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

SUPPLEMENTARY WRITTEN SUBMISSION OF THE UNITED STATES

NON-CONFIDENTIAL VERSION

June 17, 2015

I. Introduction

1. At this stage in the proceeding, it is useful to take a step back and consider the overall evidence that has been presented in this dispute. That evidence demonstrates inaction by Guatemala over *a period of eight years* regarding the enforcement of its labor laws relating to the right of association, the right to organize and bargain collectively, and acceptable conditions of work. This inaction is contrary to Article 16.2.1(a) of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR"), and creates an unwelcome precedent that, if allowed to go unchecked, could lead to the very adverse consequences that Chapter 16 is intended to guard against. Guatemala's sustained and recurring course of inaction has meant that thousands of workers from over a dozen companies, each in one of Guatemala's major exporting sectors, remain vulnerable to problems in the workplace contrary to the protections set out in Guatemalan law, with a resulting effect on trade.

2. In this Supplementary Written Submission, the United States responds to certain matters that arose during the Panel hearing on June 2, 2015. We begin with a brief overview of the developments in the disputing Parties' interpretative arguments, before addressing Guatemala's objection to the U.S. use of redacted evidence and then turning to outstanding areas of dispute between the disputing Parties related to the facts comprising the three groups of failures the United States has identified.

3. The United States has explained in its written submissions and at the hearing that Article 16.2.1(a) has four elements, each of which has been demonstrated with respect to three groups of failures.[1] That is, the United States has shown that Guatemala has failed to effectively enforce its labor laws directly related to internationally recognized labor rights in three ways.

4. For its part, Guatemala continues to promote a reading of Article 16.2.1(a) that falls far outside the plain text of the Article, maintaining that there are seven elements that a complaining Party must show to succeed in a claim under Article 16.2.1(a).[2] Within its seven-element standard, Guatemala invents requirements such as a "deliberate policy of neglect," a deliberate intent to affect trade, the effect on trade being demonstrated as to all seven CAFTA-DR Parties, and excluding from a Party's obligation to effectively enforce one's labor laws certain government actors *of that Party*. This reading has no basis in the text of the agreement. Guatemala's standard would allow Parties to evade their obligations under Article 16.2.1(a), and would impose on a complaining Party a standard all but impossible to prove, rendering Article 16.2.1(a) in effect a nullity.

5. For example, although the Parties agree on the plain meaning of "effectively enforce," Guatemala maintains that the inactions of its labor courts do not fall within the scope of Article 16.2.1(a).[3] It reaches this misplaced conclusion through its reading of Article 16.8 according to which statutes or regulations for purposes of Chapter 16 are those that are enforceable by action of the executive body. Contrary to Guatemala's assertions, once those labor laws have been

[1] Oral Statement by the United States at the Hearing of June 2, 2015 ("U.S. Opening Statement"), paras. 11 and 18.

[2] Opening Statement of Guatemala at the Hearing of June 2, 2015 ("Guatemala's Opening Statement"), para. 38.

[3] Guatemala's Opening Statement, para. 40.

identified (and here, there is no question that the Guatemalan Labor Code is one such statute), the Party – that is, the State as a whole – is obliged to ensure that the labor law is enforced.

6. By contrast, Guatemala's view would allow a Party to cease to act in respect of judicial enforcement of labor laws. This would mean that in the case of illegal dismissals, for example, workers would not need to be reinstated for Guatemala to be effectively enforcing its laws regarding such dismissals, because ordering reinstatement is the job of the courts. However, enforcement encompasses the work of all State actors responsible for compelling compliance with the law.[4] This interpretation flows not only from the text of Article 16.2.1(a), but from the context of this provision, including Article 16.3 of the CAFTA-DR, which deals extensively with judicial enforcement of labor laws.[5] Given the text and context of the obligation, the suggestion that a Party's judicial organs are not subject to the obligation of effective enforcement is wholly unsupported.

7. Guatemala's interpretation of a sustained or recurring course of action or inaction also suffers from some of the same deficiencies. At the hearing, Guatemala read into the text a requirement of intent, coordination, and deliberateness.[6] This requirement apparently can be gleaned, according to Guatemala, from use of the term "course" alone. As the United States has observed in its prior submissions, however, nothing about the plain meaning of the words of that phrase suggests that the standard includes an intent requirement.[7] If deliberateness were intended by the drafters, one might expect use of language conveying as much. For example, Article 16.2.2 recognizes that it is inappropriate to encourage trade or investment through certain actions, and requires Parties to strive to ensure that they do not waive or otherwise derogate from their domestic labor laws as an encouragement for trade with another Party. This language makes clear that a certain relation must exist between the action by the Party and the encouragement of trade or investment. Such is not the case with Article 16.2.1(a).

8. Finally, with respect to the fourth element of Article 16.2.1(a), Guatemala argues that a complaining Party must show a deliberate effect on trade, and that the effect must extend to all seven CAFTA-DR Parties. Further, Guatemala argues that the effect on trade must have manifested through evidence of actual trade effects such as a reduction in market prices. As with its other interpretative arguments, however, Guatemala again fails to offer an interpretation consistent with the text and context of Article 16.2.1(a), and the object and purpose of the CAFTA-DR. As with the phrase "sustained or recurring course," nothing in the phrase "in a manner affecting trade" suggests that intent is required to demonstrate a breach.

9. Nor is there any indication that in a dispute between two CAFTA-DR Parties, the phrase "between the Parties" must be interpreted as meaning each of the seven CAFTA-DR Parties. Such a requirement would mean that the lack of CAFTA-DR trade in a particular product for a single Party would preclude the finding of a breach with respect to any of the remaining six

[4] U.S. Opening Statement, para. 22.

[5] U.S. Rebuttal Submission, paras. 42-43.

[6] Guatemala's Opening Statement, paras. 31 and 32.

[7] U.S. Rebuttal Submission, paras. 51-52.

Parties where that product was concerned. This would result not only in an arbitrary standard that changes depending on the product at issue and not in relation to the actions or inactions of governments, but would mean that a Party's failure could distort trade between multiple Parties, even severely distort trade, and that distortion could not be addressed under the CAFTA-DR.

10. Similarly, Guatemala's suggestion that the effect on trade must have manifested itself in particular price or other changes in trade patterns would serve only to shield from a finding of breach any failures, for example, where the modification in the conditions of competition has not yet manifested in an impact on trade patterns or where the complaining Party does not have access to the relevant evidence from the employers in the responding Party who are benefitting from the failure to effectively enforce. Again, Guatemala's approach is not supported by a proper interpretation of the text of Article 16.2.1(a). Guatemala's interpretation is also inconsistent with interpretations of similar language made in the context of WTO dispute settlement, as the United States has indicated in its written and oral submissions.

11. Before turning to the factual claims in greater detail, the United States observes that Guatemala maintains its challenge to the U.S. evidence despite that for most factual scenarios presented by the United States, Guatemala does not contest that the facts are as the United States has presented them. Even without the statements of workers who were courageous enough to share their experiences with the Panel, the documents of the courts and of the Ministry of Labor lay bare the extent of the failure that has occurred.

II. Guatemala's Continued Objection Involving the Anonymity of the U.S. Evidence is Overstated and Unsubstantiated

12. At the hearing, Guatemala again objected to the redaction of personally identifying information from the U.S. exhibits. Guatemala persisted in characterizing the redactions as wholly discretionary on the part of the United States. But that is simply inaccurate. As the United States has previously discussed, the individuals who offered statements and provided materials to the United States did so on the condition that the United States would not disclose the workers' identities in this proceeding, out of concern for their personal safety and to prevent further reprisals in their current or future employment. In keeping with the conditions for receiving the information, the United States redacted the court numbers, workers' names, and other personally identifiable information from the worker statements and related court and administrative documents.

13. As a procedural matter, Guatemala claims that the United States has not justified the basis for its redactions[8] or explained why the procedures under the Rules of Procedure for Chapter Twenty of the CAFTA-DR protecting the disclosure of confidential information are not

[8] Guatemala's Opening Statement, para. 21; Guatemala Rebuttal Submission, para. 51.

sufficient to prevent the disclosure of the identity of the workers to the public.[9] Guatemala is wrong on both counts.

14. The United States has described on several occasions the request on the part of the workers who offered statements and information to remain anonymous. The workers' concerns are well-founded, given that reprisals by employers and violence against workers seeking to pursue their labor rights are ongoing concerns in Guatemala. The United States is bound by this commitment to the workers, and the Panel has determined that evidence in the form of anonymous statements is permissible.[10] Therefore, the United States is not obliged to present the unredacted evidence or to rely on the confidentiality procedures of the Rules.

15. With respect to the substance, Guatemala's evidentiary objection comprises three points. Guatemala claims that the redactions (1) make it difficult for Guatemala to locate the relevant judicial files;[11] (2) prevent it from verifying the accuracy of the information;[12] and (3) preclude it from identifying any personal motives that may affect the reliability of the evidence.[13] At the hearing, Guatemala said that the workers "can invent a story" and that "people lie."[14] Based on these points, Guatemala argues that the anonymous evidence should be afforded no probative value.[15]

16. The United States again demonstrates why each of Guatemala's concerns is either overstated or without reasonable basis in the record. First, as the United States has previously called to the Panel's attention, Guatemala's objection to the anonymity of the evidence is a diversion from the central issue of these proceedings.

