

DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES  
FREE TRADE AGREEMENT

ARBITRAL PANEL ESTABLISHED PURSUANT TO CHAPTER TWENTY

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

FINAL REPORT OF THE PANEL  
June 14, 2017

Panel Members

Professor Kevin Banks (Chair)

Mr. Theodore R. Posner

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<i>Anglo-Iranian Oil Co. Case (Preliminary Objection)</i>	Individual Opinion of President Sir A. McNair, <i>Anglo-Iranian Oil Co. Case (Preliminary Objection)</i> (1952) I.C.J. Rep. 116.
<i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R (adopted 16 February 2001).
<i>Argentina - Safeguard Measures on Imports of Footwear</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R (adopted 12 January 2000).
<i>Australia - Measures Affecting the Importation of Apples from New Zealand</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R (adopted 17 December 2010).
<i>Canada – Autos</i>	Panel Report, <i>Canada – Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R (adopted 11 February 2000).
<i>Canada – Measures Affecting the Export of Civilian Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R (adopted 2 August 1999).
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Abbreviated Title	Full Title and Reference
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<i>China - Measures Related to the Exportation of Various Raw Materials</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R / WT/DS395/R / WT/DS398/R / and Corr.1, Annex F-1 (adopted 22 February 2012), as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R.
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Publications and Audiovisual Products</i> WT/DS363/R (adopted 12 August 2009).
<i>El Salvador - Tariff Treatment for Goods Originating from Costa Rica</i>	<i>El Salvador – Tariff Treatment for Goods Originating from Costa Rica</i> , CAFTA-DR/ARB/2014/CR-ES/18 (18 November 2014).
<i>European Communities - Measures Affecting Trade in Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R (adopted 1 June 2011).
<i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R para. 104 (adopted 13 February 1998).
<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R (adopted 25 September 1997).
<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/R, (adopted 25 September 1997).

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<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R (adopted 5 April 2002).
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<i>Japan - Taxes on Alcoholic Beverages</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 1 November 1996).
<i>Korea - Definitive Safeguard Measures on Imports of Certain Dairy Products</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products</i> , WT/DS98/AB/R (adopted 12 January 2000).
<i>Mexico - Anti-Dumping Investigation of High-Fructose Corn Syrup</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the US – Recourse to Article 21.5 of the DSU by the US</i> , WT/DS132/AB/RW (adopted 21 November 2001).
<i>US - Anti-Dumping Act of 1916</i>	Appellate Body Report, <i>US – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R (adopted 26 September 2000).
<i>US – Anti-Dumping Act of 1916, Complaint by the European Communities</i>	Panel Report, <i>US – Anti-Dumping Act of 1916, Complaint by the European Communities</i> , WT/DS136/R (adopted 26 September 2000).
<i>US – Anti-Dumping Act of 1916, Complaint by Japan</i>	Panel Report, <i>US – Anti-Dumping Act of 1916, Complaint by Japan</i> , WT/DS162/R (adopted 26 September 2000).

Abbreviated Title	Full Title and Reference
<i>US – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand</i>	Panel Report, <i>US – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand</i> , WT/DS383/R (adopted 18 February 2010).
<i>US – Anti-Dumping Measure on Shrimp from Ecuador</i>	Panel Report, <i>US – Anti-Dumping Measure on Shrimp from Ecuador</i> , WT/DS335/R (adopted 20 February 2007).
<i>US - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i>	Appellate Body Report, <i>US – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R (adopted 19 December 2002).
<i>US – Measures Relating to Shrimp from Thailand</i>	Panel Report, <i>US – Measures Relating to Shrimp from Thailand</i> , WT/DS343/R (adopted 1 August 2008).
<i>US — Measures Affecting Imports of Woven Wool Shirts and Blouses from India</i>	Appellate Body Report, <i>US — Measures Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R (adopted 23 May 1997).
<i>US – Section 211 Omnibus Appropriations Act of 1998</i>	Panel Report, <i>US – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/R (adopted 1 February 2002).
<i>US – Sections 301-310 of the Trade Act of 1974.</i>	Panel Report, <i>US – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R (adopted 27 January 2000).
<i>US - Standards for Reformulated and Conventional Gasoline</i>	Appellate Body Report, <i>US – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R (adopted 20 May 1996).
<i>United States – Subsidies on Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton—Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW (adopted 20 June 2008).
<i>US - Tax Treatment for “Foreign Sales Corporations”</i>	Appellate Body Report, <i>US – Tax Treatment for “Foreign Sales Corporations”</i> , WT/DS108/AB/R (adopted 20 March 2000).

