed within four months of the reinstatement orders being issued.

89. However, Guatemala's argument disregards the relevant enforcement obligations mandated by the Code. First, while the nine workers of Fribo admittedly could not be reinstated to the company once it had closed, Guatemala's argument does not undermine the fact that it failed to take the necessary steps to compel Fribo to reinstate the workers during the period when the company was still in operation.

90. Second, the terms of the court order for the payment of back wages, benefits, and fines remain irrespective of the company closure, and the record demonstrates that Fribo has not complied with these terms of the order. Guatemala has presented no evidence that it took the necessary steps to compel Fribo to comply with these directives, nor has Guatemala presented any evidence to suggest that the court orders were invalidated or altered in any way.

91. We note that, had these nine workers been reinstated, they would have been actively employed by Fribo at the time of the company closure. As we discussed above, this status as an employee would have triggered further rights for the workers under the Code at the time of the company closure. Namely, the workers would have been entitled to severance or damages in addition to the back wages ordered by the Court. Guatemala has presented no evidence that Fribo has paid the workers the full severance or damages that they would have been entitled to under the Code at the time of the closure.

92. Guatemala's arguments involving Avandia also must be rejected. Guatemala argues that the evidence presented by the United States, specifically U.S. Exhibit 169, suggests that Avandia "ceased to exist" and that the United States has not explained what steps the labor court should have taken in this context.[81] Guatemala's description of the record evidence is incorrect.

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

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

[81] Guatemala's Rebuttal Submission, para. 169.

93. The record reflects that the company did not close, but rather reorganized under a different name and different location.[82] U.S. Exhibit 169 is a certified response to a questionnaire from a legal advisor for a trade federation who assisted the workers of Avandia with their legal claims.[83] In the responses to Questions 4 and 5, the legal advisor confirms that **[confidential information redacted regarding reorganization of the company].**[84] The newly organized company, in effect, stepped into the shoes of Avandia as the employer for the workers.

94. The Labor Code protects workers when an employer reorganizes under these circumstances. Article 23 of the Labor Code provides for "novation of the employer." Pursuant to Article 23 of the Labor Code, "[s]ubstitution of the employer does not affect any existing work contracts to the detriment of the worker."[85] Rather, the employer that is substituted remains jointly liable with the new employer for a period of six months for all labor obligations and court orders that arose prior to the date of substitution.[86] After this six-month period, the new employer becomes solely responsible for these obligations.[87]

95. Accordingly, in compliance with its enforcement obligations under Articles 10, 23, 62(c), 209, 223, 379, and 380, the labor court should have increased fines for Avandia (or its successor) for the noncompliance with court orders, and if necessary, referred the matter to the Public Ministry for possible criminal penalties. Instead, the labor court did not take these actions, and the labor laws violated by Avandia remained unenforced.

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

ANSWER:

96. Yes. As discussed in response to Question 2, any agreement that purports to settle the worker's claims for less than what is required under the law is void and not enforceable pursuant to Article 12 of the Labor Code and Article 106 of the Guatemalan Constitution. Consequently, in these circumstances, any partial payments made to the workers for

[82] Statement of OOOO (March 6, 2015) (USA-169).

[83] Statement of OOOO (March 6, 2015) (USA-169).

[84] Statement of OOOO (March 6, 2015) (USA-169).

[85] GLC, Art. 23.

[86] GLC, Art. 23.

[87] GLC, Art. 23.

compensation owed would not constitute a legal settlement, and the labor court would be obligated to award and enforce all remedies due to the worker under the law.

97. With respect to mandatory fines and penalties imposed by the Labor Code for an employer's violation of the law, because these fines and penalties are paid to the Government of Guatemala, a worker and an employer cannot agree to settle the payment of these obligations. As a result, if a settlement agreement provided the worker with reinstatement and full compensation of back wages as provided for under the law, the Labor Court is still obligated to impose and collect fines for the employer as a result of the employer's violation of the law.[88]

98. In short, a partial payment made to workers by an employer does not constitute a legal settlement of the workers' claims and therefore does not alter the obligation of the Government of Guatemala to enforce the law or ensure an employer's full compliance with the law.

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

ANSWER:

99. Yes. For the reasons set forth in response to Question 17, where a private agreement between an employer and worker involves the partial payment of compensation owed to the worker, that agreement does not constitute a legal settlement, and therefore does not alter the obligation of the government of Guatemala to enforce the remedy awarded by a court.