17. Irrespective of the redactions of personally identifiable information, each of the U.S. exhibits establishes a factual foundation for the instances in which Guatemala failed to effectively enforce its labor laws. Guatemala is in a position to have and produce evidence to show that Guatemala ensured employers' compliance with court orders, conducted inspections, imposed obligatory penalties, timely registered unions, and properly instituted conciliation tribunals. However, rather than advancing such evidence were it to exist, Guatemala principally responds by challenging the sufficiency of the U.S. exhibits based on the protection of personally identifiable information. This approach fails to respond to the central question of these proceedings: whether Guatemala has taken the actions necessary to compel compliance with its labor laws so as to enforce those laws with substantial effect or result.

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[9] Guatemala's Opening Statement, para. 21; Uncorrected Transcript (English) of the Hearing of June 2, 2015 ("Transcript"), p. 58.

[10] *Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence*, para. 42 (February 26, 2015).

[11] Transcript, p. 75.

[12] Guatemala's Opening Statement, para. 19.

[13] Transcript, p. 57.

[14] Transcript, p. 57.

[15] Transcript, p. 38.

18. Turning to the first point of Guatemala's evidentiary objection – that the redactions make it difficult for Guatemala to locate relevant evidence – the Panel previously commented on Guatemala's ability to locate relevant documents and other evidence in its February 26, 2015 Ruling on the Treatment of Redacted Evidence.[16] The Panel observed that it "may be that by reference to [Guatemala's] own files and interviews of its own officials, Guatemala is able to verify or refute the allegations of the United States."[17] Guatemala acknowledges that, while its efforts to locate the government documents necessary to verify the U.S. claims are time-consuming and burdensome because of the redactions, its investigation is not impossible.[18] To "ensure that Guatemala [had] an adequate opportunity to respond to the case against it to the extent that the case is based on anonymous testimonial evidence," the Panel afforded Guatemala more time to research the claims and provide its Initial Written Submission.[19]

19. An examination of the record makes clear that Guatemala had sufficient information to evaluate the U.S. claims and to present its defense. The U.S. submissions fully describe the nature of the employer's violation of the law and Guatemala's inaction in response to those violations. Further, the record clearly identifies the name of the employer, the location, and the relevant dates and facts for each claim. The United States took great care in its redactions to ensure that only personally identifiable information was protected from disclosure, and not the operative facts for the claim. Guatemala can freely access its labor courts and regional offices of the Ministry of Labor, and with the operative dates, location, name of employer, and nature of offense, Guatemala may confirm or rebut the U.S. claims.

20. At the hearing, Guatemala voiced a concern that, when it locates a particular government record that may relate to a U.S. claim, Guatemala cannot know with certainty that the record is in fact relevant to the U.S. claim.[20] In the words of Guatemala, "how can [Guatemala] possibly … know that the document that [it] located is the document that the United States has as evidence."[21] Guatemala's complaint, however, is difficult to reconcile with the detailed facts provided in the record. Not only has Guatemala been unable to explain why knowledge of the specific identities of those workers who came forward with their stories is necessary to its defense, Guatemala has been able consistently to present evidence regarding the incidents described in the U.S. submissions.

21. The facts involving ODIVESA are useful to illustrate this point. The record shows that on May 15, 2008, ODIVESA improperly dismissed at least 11 stevedores who, it concluded, had

[16] *Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence* (February 26, 2015).

[17] *Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence*, para. 56 (February 26, 2015).

[18] *Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence*, para. 53 (February 26, 2015).

[19] *Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence*, paras. 84-86 (February 26, 2015).

[20] Transcript, p. 75.

[21] Transcript, p. 75.

engaged in union-forming activities.[22] On June 24 and August 25, 2008, the labor court found that, for each of the 11 stevedores, ODIVESA's dismissal of the worker violated Articles 209 and 223 of the Guatemalan Labor Code.[23] The labor court ordered that each stevedore be reinstated with back pay and benefits and that ODIVESA be fined.[24] As of October 15, 2014, six stevedores remained to be reinstated.[25]

22. In response to these facts, Guatemala put forward documents purporting to rebut the U.S. evidence. Specifically, Guatemala submitted "case documents" from the Constitutional Court which allegedly showed "that the reinstatement orders [for the ODIVESA workers] were quashed on appeal and, in some cases, that the employees themselves requested termination of the proceedings."[26] The United States explained at the hearing, and will explain in more detail below, why Guatemala's "case documents" do not support its claims in this respect, but the fact remains that Guatemala had knowledge of the factual circumstances underlying the U.S. claim, and was able to present a defense.

23. Therefore, given the detailed record of the facts surrounding the U.S. claims, including the identity of the employer, the nature of the claim, the operative dates, and the related court documents, it is difficult to reconcile Guatemala's claim that, when it locates a particular government record, Guatemala cannot know with certainty that the record is in fact relevant to the U.S. claim.

24. Turning to Guatemala's second point regarding Guatemala's ability to verify the accuracy of the redacted evidence, the Panel has recognized that "when an anonymous witness simply presents information readily verifiable through other sources, the credibility of the witness in question may not be a material issue because parties can readily verify the accuracy of the information."[27] That is, in most cases the redacted workers' statements are not the only evidence establishing the facts underlying the U.S. claim. Again, the record confirms the Panel's observation.

[22] Letter from the Ministry of Labor with attached information regarding the union confederation UNSITRAGUA to B (January 21, 2009) (USA-56). 11 reinstatement orders (June 24, 2008, and August 25, 2008) (USA-59).

[23] 11 reinstatement orders (June 24, 2008, and August 25, 2008) (USA-59).

[24] 11 reinstatement orders (June 24, 2008, and August 25, 2008) (USA-59).

[25] Email communication from NNN, Coordinators' Committee, UNSITRAGUA Histórica (stating that none of the stevedores has been reinstated) (USA-58). Three of the dismissed stevedores have attested to their non-reinstatement at ODIVESA as of that date. Statement of I (May 28, 2014) (USA-9); Statement of J (May 28, 2014) (USA-10); and, Statement of F (May 29, 2014) (USA-6). The other five stevedores agreed to settle with ODIVESA for lesser amounts than what they were owed.

[26] Guatemala's Rebuttal Submission, para. 145; Selected excerpts from court decisions (GTM-53).

[27] *Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence*, para. 58 (February 26, 2015).

25. The United States recalls that each piece of evidence should be evaluated on its own merits, and in the context of the arguments and other evidence raised by the disputing Parties. The type and quantum of evidence needed to prove a claim will vary depending on the facts and circumstances at issue. Here, each document presented by the United States relates to a particular worker or a particular occurrence and therefore derives from a single nexus of facts. As a result, each document adds to the broader picture, while also confirming and corroborating the facts and circumstances of the related documents of the record. The fact that personally identifiable information was not included does not diminish the value of this evidence. While the evidence presented by the United States is anonymous, when the documents and statements are pieced together, and viewed in context, a detailed picture emerges of the experiences of the workers.

26. For example, with respect to the first group of failures related to noncompliance with court orders, Guatemala does not challenge the authenticity or substance of most of the U.S. evidence, including the court orders and Ministry records that demonstrate that employers improperly dismissed workers for forming a union or for seeking to set up a conciliation tribunal. Further, Guatemala does not challenge that the Guatemalan labor courts have found these reprisals to be contrary to law and have ordered the workers be reinstated and paid back wages and for the employer to be fined.[28] Therefore, the Panel can look to the record as a whole to determine the reliability and credibility of the U.S. evidence.

27. The case of worker S is a useful example. Worker S is a stevedore worker formerly employed by RTM. On July 22, 2010, worker S and several of his colleagues commenced a conciliation proceeding against RTM **[confidential information redacted containing basis for conciliation].**[29] To protect against retaliatory dismissals in response to a conciliation, Labor Code Articles 379 and 380 prohibit employers from dismissing a worker absent judicial authorization once the list of grievances for a conciliation tribunal has been submitted. Despite this prohibition, RTM dismissed worker S without judicial approval on August 19, 2010. On August 23, 2010, the labor court found that worker S was improperly dismissed, and ordered that worker S be reinstated and paid back wages and other economic benefits. RTM appealed the order. On May 16, 2011, the appellate court affirmed the order. Despite these facts, worker S states that, as of May 2014, he has not been reinstated or paid the wages owed. As of July 2014, the labor court had taken no action to execute the order.

28. To demonstrate this claim for worker S, the United States put forward, first, the complaint from worker S filed with the labor court on August 19, 2010.[30] This complaint describes the initiation of the collective conflict on July 22, 2010, and the dismissal of worker S

[28] Rather, Guatemala responds in three principal ways. First, for ITM and NEPORSA, Guatemala argues that it could not execute the orders due to purported actions of the workers. Second, for ODIVESA, Fribo, Mackditex, and Alianza, Guatemala claims that it had no legal obligation to execute the orders because either the orders were overturned on appeal, or the workers and the employers entered into voluntary settlements. Third, for Fribo, Mackditex, and Alianza, Guatemala suggests that it is in compliance with Article 16.2.1(a) by operation of subparagraph (b).