Abbreviated Title	Full Title and Reference
<i>US - Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU</i>	Appellate Body Report, <i>US - Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW (adopted 29 January 2002).

#### ABBREVIATIONS

Abbreviation	Description
CAFTA-DR	The Dominican Republic-Central America Free Trade Agreement
CUSG	Confederation of Labor Unity of Guatemala
DSU	Understanding on the Settlement of Disputes
FESEBS	Labor Federation of Banking Employees and State Services
Final	Final Submissions
GATT	General Agreement on Tariffs and Trade 1994
GATS	General Agreement on Trade in Services
GLC	Guatemalan Labor Code
GLI	Guatemala’s General Labor Inspectorate
GTM	Guatemala

Abbreviation	Description
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
ITM	Industria de Representaciones de Transporte Marítimo
IWS	Initial Written Submission
ODIVESA	Operaciones Diversas
MSICG	El Movimiento Sindical, Indígena y Campesino Guatemalteco
NEPORSA	Negocios Portuarios S.A.
RTM	Representaciones de Transporte Marítimo, S.A
Rules or MRP	Model Rules of Procedure
PR	Preliminary Ruling
PRR	Preliminary Ruling Request
RS	Rebuttal Submission
Responses	Responses to Panel's Questions Following the Hearing
SITRASOLEIDAD	Sindicato de los Trabajadores de la Finca la Soledad

Abbreviation	Description
UN	United Nations
UNSITRAGUA	Unión Sindical de Trabajadores de Guatemala
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

## **INTRODUCTION**

1. This dispute settlement proceeding between the United States and Guatemala takes place under *The Dominican Republic-Central America-United States Free Trade Agreement* (“**CAFTA-DR**”).<sup>1</sup> In particular, it is governed by Chapter 20 of the CAFTA-DR (entitled “Dispute Settlement”) and the Rules of Procedure for Chapter Twenty of the Dominican Republic-Central America-United States Free Trade Agreement (the “**Rules**”).<sup>2</sup>

2. By letter of August 9, 2011 from United States Trade Representative Ron Kirk to the Honorable Luis Velásquez, Minister of Economy of Guatemala, the United States requested “the establishment of an arbitral panel pursuant to Article 20.6.1 of *The Dominican Republic-Central America-US Free Trade Agreement* (CAFTA-DR) to consider whether the Government of Guatemala is conforming to its obligations under Article 16.2.1(a) of the CAFTA-DR.” In that letter, the United States complained about “Guatemala’s failure to conform to its obligations under Article 16.2.1(a) with respect to the effective enforcement of Guatemalan labor laws related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work.”

### **I. Procedural History**

3. The Panel in this dispute was constituted on November 30, 2012.

4. As agreed by the disputing Parties, the Chair of the Panel is Professor Kevin Banks (a national of Canada). The member of the Panel selected by the United States as complaining Party is Mr. Theodore R. Posner (a national of the United States). The member of the Panel selected by Guatemala as the Party complained against was Mr. Mario Fuentes Destarac (a national of Guatemala). Mr. Fuentes Destarac served as a panel member until he

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<sup>1</sup> The Agreement sometimes is referred to as “DR-CAFTA.” We will use the shorthand “CAFTA-DR” consistently, except to the extent that an alternative shorthand is used in a quotation.

<sup>2</sup> The Rules are published as Annex 1 to the Decision of the Free Trade Commission Establishing Model Rules of Procedure, dated February 23, 2011.

resigned on November 4, 2015. On November 19, 2015, Guatemala selected Professor Ricardo Ramírez Hernández (a national of Mexico) to serve as a panel member, and the Panel was reconstituted on November 30, 2015.