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

ANSWER:

100. If an employer improperly dismisses a worker for participating in the formation of a union or for undertaking the conciliation process, an action may be commenced in the labor court. For those claims that the court determines to be meritorious, the law requires

[88] GLC, Arts. 209, 379.

that the worker be reinstated and paid the missing wages and economic benefits, and that the employer be fined.[89]

101. Pursuant to Articles 209 and 380 of the Labor Code, the labor court must issue the order of reinstatement within 24 hours of receiving the complaint.[90] The labor court then has six business days to notify the employer of the court order for reinstatement.[91] After the employer has been notified of the court order, the employer has three days to commence an appeal challenging the order.

102. Execution of the order for reinstatement begins with a writ of enforcement. This is a separate judicial order wherein the judge orders compliance with the directives of his or her decision to reinstate the worker and appoints an executor to execute, or carry out, the reinstatement order.[92] Pursuant to Article 328, the labor court must provide notice of the writ of enforcement to the employer.[93]

103. Guatemala's argument implies that the timing of the issuance of the reinstatement order somehow means that the order does not actually need to be enforced until after some period of time has elapsed. This is not the case. If an order has been issued, it must be executed and enforced.[94] Only if the employer appeals the order would execution be temporarily suspended. However, Guatemala has not demonstrated that any of the orders at issue were the subject of appeals such that reinstatement was not required. Therefore, the timing of the issuance of the reinstatement orders does not affect their enforceability under Guatemalan law.

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

a. Diligencias y Verificaciones, Organismo Judicial de Guatemala (Aug. 1, 2012 through Sep. 4, 2014), see U.S. Rebuttal Submission ¶ 114;
b. Guatemalan data on 2014 agricultural exports (Exh. USA-199), see U.S. Rebuttal Submission, ¶¶ 129, 225, 285;
c. Report of the Special Rapporteur on the Right to Food, Olivier de Schutter, UN Human Rights Council, Doc. A/HRC/13/33/Add.4, (January 26, 2010) (Exh. USA-207), see U.S. Rebuttal Submission, ¶ 159; Guatemala's Rebuttal Submission, ¶ 227
d. 2011 Observation for Guatemala, International Labor Organization Committee of Experts on the Application of Conventions and Recommendations,

[89] GLC, Arts. 209, 379, and 380.

[90] GLC, Arts. 209, 380.

[91] GLC, Arts. 327, 328.

[92] GLC, Arts. 380, 425-428.

[93] GLC, Art. 328.

[94] GLC, Arts. 285, 380, 425-428.

"Article 5. Adequate inspection" (adopted 2011, published 101st ILC session 2012) (USA- 208), see U.S. Rebuttal Submission ¶ 159;
e. Annual Report of the United Nations High Commissioner for Human Rights, Doc. A/HRC/19/21/Add.1, ¶ 73(January 30, 2012) (USA-209), see U.S. Rebuttal Submission ¶ 159;
f. Statistics of the Judiciary, available at http://www.oj.gob.gt/estadisticaj/, see Guatemala's Rebuttal Submission, ¶ 249;
g. Guatemala Labor Inspectorate Statistics, see Guatemala's Rebuttal Submission,
¶¶ 355, 357;
h. Statistics from the Guatemalan Ministry of Labor on union registration, see Guatemala's Rebuttal Submission, ¶ 376;
i. The observation of the ILO Committee of Experts, see Oral Statement by the United States at the hearing, n. 106.

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

ANSWER:

104. Each of the statistical references noted by the Panel in its question has a distinct application and degree of relevance to the issues before the Panel. We will address each reference in turn.

105. (a.) In paragraph 114 of its Rebuttal Submission, the United States presented publicly available information compiled by Guatemala according to which employers failed to comply with court orders to pay minimum wages and benefits on 1,571 occasions and complied on 23 occasions between August 1, 2012 and September 4, 2014. This evidence demonstrates the ongoing nature of Guatemala's failure to effectively enforce its labor laws with respect to the first group of failures identified by the United States. It supports the U.S. position that in addition to those instances documented by the United States in its submissions, Guatemala's failure to effectively enforce its labor laws extends to even more employers and workers, and that Guatemala has publicly acknowledged this ongoing enforcement issue.

106. (b.) In paragraphs 129, 225, and 285 of its Rebuttal Submission, the United States has provided data reflecting how the enterprises identified in the U.S. submissions are engaged in the production of commodities that are traded between the United States and Guatemala. Guatemala's failure to compel compliance by these employers with its labor laws permits the employers to avoid labor costs they otherwise would have to pay if Guatemala effectively enforced those laws. Thus, Guatemala has failed to effectively enforce its labor laws in a manner affecting trade between the Parties. The evidence regarding the volume of trade between the Parties in this area of agriculture makes clear that the enterprises in that sector have a cross-border impact and goes directly to the

element of Article 16.2.1(a) that a complaining Party must show that the responding Party's failure occurred in a manner affecting trade.