[29] Statement of S (May 31, 2014) (USA-15).

[30] Statement of S (May 31, 2014) (USA-15).

on August 19, 2010. Second, the United States provided the court order, dated August 23, 2010, which details the date of dismissal for worker S, and finds that the dismissal violated Labor Code Articles 379 and 380.[31] The order awards worker S reinstatement and payment of back wages and imposes a fine on RTM. Third, the United States provided proof of service of the reinstatement order on RTM, dated September 8, 2010.[32] Fourth, the United States provided the appellate court decision, dated May 16, 2011, upholding the order on appeal.[33] Fifth, the United States provided a statement from worker S saying that as of May 31, 2014, RTM had not reinstated or paid the worker the wages or benefits owed pursuant to the reinstatement order.[34]

29. Finally, sixth, the United States provided a report from local legal counsel who reviewed the court file for worker S.[35] The report verifies that the court had not taken action to execute the order as of July 14, 2014.[36] The report further indicates that, although the order imposed penalties on RTM for improperly dismissing worker S, there is no court record that the penalties were actually collected.[37]

30. As is illustrated by this example, each document derives from the same nexus of facts, and as a result, each document confirms and corroborates the facts and circumstances of the related documents in the broader group. The fact that personally identifiable information was not included does not diminish the value of this evidence. Rather, because the evidence is consistent, and was created contemporaneously with the events described, the information is reliable.

31. On the third evidentiary objection regarding the credibility of the workers providing statements, Guatemala has maintained that it cannot test the credibility of the workers, or ascertain their personal motives in coming forward with information because Guatemala is

[31] Statement of S (May 31, 2014) (USA-15).

[32] Statement of S (May 31, 2014) (USA-15).

[33] Statement of S (May 31, 2014) (USA-15).

[34] Statement of S (May 31, 2014) (USA-15).

[35] Legal Expert Report of Alejandro Argueta (July 23, 2014) (USA-63).

[36] Legal Expert Report of Alejandro Argueta, p. 4 (July 23, 2014) (USA-63). Guatemala argues that the report from local legal counsel (USA-63) demonstrates that the conditions that would give rise to the increase in fines or the referral of the matter for criminal penalties have not been met. Therefore, the United States cannot claim that the labor court failed to act with respect to these workers. See Guatemala Rebuttal Submission, para. 158. Guatemala entirely misconstrues the report. In fact, quite the opposite is true. As U.S. Exhibit 63 explains, until July 14, 2014, the labor court had not properly executed the reinstatement orders. Argueta Report, p. 5 (USA-63). Consequently, **[confidential information redacted containing quotation from report]**. Argueta Report, p. 5 (USA-63). The labor court's obligation to increase fines for RTM or refer the matter to the Public Ministry was therefore **[confidential information redacted containing quotation from report]** because, at that time, the court was responsible for the delay in the execution of the court order, not RTM. Argueta Report, p. 5 (USA-63). That is, the court executor never attempted to go to the employer to reinstate the worker.

[37] Legal Expert Report of Alejandro Argueta, p. 5 (July 23, 2014) (USA-63).

prevented from cross-examining the witnesses.[38] Therefore, Guatemala argues, the anonymous evidence is inherently unreliable.[39]

32. Guatemala's focus on the identity of the workers is misplaced as the reliability and probative value of the workers' statements can be ascertained through means other than cross-examination. First, the circumstances in which the individuals provided information lend credibility to their statements. No worker stands to personally benefit from the outcome of these proceedings. This Panel cannot bind the labor courts or administrative bodies of Guatemala regarding the proceedings of individual workers. Similarly, this Panel cannot award personal relief to any individual workers. Thus, any suggestion that workers are providing information with the intent of personal or financial gain is not plausible.

33. Moreover, workers face great personal risk to their physical safety and economic livelihood in coming forward to provide the statements and other information presented by the United States in this dispute. In the course of advocating for their rights, workers have noted that they have faced homicide attempts and threats.[40] In some instances, workers have notified the Ministry of Labor about such incidents, and authorities failed to respond.[41] The risk the workers have undertaken by assisting in this proceeding, even without revealing their names, casts doubt on Guatemala's claim that they would come forward to provide false statements, especially considering the lack of any personal benefit to the individual workers in doing so.

34. At the hearing, the Panel observed that the manner in which these statements were memorialized may affect the probative value of the statements and inquired as to the method or process in which the workers provided their statements.[42] Specifically, the Panel asked whether the workers were interviewed alone or in groups, whether the workers were invited to provide statements, and whether the interviewer asked leading questions.[43]

35. The United States recognizes that external factors, such as the conditions in which individuals are interviewed, can influence testimonial evidence. Here, however, the record reflects that the individual remarks should be given probative value.

36. First, the involvement of the workers in these proceedings was voluntary. The initial complaints regarding labor law enforcement were brought to the attention of the United States by

[38] Transcript, pp. 82-83.

[39] Guatemala's Opening Statement, paras. 19, 20.

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

[41] Statement from GGGG (March 24, 2010) (USA-163).

[42] Transcript, pp. 78-86.

[43] Transcript, pp. 80-81.

unions through the public submission process established in Article 16.4.3 of the CAFTA-DR.[44] On April 23, 2008, the U.S. Department of Labor's Office of Trade and Labor Affairs ("OTLA"), the U.S.-designated contact point for the CAFTA-DR Labor Chapter, received a public submission from the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and six Guatemalan labor unions and coalitions.[45] Workers from Avandia and Fribo were among these petitioners. The submission alleged that Guatemala was failing to effectively enforce its labor laws in a number of different ways. On January 16, 2009, OTLA reported its findings regarding the public submission, many of which are reflected in the U.S. submissions presented in this dispute.[46]

37. Subsequent to the OTLA report, the United States continued to engage with various workers, unions, organizations, and other labor stakeholders in Guatemala. As part of this engagement, the United States further investigated the allegations in the public submission by speaking with labor organizations and workers identified in the public submission. Through its work in the region, the United States identified additional organizations and individuals that were willing to speak with the United States about labor law enforcement failures about which they were aware. These organizations liaised with the United States to arrange for workers and others to provide first-hand statements as to their experiences.

38. The individuals provided the statements to the United States in a number of ways. In some instances, workers and attorneys provided statements during meetings with representatives from the United States. In other instances, the United States worked with local counsel to speak with individuals and collect their statements. In a few instances, such as when the individual providing the statement was an attorney, that person created the statement on his or her own outside the presence of the United States or local counsel.

39. The structure of the conversations with each worker varied. On some occasions, when the United States was aware through its engagement with local organizations and other labor stakeholders that certain workers had been wrongfully dismissed or had experienced difficulties regarding conditions of their workplace, the United States asked the worker to describe the circumstances surrounding his or her dismissal or workplace complaints. During other conversations, the United States or local counsel asked workers to describe the conditions of their employment and whether they notified the Government of Guatemala of any complaints or perceived violations of the law. If the workers filed complaints or other notifications with the Government of Guatemala, the United States asked the workers to describe any response they received from the Government of Guatemala.

40. Second, the content and form of the statements, which vary greatly from statement to statement, further reflect the probative value of each individual's remarks and the spontaneity in which they were given. The record contains statements from a diverse group of individuals,

[44] U.S. guidelines regarding the submission of communications from the public can be found at 71 Fed. Reg. 76,695 (U.S. Dep't of Labor Dec. 21, 2006), available at http://www.dol.gov/ilab/media/pdf/2006021837.pdf.

[45] Available at http://www.dol.gov/ilab/reports/pdf/GuatemalaSub.pdf.

[46] Available at http://www.dol.gov/ilab/reports/pdf/20090116Guatemala.pdf.

including workers,[47] union leaders,[48] lawyers,[49] and worker-rights advocates.[50] The background, profession, or employment status of each individual is expressly stated in the statement. The statements themselves reflect that certain individuals provided statements alone,[51] while other individuals provided statements in small groups[52] or in conjunction with the lawyer or worker-rights advocate that assisted them with their claims before the Guatemalan labor court or the Ministry of Labor.[53] Again, this information is evident from the face of each statement. The record also shows the differences in the formality of each statement. Some statements are notarized,[54] while others are signed by the individual.[55] Some statements comprise a narrative description of the individual's personal experiences,[56] while others are in the form of questions and answers.[57] All of these factors, however, are evident from the face of the documents.

41. At the conclusion of providing each statement, the individual reviewed the statement, or in those circumstances where the individual could not read the statement, the statement was read to them. The individual then confirmed in writing that he or she had reviewed or listened to the contents of the statement, and the individual attested that the information was true and correct to the best of his or her knowledge.

42. It is counterintuitive that workers who face great risk in affiliating themselves with unions and other organizing activities would be inclined to come forward unnecessarily for this proceeding only to present false statements, especially given the lack of any personal benefit to the individual worker in doing so.

43. In conclusion, Guatemala's continued objection over the anonymity of the U.S. exhibits is without support and should be rejected.