A. **Procedural History from Panel Constitution Through September 2014**

5. Following constitution of the Panel, the disputing Parties transmitted a joint letter to the Responsible Office<sup>3</sup> dated November 30, 2012, in which they agreed to suspend proceedings for a period of 60 days.

6. By joint letter to the Responsible Office dated January 29, 2013, the disputing Parties communicated their agreement to a further 10-day suspension. By separate joint letter of the same date, they also communicated their agreement on a modified timetable for proceedings if they should resume. (The Responsible Office conveyed both joint letters to the members of the Panel under cover of a letter dated January 31, 2013.)

7. By joint letter of February 25, 2013, the disputing Parties agreed to a further 10-day suspension. Following the expiration of that 10-day period, on March 15, 2013, the Panel Chair sent a communication to the disputing Parties announcing the resumption of proceedings and establishing a timetable.

8. By joint letter of March 20, 2013, the disputing Parties proposed a modification to the timetable set forth in the Chair's letter of March 13, 2013. By letter of March 22, 2013, the Chair confirmed that timetable.

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<sup>3</sup> See the Rules. "[R]esponsible office means the office of the Party complained against", p.5.

9. By joint letter of April 5, 2013, the disputing Parties requested a 14-day suspension of proceedings. Through successive joint communications, that suspension was extended until September 2014.

10. On September 18, 2014, by letter to the Responsible Office from Mr. Timothy M. Reif, General Counsel in the Office of the United States Trade Representative, the United States asked the Panel to resume its work effective September 19, 2014.

**B. Procedural History Following the September 19, 2014 Resumption of Proceedings**

11. By letter to the disputing Parties (via the Responsible Office) dated September 26, 2014, the Chair proposed a new timetable in light of the resumption of proceedings. By joint letter of October 10, 2014, the disputing Parties requested certain modifications to the Chair's proposed timetable. As agreed by the disputing Parties, the first stages of the resumed proceeding would entail submission by the United States of its Initial Written Submission no later than October 31, 2014, and submission by Guatemala of its Initial Written Submission no later than November 28, 2014.

12. Also on October 10, 2014, within two hours after transmittal of the disputing Parties' joint communication agreeing on a timetable, Guatemala sent a separate communication to the Responsible Office, which the Responsible Office forwarded to the Panel members, by which Guatemala conveyed a Request for a Preliminary Ruling, a form of submission *not* contemplated by the agreed timetable.<sup>4</sup> In that Request, Guatemala asked the Panel to "make a preliminary procedural ruling to find that this dispute is not properly presented before it, as the U.S. panel request does not meet the minimum requirements to present the problem clearly."<sup>5</sup> To

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<sup>4</sup> Although the cover of the Preliminary Ruling Request ("**PRR**") is dated October 10, 2014, and that is the date on which Guatemala conveyed it to the responsible office for submission to the Panel, we note that a header on each page of the Request indicates a date of October 7, 2014.

<sup>5</sup> PRR, para. 126.

that end, Guatemala asked the Panel to suspend the previously agreed timetable and establish separate, expedited procedures for purposes of deciding on its request.

13. By letter of October 15, 2014, the United States objected to Guatemala's request for a suspension of the timetable and a separate process to decide its Preliminary Ruling Request. By letter of October 18, 2014, the Chair invited Guatemala to reply to the latter communication, which Guatemala did by letter of October 21, 2014. The United States submitted a rejoinder by letter dated October 27, 2014.

14. By letter of October 30, 2014, the Chair announced the Panel's finding (by a majority) "that it must, as a matter of procedure, address Guatemala's preliminary ruling request without altering the procedures and timetable for proceedings established in the October 10, 2014 letter from the disputing Parties to the Responsible Office." The Chair stated that the Panel's reasons would follow and also announced certain minor adjustments to the agreed timetable in light of an announcement that government offices in Guatemala would be closed on October 31, 2014, the date originally set for the United States to file its Initial Written Submission. The Panel transmitted the majority's reasons, together with a dissent, to the disputing Parties on November 20, 2014.<sup>6</sup>

15. On November 3, 2014, the United States submitted its Initial Written Submission.<sup>7</sup>

16. By letter of November 10, 2014, Guatemala requested an extension of time in which to file its Initial Written Submission. In particular, it asked that instead of December 1, 2014, its Initial Written Submission be due no later than February 1, 2015. Guatemala cited several reasons for this request, including the number of exhibits submitted by the United States with its Initial Written Submission and the fact that redactions of certain information from those exhibits would make it difficult for Guatemala to prepare its response.