107. (c., d., e.) In paragraph 159 of its Rebuttal Submission, the United States referred to the observations of three intergovernmental organizations to describe how these entities have noted the continuing abuses of labor laws by employers in Guatemala. In 2009, the United Nations Special Rapporteur on the Right to Food made note of employers' widespread non-compliance – across 50 percent of the agricultural sector – with the minimum wage law.[95] The same "persistent widespread violations" were noted by the International Labor Organization in 2011.[96] Both of these observations were made during the period of the Panel's evaluation of Guatemala's sustained and recurring course of inaction, and suggest that the employers' violations were extensive and that Guatemala failed to take action to effectively enforce its minimum wage law. These observations further confirm the statements of workers submitted by the United States that violations of this nature were pervasive but the government did little or nothing at that time to compel compliance. Likewise, in 2012, the U.N. High Commissioner for Human Rights found that, across the agro-industry, this trend continued.[97] These observations further support that Guatemala failed through a sustained and recurring course of inaction in this respect.

108. (f.) In paragraph 349 of its Rebuttal Submission, Guatemala identifies that in 2013, 12,697 cases were initiated in its labor courts and that in 2014, the number was 17,414. These numbers are neither relevant nor probative to the Panel's analysis. First, these numbers do not reflect any government activity other than registration of new cases. They do not indicate effective enforcement and they do not respond to the courses of inaction the United States has presented. For enforcement statistics, as noted above, Guatemala's public statistics show its widespread failure to effectively enforce its labor laws over this same period. Second, as noted at the hearing, the issue is whether the failure to effectively enforce was occurring on the date of the U.S. panel request, August 9, 2011. The fact that more cases were begun after the date of the panel request does not have any bearing on the Panel's analysis.

109. (g.) The same is true for the statistics provided by Guatemala in paragraphs 355 and 357 of its Rebuttal Submission. Guatemala comments that the numbers demonstrate that the General Labor Inspectorate has carried out more inspections each year since 2011 and that the "amount verified with respect to minimum wages increased 4,886%."[98]

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[95] 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).

[96] 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).

[97] 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).

[98] The lack of information regarding the calculation of these statistics and that which they are intended to capture exacerbates their irrelevance. In the table in paragraph 355, it is not clear what "amount verified" means here.

However, the information presented does not speak to the number of inspections requested that did not occur, for example, or to the sufficiency of the inspections that did. The tables also do not reflect the length of time between receipt of a complaint and an inspection, or any follow-up action subsequent to those inspections – all failures the United States has demonstrated by the evidence put forward in the U.S. submissions. Likewise, the table reflecting an increase in the number of proceedings for the imposition of penalties does not rebut the U.S. demonstration of Guatemala's failure to impose such penalties. Without those details, the Panel cannot infer from the tables that Guatemala is effectively enforcing its labor laws by carrying out appropriate inspections.

110. In this respect, we recall that the Article 16.2.1(a) standard does not involve a comparative exercise such that if Guatemala shows a thousand instances of court action and the United States has demonstrated that there was no action on hundreds of occasions, Guatemala has rebutted the U.S. showing. Furthermore, Guatemala's statistical presentation lacks qualitative information that the Panel requires to evaluate whether these instances of action constitute effective enforcement in a way that contradicts the U.S. showing of a sustained and recurring course of inaction. Therefore, Guatemala's statistics cannot rebut the U.S. showing that Guatemala failed to effectively enforce its labor laws directly related to acceptable conditions of work during the relevant period.

111. (h.) In paragraph 376 of its Rebuttal Submission, Guatemala has provided statistics regarding union registration in an attempt to undermine the U.S. showing with respect to the third set of failures the United States identified.

112. First, the United States would reiterate that the examples of delay in both union registration and in setting up conciliation tribunals, as well as those of the courts not setting up conciliation tribunals at all, *together* constitute a sustained and recurring course of inaction.

113. Guatemala has not argued that these incidents did not occur, nor has it shown that these were isolated or exceptional incidents. Guatemala merely asserts that these examples constitute less than one percent of union registrations in a two-year period. Such a statistic, if verified, would not be relevant to the Panel's analysis, however. The United States has challenged Guatemala's enforcement regarding the registration of unions based on the delays experienced by workers attempting to form a union. That there were 225 unions registered in 2011 and 2012 does not provide any information that would inform the Panel's analysis in this respect. The number of unions registered is not relevant because it does not provide any indication about the effectiveness of Guatemala's carrying out registrations. The information does not speak to the question of delay, so the Panel cannot know whether those unions waited for years for their registration, or whether there were many other applications that were not acted upon at all.