III. Guatemala's Failure to Effectively Enforce Laws Directly Related to Right of Association and Right to Organize and Bargain Collectively by Not Compelling Compliance with Court Orders

44. Guatemala's presentation at the hearing and in its Rebuttal Submission did nothing to undermine the validity of the first group of failures – Guatemala's failure to compel compliance

[47] See, e.g., Statement of A (June 1, 2014) (USA-1).

[48] See, e.g., Statement of HH (October 10, 2014) (USA-42).

[49] See, e.g., MSICG Declaration (February 16, 2015) (USA-164).

[50] See, e.g., Statement of BB, CC (July 2, 2014) (USA-22).

[51] See, e.g., Statement of C (May 30, 2014) (USA-3).

[52] See, e.g., Statement of NN, OO, PP, QQ (July 2, 2014) (USA-38).

[53] See, e.g., Statement of III, KKK, LLL (July 2, 2014) (USA-24).

[54] See, e.g., Statement of P (March 24, 2010) (USA-12); and MSICG Declaration (February 16, 2015) (USA-164).

[55] See, e.g., Second Statement of B (March 5, 2015) (USA-161).

[56] See, e.g., Statement of II (June 26, 2014) (USA-43).

[57] See, e.g., Statement of OOOO (March 6, 2015) (USA-169).

with court orders. Pursuant to the Labor Code, employers are expressly prohibited from dismissing workers for participating in the formation of a union or for seeking to set up a conciliation tribunal to resolve employment disputes.[58] If an employer violates these provisions, an action may be commenced in the labor court. For those claims that the court determines to be meritorious, the law requires that the worker be reinstated and paid the missing wages and economic benefits, and that the employer be fined.[59] If the employer fails to remedy the violation after seven days, the court is required to increase the fine by 50 percent.[60] If the failure to comply persists, the court must impose additional fines of six to 18 times the minimum monthly wage[61] and refer the matter to the Public Ministry for possible criminal sanction.[62]

45. Here, the record evidence shows that at least 191 workers were dismissed between 2006 and 2014 in reprisal for forming a union or for seeking to resolve claims through conciliation. Guatemalan courts issued orders for reinstatement and back pay for each of these workers, and imposed a fine. Contrary to the statutory requirements, Guatemala failed to take effective action to ensure compliance with the orders or to otherwise ensure compliance with the law.

46. Guatemala responds in three principal ways. First, for ITM and NEPORSA, Guatemala argues that it could not execute the orders due to purported actions of the workers.[63] Second, for ODIVESA, Fribo, Mackditex, and Alianza, Guatemala claims that it had no legal obligation to execute the orders because either the orders were overturned on appeal, or the workers and the employers entered into voluntary settlements.[64] Third, for Fribo, Mackditex, and Alianza, Guatemala suggests that it is in compliance with Article 16.2.1(a) by operation of Article 16.2.1(b).[65] Specifically, Guatemala argues that, as a result of the purported settlement agreements, its inaction regarding the employer's compliance with the court orders reflects a reasonable exercise of discretion or results from a *bona fide* decision regarding the allocation of resources.[66] None of these arguments is persuasive.

47. First, for ITM and NEPORSA, as the United States explained at the hearing, Guatemala's attempt to the blame the workers for the non-execution of the orders is misplaced.[67] Between February and May 2008, ITM and NEPORSA improperly dismissed 54 stevedores in reprisal for

[58] GLC, Arts. 10, 62(c), 209, 223, 379, 380.

[59] GLC, Arts. 209, 379, 380.

[60] GLC, Arts. 209, 379, 380, 426.

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

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

[63] Guatemala's Opening Statement, para. 44. Guatemala's Rebuttal Submission, paras. 139-144.

[64] Guatemala's Opening Statement, paras. 45, 46; Guatemala's Rebuttal Submission, paras. 145-147, 149, 155, 156, 159-160, 162, 164-168.

[65] Guatemala's Opening Statement, para. 46; Guatemala's Rebuttal Submission, paras. 168, 150-151.

[66] Guatemala's Rebuttal Submission, paras. 168, 150-151.

[67] Guatemala's Rebuttal Submission, paras. 139-144.

forming unions.[68] The labor court ordered that the workers be reinstated with back pay, and that the companies be fined.[69] The labor court failed to take the required actions, such as increase fines or refer the matter to the Public Ministry, to compel the employer's compliance with the law. As a result, as of 2014, neither company had reinstated the workers or provided them with back wages.[70]

48. Guatemala argues that it could not execute the orders because either the relevant worker did not appear for reinstatement, the worker withdrew the request for reinstatement, or the worker provided the wrong address of the employer.[71] In support, Guatemala provides only two exhibits: GTM-52 and GTM-54. These exhibits comprise informal notices, dated between 2010 and 2014, which reflect that on one occasion for each of 33 workers, the executor attempted to execute the worker's reinstatement order and the worker did not appear or the employer's address was not provided.[72] From these documents, Guatemala concludes that the reinstatement orders could not be executed, and that because the employees did not pursue their reinstatement, there was no basis for the court to refer the matter to the Public Ministry to take criminal action against the employer.[73]

49. At the hearing, the United States identified several evidentiary problems with Guatemala's argument. First, the number of informal notices submitted by Guatemala does not match the number of workers that Guatemala discusses in its rebuttal submission.[74] As a result, for those workers not covered by the exhibits, Guatemala's argument lacks any support. As another example, none of the documents put forward in GTM-52 supports, or even suggests, that any worker "voluntarily withdrew the reinstatement request" or that the incorrect address of the workplace was the fault of the worker.[75] Accordingly, Guatemala misrepresents the significance of the evidence.

[68] 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).

[69] 14 reinstatement orders (February 19, 2008) (USA-55); 40 reinstatement orders (February 19, 2008) (USA-57).

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

[71] Guatemala's Rebuttal Submission, paras. 139-144.

[72] Informal court notices (GTM-52 and GTM-54).

[73] Guatemala's Rebuttal Submission, paras. 141, 144.

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

[75] Informal court notices (GTM-52); Guatemala's Rebuttal Submission, paras. 140, 141.

50. Turning to the merits, Guatemala is mistaken that the nonappearance of a worker on one occasion results in the vacatur of the reinstatement order or otherwise relieves the government of its obligation to enforce the law.

51. As the United States explains in response to Question 15 from the Panel, judges are obligated to "execute" the judgments that they issue,[76] and there is no statutory provision that allows the court to vacate or suspend the order or close the proceedings in favor of the employer should the worker not appear for reinstatement. Rather, the order remains in place, and the labor court's obligation to execute the order continues. If a worker fails to appear for reinstatement on one occasion, the court, through the executor, must attempt execution of the order again at a later time. If a worker fails to appear for reinstatement, the court may summon the worker to appear before the court for an explanation and, if good cause exists after adequate warning, the court may fine the worker.[77] Thus, Guatemala's claim is not supported by the law, and the statements from the former employees of ITM and NEPORSA make clear that, in these cases, the workers have not abandoned their claims to reinstatement and back pay.[78]

52. Guatemala's argument involving inaccuracies with the address of the employer, again, is without basis in the law. The labor court effectuates a reinstatement order through 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.[79] The labor court must provide notice of the writ of enforcement to the employer.[80]

53. Pursuant to Labor Code Article 328, both the employee and the employer are required to provide correct addresses to the court for purposes of notification.[81] The employee must provide the employer's address at the outset of the proceedings.[82] However, after the employer first appears for the legal proceedings, the employer must keep the court apprised of its address for purposes of legal notifications.[83] By the time the court executor executes the reinstatement orders, the employer will have become a party to the proceedings and is therefore responsible for informing the court of its current address.

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

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[76] GLC, Arts. 285, 380, 425.

[77] GLC, Arts. 270-272.

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

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

[80] GLC, Art. 328

[81] GLC, Art. 328.

[82] GLC, Art. 328.

[83] GLC, Art. 328.

55. Turning to Guatemala's second defense, that it had no legal obligation to execute the orders for ODIVESA, Fribo, Mackditex, and Alianza, Guatemala's arguments are equally unsubstantiated. For ODIVESA, the "case documents" put forward by Guatemala, said to be documents from the Guatemalan Constitutional Court, are insufficient to rebut the U.S. claim.[84] As the United States explained at the hearing, upon closer examination, Guatemala's "case documents" only comprise the last page of six separate decisions.[85] For all but one of the pages, there is no indication that the decision was in fact rendered by the Constitutional Court.[86] Further, the excerpted pages do not reflect that any employees requested termination of the proceedings.[87] As a result, the United States demonstrated that the documents do not substantiate Guatemala's claims.

56. At the hearing, the United States also submitted three decisions of the Constitutional Court (U.S. Exhibits 237, 238, and 239), which confirm that the orders for eight of the 11 workers noted in the U.S. Initial Written Submission were affirmed on appeal.[88] These decisions also confirm the representation of the workers that the reinstatement orders were final and not invalidated on appeal, as reflected in U.S. Exhibits 6 and 161.[89] Accordingly, the United States established that Guatemala's case documents do not invalidate the substance of the U.S. claim.