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<sup>6</sup> The Panel's findings and majority and dissenting reasons on this and all other preliminary matters are annexed to the report.

<sup>7</sup> The United States submitted a corrected version of its Initial Written Submission on November 10, 2014.

17. By letter of November 12, 2014, the United States asked the Panel to reject Guatemala's request for an extension, but indicated that it would be amenable to an extension as permitted under the Rules to allow additional time for the translation of certain documents included with the Initial Written Submission of the United States.

18. By letter of November 18, 2014, the Chair asked the disputing Parties whether they would be amenable to extending the deadline for Guatemala's Initial Written Submission to January 14, 2015. By letter of November 20, 2014, the United States stated that it would not object to such an extension. By letter of that same date, Guatemala expanded on its earlier-expressed concerns regarding redactions in exhibits submitted by the United States. Guatemala stated that the redactions warranted not just an extension of time, but additional relief. Specifically, Guatemala argued that the United States should be required to produce non-redacted versions of its exhibits and that, if it failed to do so, those exhibits should be declared inadmissible and stricken from the record. Guatemala stated that if the United States produced complete non-redacted versions of the exhibits at issue, then Guatemala would be able to file its Initial Written Submission by February 2, 2015. Conversely, if the United States failed to submit such non-redacted versions, then Guatemala requested that the documents be declared inadmissible, in which case Guatemala would be able to submit its Initial Written Submission by January 16, 2015.<sup>8</sup>

19. By letter of November 21, 2014, the Panel announced its decision to extend the deadline for Guatemala's Initial Written Submission to January 14, 2015, subject to the possibility of a further extension following deliberation on the issues raised in Guatemala's letter of November 20, 2014.

20. By letter of November 25, 2014, the United States opposed the relief requested in Guatemala's letter of November 20, 2014.

21. In view of the correspondence regarding redactions from the exhibits submitted by the United States and a possible extension of the deadline for Guatemala's Initial Written

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<sup>8</sup> The letter in fact refers to "January 16, 2014," but this was plainly a typographical error.

Submission beyond January 14, 2015, the Panel convened a conference call with the disputing Parties on December 11, 2014. Following that call, the United States submitted further views by letter dated December 16, 2014, and Guatemala replied by letter dated December 22, 2014.

22. By letter of December 31, 2014, the Chair stated the findings of a majority of the Panel regarding redacted evidence and the timetable of proceedings, in the relevant part, as follows:

The panel finds that it is without authority to instruct the United States to submit unredacted copies of the exhibits submitted with its initial written submission. The panel will assess what effects the redactions have, if any, on the probative value of those exhibits in the course of dealing with the dispute on its merits.

The panel declines to treat any evidence as inadmissible at this stage of the proceedings. The panel will keep under review the question of the treatment of evidence from anonymous sources and may revisit the question of the admissibility of such evidence at a later stage of the proceedings.

The panel hereby extends the deadline for the filing of Guatemala's initial written submission to February 2, 2015.

23. The Panel majority provided its reasons for the foregoing decision to the disputing Parties, together with a dissenting opinion, on February 26, 2015.

24. In view of the Panel majority's decision of December 31, 2014, consequential modifications to the timetable of proceedings were made in subsequent correspondence and confirmed in a letter from the Chair dated March 11, 2015.

25. On February 2, 2015, Guatemala submitted its Initial Written Submission.

26. On February 9, 2015, pursuant to Rule 54 of the Rules, the Panel received requests from the following non-governmental entities to submit written views: The Guatemalan Labor Law Association; The Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations; The American Federation of Labor and Congress of Industrial Organizations; The Institute of Labor Studies, Indigenous and Peasant Guatemala; The Apparel

and Textile Industry Association; The Chamber of Agriculture; Global Labor Unions of Guatemala, Autonomous and Popular Labor Union Movement of Guatemala, Labor Federation of Banking Employees and State Services of Guatemala, and Confederation of Labor Unity of Guatemala; The Guatemalan Exporters' Association; The International Trade Union Confederation; and The Trade Union Confederation of the Americas.