There is no indication that minimum wage was being paid by any of the inspected employers. Likewise, the table in paragraph 357 shows fines imposed but not amounts collected.

114. (i.) As to whether the examples of the United States are aberrations – the United States has provided additional material to show that they are not. International organizations have commented on the problems associated with delays in registering unions in Guatemala for many years. As the United States has articulated in its submissions, and as the Panel noted in its question, the International Labor Organization has commented on the union registration process delays or refusals. In 2012, the ILO Committee of Experts on the Application of Standards and Recommendations noted in the last several observations regarding Guatemala's compliance with the Freedom of Association and Protection of the Right to Organise Convention (1948), there have been "delays in the registration of trade unions, or the [Government's] refusal to register them."[99] Guatemala has reported to the ILO that at the relevant time (2011, 2012) the average time for registration of a union was seven months.[100] This information is directly responsive to Guatemala's assertion that each of the other unions it accounts for in its chart were registered on time. Delays in the registration of unions are well-known and emblematic of the general resistance experienced by workers when they attempt to unionize in Guatemala.

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

ANSWER:

115. As discussed in response to Question 1, Article 16.2.1(b) affords the responding Party a justification, *i.e*., an affirmative defense, for why it has failed to carry out the obligations imposed by subparagraph (a). Specifically, the subparagraph provides that a responding Party will be 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."

116. Pursuant to Rule 66 of the Rules, "a Party asserting that a measure is justified by an affirmative defense under the Agreement shall have the burden of establishing that the defense applies." Accordingly, once the complaining Party has made a showing of the responding Party's course of inaction as part of the prima facie case under subparagraph (a) – and in accordance with Rule 65– it is then for the responding Party to show whether that course of inaction is justified by a reasonable exercise of discretion or resulted from

[99] 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.

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

a *bona fide* decision regarding the allocation of resources based on a determination regarding the priority that Party has assigned to various labor matters.

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

ANSWER:

117. As the United States has explained in its submissions, Article 20.6.1 involves an examination of the panel request on its face and as a whole.[101] Accordingly, the U.S. panel request should be considered holistically with respect to the claims concerning the third set of failures by Guatemala.

118. The U.S. panel request refers to the measure or other matter at issue in stating that "the matter at issue . . . is Guatemala's failure to conform to its obligations under Article 16.2.1(a) with respect to the effective enforcement of Guatemalan labor laws related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work."[102]

119. In failing to register unions in a timely fashion and to timely institute conciliation proceedings, Guatemala failed to effectively enforce its labor laws related to each of these three internationally recognized labor rights. 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. As noted in response to Question 5 above, in this case, the delay in registering the unions also constituted a failure to effectively enforce laws relating to acceptable conditions of work. For example, the workers of Mackditex sought to form a union at the same time they unsuccessfully sought assistance from the Ministry of Labor regarding alleged violations of laws relating to acceptable conditions of work.[103] The conciliation process also 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. Given the lists of grievances presented by the workers of Las Delicias, Avandia, Fribo and Ternium,[104] the delayed institution, or lack of

[101] U.S. Rebuttal Submission, para. 313 (*citing* Final Arbitral Panel Report, *Costa Rica v. El Salvador—Tariff Treatment*, para. 4.57).

[102] U.S. Panel Request (August 9, 2011).

[103] *See* U.S. Rebuttal Submission paras. 171-175, 240-242.

[104] *See* U.S. Rebuttal Submission, paras. 251-273.

institution, of conciliation tribunals also constituted a failure to enforce laws relating to acceptable conditions of work.

120. Although the third group of government failures is not described in the examples of the types of inaction set out in the U.S. panel request, these examples were provided as an illustrative list only, and do not serve to limit the scope of the U.S. panel request.[105] Similar findings have been made in the context of WTO dispute settlement.[106]

[105] U.S. Initial Written Submission, para. 273.

[106] *See, e.g.*, Appellate Body Report, *EC – Selected Customs Matters*, para. 153, WT/DS315/AB/R, adopted 11 December 2006 (finding that if a complainant chooses to "foreshadow its arguments in substantiating its claim" in its panel request, "these arguments should not be interpreted to narrow the scope of the measures of the claims.").