57. For Fribo, Mackditex, and Alianza, Guatemala claims that the workers voluntarily settled their claims with their employers, and as a result, there was no basis for the labor courts or the Public Ministry to take further action, despite the fact that the workers purportedly settled for amounts less than what the workers were awarded by court order.[90] Guatemala's argument, again, is premised on a flawed view of both the record evidence and its enforcement obligations.

58. As a threshold legal issue, the partial payments to the workers of Fribo, Mackditex, and Alianza could not have constituted a legal settlement of the worker's claims and therefore do not alter the obligation of the Government of Guatemala to enforce the law or ensure an employer's full compliance with the law. Pursuant to Article 12 of the Labor Code and Article 106 of the Guatemalan Constitution, workers and employers may not negotiate away the rights or protections imparted to workers under the Labor Code. Specifically, "[c]ollective or individual contracts with terms involving the waiver, reduction, distortion or restriction of the rights recognized in favor of the workers as set out in the Constitution, law, international treaties ratified by Guatemala, the regulations or other labor provisions are void ipso jure and not will be enforceable against the workers."[91]

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[84] Selected excerpts from court decisions (GTM-53).

[85] Selected excerpts from court decisions (GTM-53).

[86] Selected excerpts from court decisions (GTM-53).

[87] Selected excerpts from court decisions (GTM-53).

[88] Constitutional Court decisions (USA-237, USA-238, USA-239).

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

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

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

59. In the context of settlements involving the conciliation of a collective conflict, in addition to this constitutional requirement, the General Labor Inspectorate ("GLI") is obligated to "ensure that such agreements do not violate legal provisions protecting employees" among other requirements.[92]

60. Consequently, because the payments made to the workers of Fribo, Mackditex, and Alianza were less than that which the court ordered and was required by law, the purported agreements between the workers and these companies would not constitute legal settlement agreements. As a result, the partial payments do not alter the obligation of the Government of Guatemala to enforce the law or ensure an employer's full compliance with the law.

61. In addition to this legal flaw, Guatemala's arguments involving Fribo and Mackditex are also not supported by the record. For Fribo, Guatemala has presented no evidence to demonstrate that the partial payment was a settlement of the workers' legal claims, and the statements of the workers reflect that they did not view this partial payment as a settlement. The United States refers the Panel to paragraphs 47-51 of the U.S. Opening Statement and the U.S. Response to Question 2 from the Panel for further discussion of this issue.

62. Guatemala's arguments are equally deficient for Mackditex. In October of 2011, Mackditex improperly dismissed a group of 17 workers for undertaking a conciliation process to resolve a dispute involving the workers' forced suspension from work.[93] The labor court ordered that Mackditex reinstate the workers and pay them their wages and benefits for the period of their dismissal.[94] By 2013, the workers had not been reinstated, nor had they received payment for their wages and benefits claims.[95] It was at this time that an apparel company for which Mackditex supplied merchandise provided the workers with "a payment."[96] The workers state that this payment amounted to less than the wages owed to them from Mackditex.[97] Again, Guatemala has put forward no evidence to demonstrate that the payment from the third party apparel company amounted to a legal settlement of the workers' claims.[98] As described by the workers, only after a year had passed and Mackditex had not complied with the reinstatement orders did the workers accept a payment from the apparel company.[99] At no point do the workers indicate that, as a result of the payment, they no longer wished to pursue the full compensation for their claims from Mackditex,[100] and Guatemala has provided no evidence that the workers withdrew their requests for reinstatement.

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[92] GLC, Art. 375.

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

[94] Reinstatement Order (November 21, 2011) (USA-67).

[95] Statement of W and Z (June 25, 2014) (USA-18); Statement of Y, Z, AA (June 25, 2014) (USA-19).

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

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

[98] Statement of W and X, see, in particular, the last full paragraph of page 2 (June 25, 2014) (USA-18).

[99] Statement of W and X (June 25, 2014) (USA-18).

[100] Statement of W and X (June 25, 2014) (USA-18).

63. With respect to Guatemala's third point[101] – the application of Article 16.2.1(b) – the United States refers to the Panel to the U.S. Responses to Questions 1 and 2 from the Panel. Guatemala must do more than simply assert that, by virtue of Article 16.2.1(b), its course of inaction was consistent with Article 16.2.1(a). Rather, Guatemala must show that a particular course of action or inaction occurred as a result of or pursuant to a law or policy regarding the exercise of discretion, or that it occurred as a result of or pursuant to a government decision regarding the allocation of resources, and that that decision was *bona fide*.[102] Guatemala has failed to make this showing.

64. In sum, the evidence and arguments presented by Guatemala do not undermine the validity of the first group of failures. The record remains that Guatemala has failed to take the necessary steps to compel compliance with court orders.

IV. Guatemala's Failure to Effectively Enforce Laws Directly Related to Acceptable Conditions of Work by Not Carrying Out Appropriate Inspections or Imposing Appropriate Penalties

65. With respect to the second group of failures identified by the United States, Guatemala continues to argue that the documents presented by the United States "do not prove the facts" asserted by the United States.[103] We will address Guatemala's two specific objections before addressing its claim more generally.

66. First, Guatemala persists in noting that "inspectors' reports . . . are not the appropriate legal instrument to prove inaction regarding the imposition of penalties."[104] Guatemala comments that only the GLI and the enterprises would know if a sanction was imposed.[105] As the United States has explained previously, since Guatemala is the disputing Party that would be in possession of any evidence regarding imposition of penalties but has not produced such evidence, a logical inference to be drawn is that no such sanction has been imposed.[106]

67. Second, Guatemala contends that the United States put forward studies "that do not refer to the issues at hand or were prepared by NGOs whose objectivity is questionable."[107] In particular, Guatemala takes issue with the report by Verité which Guatemala says was prepared

[101] Guatemala's Rebuttal Submission, paras. 150-151, 168.

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

[103] Guatemala's Opening Statement, para. 54.

[104] Guatemala's Opening Statement, para. 54.

[105] See, e.g., Guatemala's Rebuttal Submission, para. 254.

[106] WTO panels and the Appellate Body have found that the drawing of inferences is "an inherent and unavoidable aspect of a panel's basic task of finding and characterizing the facts making up a dispute" and that this includes "the authority to draw adverse inferences from a Member's refusal to provide information" (Appellate Body Report, *Canada – Aircraft*, paras. 198 and 202-203.) See also Panel Report, *Turkey – Textiles*, para. 6.39; Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, paras. 7.1820-7.1821.

[107] Guatemala's Opening Statement, para. 55.

by consultants of the U.S. Department of Labor "to contradict Guatemala's hard evidence showing that African Palm Oil Companies have been found to be in full compliance with labor laws."[108] Guatemala's concerns, however, are unfounded.

68. As the United States noted in its Rebuttal Submission, Guatemala's arguments with respect to the palm oil plantations are unpersuasive, and are contradicted by documents from the Ministry of the Labor as well as statements from workers presented by both the United States and Guatemala.[109] The United States also noted that nongovernmental and intergovernmental organizations have identified failures in inspections among the palm plantations to be a problem.[110] The Verité report describes a series of interactions with a member of the GLI staff cataloguing problems that plague the GLI and inhibit it from effectively enforcing Guatemalan labor laws.[111] Guatemala complains that the author of the Verité report "manages Verité's research project for the U.S. Department of Labor."[112] While certainly it would not be unusual for a government agency to contract a private organization to carry out an objective study, here that was in fact not the case. Again, Guatemala has quoted selectively from the report author's biography. According to his biography, the report author has managed a project commissioned by the U.S. Department of Labor on the topic of forced migration – not on the topic of problems of inspections in the Guatemalan palm oil industry.[113] There is no reason to doubt the veracity of the study carried by Verité.

69. Verité is not, in any event, the only organization to identify concerns with labor law enforcement in the Guatemalan African palm oil sector. The United Nations High Commissioner for Human Rights has made similar findings, commenting that the agro-industry was failing to ensure workers' received minimum wage.[114] These studies not only belie Guatemala's contention that all African palm oil companies are "in full compliance" with labor laws; they confirm that the lack of government enforcement of labor laws is a widespread problem and persists not just among the documented instances the United States has presented.

70. Contrary to its assertion, Guatemala has not put forward any "hard evidence" to rebut the U.S. showing that Guatemala failed to take effective enforcement action when workers filed complaints against the African palm oil plantations. For Tiki Industries, Guatemala has put forward inspection reports reflecting flaws in the inspection process. In two of these, the inspections appear to be incomplete.[115] The inspection reports include checklists for the inspector to go over at the worksite and indicate yes or no whether the employer is in

[108] Guatemala's Opening Statement, para. 55.

[109] See, e.g., U.S. Rebuttal Submission, para. 179.

[110] See, e.g., U.S. Rebuttal Submission, para. 179.

[111] Verité Report, Labor and Human Rights Risk Analysis of the Guatemalan Palm Oil Sector (March 2014) (USA-214), pp. 72-73.

[112] Guatemala's Rebuttal Submission, para. 278.

[113] Verité website (GTM-49).

[114] 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), para. 73.

[115] Inspector's report (June 1, 2012) (GTM-13); Inspector's report (November 14, 2012) (GTM-14).

compliance. For both of these reports, the inspectors left certain fields blank without explanation. On their face, these reports suggest that the inspections were not comprehensive. These materials do not rebut the U.S. showing. In a third report, a few workers "were interviewed but do not wish to be named because they are in harmony with their employer."[116] A worker explained later that at these inspections, the inspectors did not interview the workers in the field – those that had filed many complaints – which also meant the inspections were incomprehensive and ineffective in resolving worker concerns.[117]

71. The documents put forward by the United States do "prove the facts" that the United States has asserted. Furthermore, the documents put forward by Guatemala confirm those facts. That is, the documents of both disputing Parties show that inspections, when carried out, were not comprehensive and that when company violations were found, no further action was taken against the company.

72. Next, Guatemala contends that it has demonstrated that the majority of U.S. claims of inaction are unwarranted because the authorities took action or because the companies were in full compliance with their labor law obligations.[118] Neither contention is borne out by the facts on the record.

73. Fundamentally, Guatemala mistakes the taking of certain ineffective actions for "effective enforcement." Where authorities act, if that action does not constitute or is not in the furtherance of "effective enforcement" – that is, they do not compel compliance or achieve substantial result – the government has not fulfilled its CAFTA-DR obligation. Put differently, some action may have been taken but the required action was not. To rebut the U.S. showing, Guatemala would have had to have shown that the actions it took compelled compliance or achieved substantial result. It has not.

74. Finally, Guatemala identifies what it calls "contradictions" in the U.S. exhibits related to this group of failures. It provides two examples which in fact are not contradictions at all. Guatemala first contends that statements of workers from the Koa Modas company cannot be reconciled with the reports provided in U.S. Exhibits 118, 119, and 121. These U.S. exhibits are reports from conciliatory meetings that were convened on April 19, 2013, April 26, 2013, and June 7, 2013, respectively. The reports note that the employer was not present as was required by Article 282(m) of the Guatemalan Labor Code. Therefore, these reports corroborate, rather than contradict, the statements of the Koa Modas workers in U.S. Exhibit 38. Given this corroboration, it is difficult to understand Guatemala's position.

75. Guatemala may have intended to suggest that the fact that workers communicated with inspectors at these conciliatory meetings somehow contradicts the workers' statements that the inspectors did not speak to workers during the few inspections they held after complaints were filed between 2006 and 2012. This suggestion would also be misplaced. The U.S. exhibits do

[116] Inspector's report (January 31, 2013) (GTM-15).

[117] Second Statement of AAAA (February 25, 2015) (USA-181).

[118] Guatemala's Opening Statement, para. 56.

not contradict the statements because USA-118, USA-119, and USA-121 are reports from conciliatory meetings, not inspections. Therefore, the exhibits do not speak to what occurred during the inspections in question.

76. In its second example, Guatemala maintains that the statement of AAAA in U.S. Exhibit 181 that "Tiki Industries workers have maintained that they rarely see inspectors after complaints about working conditions have been filed with the Ministry of Labor" contradicts the statement of individual IIII in U.S. Exhibit 231 which states that "from 2012 to date [April 7, 2015], labor laws violations have been found during approximately 25 visits/inspections." According to Guatemala, "rarely" and "25 visits/inspections" are not reconcilable.[119] Here again, examination of the exhibits at issue reveals Guatemala's overstated and erroneous presentation of the facts. The full quotation from USA-231 states that, according to the Ministry of Labor, labor law violations were found "during approximately 25 visits/inspections at 9 companies" and that five of the nine companies have yet to comply with warnings issued to them, more than two years later. There is nothing inconsistent between workers at Tiki Industries saying that they saw inspectors "rarely" after having filed complaints and Guatemala's acknowledgement that over the years in question, it made only 25 visits across nine different palm companies. Guatemala's attempt to cast doubt on the validity of the workers' statements therefore fails.

77. Other comments Guatemala made at the hearing about this group of failures also were misleading or inaccurate. Guatemala first mischaracterized the U.S. position and then mischaracterized a factual example. The United States is not "second-guessing" the "discretion" of the inspectors of the GLI. Nor is the United States suggesting that there is "strict liability" for mistakes made by individual inspectors. We will address each of these in turn.

78. First, the inspectors do not have considerable discretion with respect to the enforcement actions referred to by the United States. The obligations on the GLI set out in Labor Code Articles 204, 274, 278, and 281, to ensure compliance with labor laws are not optional. The directives in the regulatory Protocol on inspections also must be followed. It is not within the discretion of the inspector whether to speak with the relevant workers,[120] for example, or whether to commence sanction procedures when a violation is found and an employer refuses to comply.[121] Thus, Guatemala's reference to the inspectors' discretion is misdirected.

79. Second, the United States has not argued that Article 16.2.1(a) poses such a "strict liability" standard such that a single instance of failure by the GLI would constitute a breach. Instead, the United States has demonstrated a sustained and recurring course of inaction by the GLI which falls well within the scope of that Article. That the unit responsible for enforcing labor laws in Guatemala is not doing so or not doing so effectively through such a course is precisely what Article 16.2.1(a) is intended to prevent.

[119] Guatemala's Opening Statement, para. 58.

[120] Protocol of Best Practices for Inspections in Guatemala (2008) (USA-91), Art. I.

[121] See, e.g., GLC, Art. 419.

80. As for Guatemala's misplaced factual allegation, Guatemala argued that it was "unreasonable" for the United States to allege failure on the part of the GLI at the Fribo company in July 2009.[122] Guatemala acknowledges that an inspection on July 10, 2009 found several violations by the Fribo company.[123] Then, Guatemala contends that the inspector gave the company "30 working days" to come into compliance with the provisions of the Labor Code it had violated. Given the difference of view between the disputing Parties about this inspection report, it may be useful to review the language of the report at length:

> **[confidential information redacted containing quotation from confidential exhibit describing 16 violation related to occupational safety and health and timeliness for their re-verification][124]**

81. From this text, there should be no doubt that of the 16 violations of the law the inspector identified, nine of them should have been re-checked within at most ten business days from July 10, 2009, which was July 24, 2009. It is Guatemala's position that when Fribo closed on August 21, 2009,[125] Guatemala had not failed to act and that on that date the government's obligations with respect to the factory ceased.[126] As of that date, however, the only violations that should have not yet been re-checked were the changes to the physical plant of the factory (violations 3-9 in the inspection report). All other violations would have been past their compliance deadlines – deadlines after which the GLI did not re-inspect. Moreover, for the one issue the GLI did confirm on re-inspection, involving reprisals against employees (violation 1), the GLI found that Fribo had not come into compliance as required.[127] Yet, the GLI did not initiate a sanction proceeding as required.

82. Guatemala did not act to ensure effective enforcement at Fribo while the company was open. Furthermore, violations regarding payment of wages, benefits, and bonuses should have been enforced despite the company's closure as those obligations on the employer (i.e., to pay appropriate wages) did not cease as a result of its closure.[128] In sum, none of Guatemala's arguments regarding the Fribo company is availing.

83. Based on the foregoing, Guatemala's rebuttal arguments regarding the second group of failures identified by the United States do not undermine the U.S. showing that Guatemala has failed to effectively enforce its labor laws directly related to acceptable conditions of work through a sustained and recurring course of inaction in a manner affecting trade between the Parties.

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[122] Transcript, p. 63.

[123] Transcript, p. 63.

[124] Adjudication (July 10, 2009) (USA-61) (bold emphasis added, underline in the original).

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

[126] Transcript, p. 63.

[127] Adjudication (July 22, 2009) (USA-113).

[128] See Responses of the United States to the Panel's Questions Following the Hearing, paras. 81-95.

V. Guatemala's Failure to Effectively Enforce Laws Directly Related to the Right of Association, the Right to Organize and Bargain Collectively, and to Acceptable Conditions of Work by Not Registering Unions or Setting Up Conciliation Tribunals in a Timely Fashion

84. Regarding Guatemala's third sustained and recurring course of inaction, Guatemala continues to blame the workers for delays that occurred in the registration of unions and in the setting up of conciliation tribunals. This position is not supported by the facts in the record. We address each union application and conciliation tribunal petition, identifying the government inaction that caused substantial delay with respect to each.

85. Pursuant to Article 218 of the Guatemalan Labor Code, the registration process should take place in 10 days. A close look at the changes the General Labor Directorate ("GLD") requested of the workers at Mackditex and Koa Modas shows that these changes were often neither legal nor necessary and only served to slow down the registration process rather than expedite it as the government is required to do.[129] For example, on December 22, 2011, the GLD issued a resolution directed toward the Koa Modas workers stating that 18 revisions to their application were required.[130] These formatting and word-choice requirements do not appear in Article 218 of the Labor Code which governs union registration applications. The same can be said for certain demands among the six additional modifications the GLD requested nearly three months later.[131] Even if all the changes the GLD asked the workers to make had been based on legal and legitimate issues, the United States has shown a delay of several weeks or months between the date on which the application was ready for processing and the actual registration of the union.

86. The record shows the Mackditex workers filed an application for a union on November 18, 2010.[132] Two months passed without any action by the GLD on the application. Seeking to expedite the process, on January 19, 2011, the union representative sent additional information to the GLD.[133] Thereafter, the workers appeared before the GLD at least twice each month to request information regarding the status of their application.[134] In those visits, they learned that more information was needed before the GLD would process their application, which they concluded was the result of their employer's influence on the GLD.[135]

87. Without providing any explanation regarding the aforementioned documentation in the record, Guatemala contends that the Mackditex workers did not file their application until July 22, 2011.[136] Guatemala further maintains that, after an exchange with the GLD, the workers did

[129] GLC, Art. 285.

[130] Providencia (December 22, 2011) (GTM-31).

[131] Additional information requested by MOL (March 7, 2012) (USA-155).

[132] Union Registration Application (November 18, 2010) (USA-140).

[133] Union Filing (January 19, 2011) (USA-141).

[134] Statement of W and X (June 25, 2014) (USA-18).

[135] Statement of W and X (June 25, 2014) (USA-18).

[136] Guatemala's Initial Written Submission, para. 411.

not correct all the deficiencies with their application until March 29, 2012, although there is no evidence in the record to establish this fact.[137] Notwithstanding the workers' changes to the application, the union's inscription in the Public Registry of Unions, giving the union legal status, did not occur until four months later: August 1, 2012.[138] Thus, even if Guatemala's contentions were correct – which they are not – the GLD still delayed the registration of the Mackditex union for four months.

88. Likewise for the Koa Modas union, the workers filed their application in December 2011.[139] After several exchanges with the GLD, including among them messages from the GLD that were not notified in a timely manner,[140] the workers filed their last amendment to their application on March 20, 2012.[141] Inscription did not take place until two months later: May 18, 2012.[142]

89. Finally, for Serigrafía Seok Hwa, the workers filed on August 8, 2012.[143] Guatemala contends that the application was not filed until August 17, 2012, but the document Guatemala has submitted to substantiate that assertion does not mention any August 17 filing.[144] In any event, the GLD did not respond to the application until over one month later, on September 20, 2012. The precise date of the union's inscription in the Public Registry is not clear, but the record indicates that the workers were not notified of the union's legal status until another month had passed, on October 25, 2012.[145]

90. At the hearing, Guatemala acknowledged that the GLD was the source of at least part of the union registration delay.[146] Guatemala commented that "there is an explanation for the delay" and that is because it was one of the busiest years for union registrations in Guatemala.[147] Guatemala's argument, thus, is that, during busy times, a delay of several months beyond a statutory deadline is not inaction that could, together with other inactions of the same variety, constitute a failure to effectively enforce its laws. It is the position of the United States that, to the contrary, not acting for several weeks or months on a completed union registration application falls squarely within the scope of that which could comprise part of a breach of

[137] Guatemala's Initial Written Submission, para. 412.

[138] Gazette of Central America (August 22, 2012) (USA-142).

[139] Union registration application (December 20, 2011) (USA-143).

[140] The United States discusses the notification delays in greater detail below. For example, when the GLD issued the four-page list of changes to the bylaws submitted by the Koa Modas workers on December 22, 2011 (GTM-31), the Koa Modas workers were not notified of this resolution until January 7, 2012 (USA-144). Multiple week delays in notification can be seen throughout the record.

[141] Amended bylaws presented to MOL (March 20, 2012) (USA-147).

[142] Gazette of Central America (June 12, 2012) (USA-150).

[143] Constituting document of the union (August 8, 2012) (USA-152).

[144] Confirmation of completion of application on August 30, 2012 (GTM-39).

[145] Interviews with II & GG (June 2014) (USA-130).

[146] Transcript, p. 63.

[147] Transcript, p. 63.

Article 16.2.1(a). An assertion hypothesizing the cause of the delay without more is insufficient to support a defense.

91. Turning to the conciliation tribunal petitions, Guatemala commented at the hearing that "the purpose of a conciliation tribunal is not to enforce the law"; therefore, "a delay in the establishment of a conciliation tribunal does not prevent workers from seeking enforcement of their rights nor can it be characterized as a failure to enforce labor laws."[148] On this issue, Guatemala misses the mark.

92. First, submitting a list of grievances and asking that a court set up a conciliation tribunal is one way through which workers exercise their right to bargain collectively. Thus, by not setting up those tribunals, the court is failing to effectively enforce the provisions of the Guatemalan Labor Code directly related to that right, Articles 377 through 396.

93. Second, the failures of Guatemala in this third group also represent a failure to enforce laws related to acceptable conditions of work. That is, the record shows that these workers were seeking to use the conciliation tribunal mechanism to pursue grievances relating to acceptable conditions of work, including minimum wage and the provision of safety appliances. By way of example, in 2007, the Fribo workers requested inspections to have the GLI enforce laws regarding the same conditions that they noted in their list of grievances filed with the court.[149] The United States has explained how the GLI failed to compel Fribo's compliance[150] and thus it should not be surprising that the workers turned to this other mechanism to try to realize their rights. Unfortunately, however, due to the court's failure to set up the tribunal, they were not able to do so.

94. The United States agrees with Guatemala that the workers should not have to organize or bargain collectively to enjoy the basic working conditions to which they are entitled under law. But one need look no further than the exhibits in the record to see that, on these facts, the workers had attempted to invoke other mechanisms – including by filing multiple complaints with the Ministry of Labor – and were now seeking to reach the minimum threshold of working conditions through the conciliation tribunal as a last resort. It should therefore be clear that the failure to set up conciliation tribunals not only impedes workers' access to their bargaining rights but also constitutes, in this instance, a failure to effectively enforce laws directly related to acceptable conditions of work.

95. At the hearing, Guatemala reiterated its view that Article 381 of the Labor Code does not allow a court to move forward toward setting up a conciliation tribunal where a list of grievances is incomplete. Guatemala also maintained that for the lists of grievances discussed by the United

[148] Guatemala's Opening Statement, para. 67.

[149] Cf. Adjudications (September 3 and 5, 2007) (USA-111) with Collective Conflict (August 18, 2007) (USA-136).

[150] See U.S. Initial Written Submission, paras. 157-158; U.S. Rebuttal Submission, para. 187.

States filed by workers of Avandia, Fribo, and Ternium the "labor court found that employees had failed to meet the requirements of Article 381."[151]

96. With respect to the first petition regarding the Avandia garment factory, dated November 13, 2006, the court did not ask the workers to provide more information. The record shows that, instead, the court acknowledged receipt but then took no further action to set up the tribunal.[152] Guatemala has submitted a document that is not related to the Avandia workers' petition in which a labor court asks that the applicants provide additional information for their petition.[153] Not only does this request not concern the Avandia workers, but the information requested in Guatemala's exhibit is clearly already provided in the Avandia petition submitted by the United States. Thus, there is no documentary evidence to suggest that the workers failed to provide required information to move their petition forward. The court simply did not act, thereby failing to effectively enforce Articles 61(c) (prohibiting verbal or physical abuse), 121 (requiring payment of overtime), 116-118 (regulating work schedules), and 377 through 396 (establishing conciliation tribunals) of the Labor Code.

97. In responding to the second petition from the Avandia workers, dated August 18, 2007, Guatemala relies on a summary of the proceedings related to this petition put together by a member of the staff of the Ministry of Labor.[154] This summary lays bare the delays caused by the court. Two types of delays come to light: first, periods when the court simply did not act despite statutory deadlines that required its expedited action and second, delays in notifying the workers and the employer of the resolutions and other orders it had issued. In the case of the latter, it is worth noting that the Labor Code requires personal notification of court orders within six business days.[155] Guatemala's evidence makes clear that not only did the court not take decisions in the required timely fashion, it also did not ensure that it notified the parties to the action within the statutory notification period.

98. According to this Guatemala's summary, the workers filed the list of grievances on August 29, 2007, and on that day the court issued an acknowledgement of receipt. The summary indicates that three business days later, and thus after the statutory deadline for constituting the conciliation tribunal, on September 3, 2007, the court issued a resolution to the parties which noted requirements still to be satisfied for the court to be able to move forward with the petition.[156] The parties were not notified of this resolution until September 20, 2007, according to the summary.[157] When the court next acted on November 7, acknowledging receipt of a further filing by the workers, its action was not notified to the parties until November 27 and

[151] Guatemala's Opening Statement, para. 68.

[152] Resolution (November 13, 2006) (USA-73).

[153] GTM-56. See also U.S. Opening Statement, para. 96, describing how it is plain from the faces of the two documents (USA-73 and GTM-56) that the Guatemalan exhibit does not relate to the U.S. exhibit, the latter of which is the acceptance by the court of the Avandia workers' petition.

[154] Summary of Avandia 2007 proceedings (January 28, 2015) (GTM-44).

[155] GLC, Art. 328.

[156] GTM-44, para. 2.

[157] GTM-44, para. 2.

29.[158] When the court acknowledged receipt of an annulment motion from the employer on November 30, the parties were not notified until December 6.[159] The court denied that motion on December 11, and the parties were notified on January 29, 2008, over six weeks later.[160] Guatemala does not provide any explanation for these notification delays, which are indisputably attributable to the government. Just as in the case of the union registration applications, the Guatemalan authorities did not notify the interested parties in a timely fashion.

99. Finally, according to Guatemala's summary, after an appeal process that took most of 2008, on October 2, 2008, the court ordered the employer to participate in the conciliation tribunal as the employer had been ordered first on November 7, 2007. When the employer once more did nothing in response, the court did not act until February 9, 2009, when it prompted the employer again to put forward its delegates for the tribunal.[161] Yet again, there was no movement on the part of the employer and it took the court until April 22, 2009 to take the "proactive stance" Guatemala described in its Rebuttal Submission and again at the hearing, in which the court finally permitted the workers to identify delegates for the employer.[162]

100. This final action came almost six months from the date on which the employer's appeal concluded and the court ordered the employer to participate in the conciliation process. Considering that the law requires the conciliation tribunal to be established within 12 hours,[163] and the conflict to be resolved in 15 days,[164] Guatemala's evidence only confirms the enforcement breakdown with respect to the second Avandia petition. The court's continued inaction over nearly two years was contrary to the statutory framework governing conciliation tribunals and constitutes a failure to effectively enforce Articles 116-118 (regulation of work schedule), 197 (mandatory measures for occupational safety and health), and 377 through 396 (conciliation tribunals) of the Labor Code.

101. In September 2009, the Avandia workers filed a third petition for a conciliation tribunal.[165] Again, the court did not take timely action. Guatemala disputed this fact in its Rebuttal Submission by continuing to rely on an exhibit that does not provide support for its position.[166] This exhibit, GTM-33, contains two separate documents. The first is a court resolution approving an agreement between the workers and the company dated October 29, 2010 – 13 months after the petition was filed.[167] However, nothing in that document refers to the September 4, 2009 collective conflict petition or otherwise suggests that it was intended to

[158] GTM-44, para. 4.

[159] GTM-44, para. 4.

[160] GTM-44, para. 5.

[161] GTM-44, para. 7.

[162] Guatemala's Rebuttal Submission, para. 413, Guatemala's Opening Statement, para. 68.

[163] GLC, Art. 382.

[164] GLC, Art. 393.

[165] Collective Conflict (September 4, 2009) (USA-134).

[166] Tribunal resolution approving the collective agreement (October 29, 2010) (GTM-33).

[167] Agreement (October 29, 2010) (GTM-30).

resolve that conflict. Even if it did represent a resolution to the relevant collective conflict, 13 months far exceeds the 15-day statutory limit for a resolution to the conflict. The second document in exhibit GTM-33 is a court resolution from January 30, 2012 – two years and four months after the date the petition was filed. This resolution appears to be related to the September 2009 list of grievances, but for the same reasons – the inaction over two years and four months – this evidence also fails to address the concerns raised by the United States.

102. In addition, at the hearing, Guatemala contended that the September 2009 Avandia petition "was filed by the employees in the wrong court, which would explain any delays."[168] It is difficult to understand how the two-year-and-four-month delay could have been caused by the workers' filing in the wrong court, particularly given that that "error," to the extent it was one, appears to have been corrected by September 9, 2009, as Guatemala notes.[169] Thus, Guatemala has no basis for claiming that "filing in the wrong court," if that occurred, "would explain any delays."

103. With respect to Fribo and Ternium, Guatemala persists in its position that the court did not act because it was missing required information from the workers. Guatemala is wrong. Article 381 sets out what information should be included in each of the two parts of a collective conflict filing: a list of grievances (the "pliego de peticiones") in its first paragraph, and a cover request or petition to the court (the "solicitud"), in its second paragraph. These two documents are submitted together to initiate a request for a conciliation tribunal. Article 381 states:

> The list of grievances shall state clearly what the demands consist of and to whom they are directed, what the complaints are, the number of employers or employees who support them, the precise location of the work sites where the dispute has arisen, the number of employees working there, and the full names of the delegates along with the date.
>
> The petition shall contain the name of the judge to whom it is addressed; the full names and personal data of the delegates; the address where notifications can be received, which shall be in the town where the court is located; the name of the party to be summoned and the address where such party can receive notifications; an indication that the list of demands is attached in duplicate; and the request to process the matter in accordance with the rules set forth in the preceding Articles.
>
> If the petition submitted does not fulfil the legal requirements, the court shall correct it sua sponte and make a record of that fact. The petition shall be processed immediately.

104. The disputing Parties differ with respect to the meaning of the final paragraph of Article 381. In Guatemala's view, the third paragraph means that the court has an obligation to correct

[168] Guatemala's Opening Statement, para. 68.

[169] Guatemala's Rebuttal Submission, para. 413.

any deficiencies only with the "petition."[170] The court is not permitted, in Guatemala's interpretation, to move forward with a request in which the list of grievances lacks an element named in the first paragraph of Article 381. This reading, however, is untenable.

105. Article 381 makes clear that the court should move forward immediately with setting up the conciliation tribunal. The elements required to constitute the tribunal are found in the "petition" described in the second paragraph of the Article. All that a group of workers need do, per this paragraph, is indicate "that the list of demands is attached in duplicate." So long as the list of grievances is attached, the court should move forward. And, as noted above, these two documents are indivisible. That is, there would be no reason to set up a conciliation tribunal without a list of grievances. The final sentence is clear: "The petition shall be processed immediately." Likewise, the following provision, Article 382, states that within the 12 hours following receipt of the "list of grievances," the labor court "shall proceed to the formation of the conciliation tribunal." Just as it would not make sense for a group of workers to file a petition alone, it would not make sense for a court to move forward a petition without any content. Thus, the court is obligated to set up the conciliation tribunal regardless of any information missing from the list of grievances.

106. In reaching their respective interpretations, both Guatemala and the United States elaborate on the meaning of this text in its context as a Guatemalan court would do in the Guatemalan civil law system.[171] Further, while giving the language practical effect leaves no doubt that the petition and the list of grievances are inseparable and should be treated the same way, the principles of interpretation applicable to the Guatemalan Labor Code lend further credence to this reading. Article 17 of the Labor Code states that the purpose or interest of a particular phrase in a provision of the Labor Code is to be interpreted in light of the relevant interest of the workers. Here, Article 381 should be read in that light – in the interest of the workers seeking to bargain collectively.

107. Finally, Articles 381 and 382 require the judiciary to move quickly and efficiently. The need for expediency is also prescribed in Article 285 of the Labor Code, which provides that the judge, in addition to respecting the procedural deadlines, also must strive to keep the court's overall processing time as short as possible. This being the case, the collective conflict process is designed so that the judge herself may resolve any deficiencies so that the petition can be "processed immediately". To reject such a petition because it fails to note the correct number of workers involved in the collective conflict, for example, does not correspond to the text or design of the law.

108. Under the correct interpretation of Article 381, therefore, it is clear that the court should have moved forward with the Ternium workers' March 5, 2012 petition[172] by no later than March 6, 2012. Instead, the court asked the workers to supplement their petition with additional

[170] Guatemala's Rebuttal Submission, para. 399.

[171] In a civil law system, the appropriate interpretation, or more aptly, application of a statutory provision should reflect the plain meaning of the text. See generally, JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION (Stanford University Press, 2007), Chp. VII (Interpretation).

[172] Collective Conflict (March 5, 2012) (USA-228).

information.[173] Even if the court were correct to wait to set up the tribunal until after it received the workers' supplemental information, this did not occur. The court determined on March 26, 2012 that the workers had *not* submitted the information requested – this despite the clear "received" stamp on the March 14 workers' submission, contained in U.S. Exhibit 229.[174]

109. The same obligations were incumbent on the court that received the Fribo workers' petition and that, rather than move forward with the setting up of the conciliation tribunal, demanded that the workers provide certain information; however, to conclude that the court should have moved forward with the Fribo petition, the Panel need not adopt the U.S. reading of Article 381. Even adopting Guatemala's view, that only errors or omissions in the cover request or petition can be corrected by the court *sua sponte*, the court considering the Fribo materials should have moved forward. The court's order indicates that the missing information from the workers' filing was the address within the court's jurisdiction where the employer can be notified, one of the elements required as part of the cover request or "petition," and not part of the list of grievances.[175] Therefore, even under Guatemala's interpretation of the relevant statute, the court failed to act when it should have acted.

110. As the United States noted at the hearing, in pointing out this discrepancy, the United States is not seeking a reopening or revision of the court's decision as would be contrary to Article 16.3.8 of the CAFTA-DR.[176] We point out this discrepancy between the labor law and the practice as illustrative of the court's hindering effective enforcement rather than enabling it.

111. None of the factual or legal arguments advanced by Guatemala has cast doubt on the U.S. demonstration. The record shows that from 2007 through 2011, and continuing through 2014, Guatemala has failed to effectively enforce its labor laws related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work by not registering unions or setting up conciliation tribunals in a timely fashion, if at all.

VI. Conclusion

112. As the record shows, Guatemala has failed to effectively enforce its labor laws, through a sustained and recurring course of inaction, in a manner affecting trade between the Parties. Therefore, the United States respectfully requests that the Panel find that Guatemala has breached its obligations under Article 16.2.1(a) of the CAFTA-DR.

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

[174] Adjudication (March 26, 2012) (USA-230).

[175] Notification document (August 24, 2007) (USA-137). See also GTM-34 which appears to be the same document.

[176] U.S. Opening Statement, para. 99.