27. By letter of February 10, 2015, the Chair invited the disputing Parties, in accordance with Rule 56, to submit their views on these requests. By letters of February 12, 2015, both disputing Parties stated that they did not object to any of the non-governmental entity requests.

28. By letter of February 20, 2015, the Chair stated that the Panel had granted all of the non-governmental entity requests to submit views, except that of The Trade Union Confederation of the Americas, due to the fact that the latter entity is not located in the territory of a CAFTA-DR Party, as required by Rule 53.

29. On March 16, 2015, the United States submitted its Rebuttal Submission.

30. By letter of March 19, 2015, Guatemala raised additional concerns about the use of redacted exhibits by the United States in light of the U.S. Rebuttal Submission. Among other concerns, Guatemala complained about the fact that the United States unilaterally had engaged the Secretary-General of the International Centre for Settlement of Investment Disputes ("**ICSID**") to review exhibits redacted by the United States, compare them to the corresponding unredacted versions, attest to the correspondence between the different versions, and make certain observations with respect to correspondences between names on unredacted versions of different documents. Guatemala renewed its request that the Panel "not afford any probative value to the redacted versions of the exhibits that have been submitted by the United States."

31. By letter of April 6, 2015, the United States urged the Panel to reject the foregoing request. Guatemala replied by letter of April 17, 2015.

32. On April 27, 2015, Guatemala submitted its Rebuttal Submission.<sup>9</sup> Also on that date, the various non-governmental entities that had been granted leave by the Panel to submit written views submitted their written views.<sup>10</sup>

33. By letter from the Chair dated May 5, 2015, the Panel majority reaffirmed its earlier decision not to require the United States to produce unredacted versions of its redacted exhibits. The letter stated, in relevant part:

For the reasons set out in its decision of February 26, 2015, a majority of the panel finds that the panel is without authority to require the United States of America to provide to the panel and to Guatemala information that it has chosen not to submit to the panel, including the information that the United States of America has disclosed to the ICSID Secretary General and her staff.

The panel is unanimously of the view that the admissibility and probative value of all evidence submitted by the disputing Parties, including the declaration of the ICSID Secretary General, are matters to be determined by the panel in the light of the submissions of the Parties and their arguments at the hearing.

34. A dissent with respect to the May 5, 2015 majority decision as to exhibits containing redacted information was transmitted to the disputing Parties on June 1, 2015.

35. On May 11, 2015, the United States submitted views on certain of the non-governmental entity submissions. By letter of the same date, Guatemala declined to comment on those submissions.

36. On May 27, 2015, the Panel held a conference call with the disputing Parties to discuss logistics for the upcoming hearing. The procedural agreement reached on the conference call was confirmed by letter from the Chair of May 28, 2015.

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<sup>9</sup> Guatemala submitted a corrected version of its Rebuttal Submission on May 4, 2015.

<sup>10</sup> Due to an apparent mis-communication, one entity, the Institute of Labor Studies, Indigenous and Peasant Guatemala, did not submit its views until May 12, 2015.

37. On June 2, 2015, a hearing on the merits was held in Guatemala City, Guatemala. The United States was represented by:

- Timothy M. Reif (Head of Delegation, General Counsel, Office of the United States Trade Representative)
- Daniel Brinza (Senior Counsel for Dispute Settlement, Office of the United States Trade Representative)
- Justin Miller (Attorney, Office of the United States Trade Representative)
- Carlos Romero (Deputy Assistant U.S. Trade Representative for Labor Affairs, Office of the United States Trade Representative)
- Annelies Winborne (Deputy Assistant U.S. Trade Representative for Monitoring and Enforcement, Office of the United States Trade Representative)
- Kathleen Claussen (Assistant General Counsel, Office of the United States Trade Representative)
- Erin Rogers (Special Assistant General Counsel, Office of the United States Trade Representative)
- Andrea Malito (Senior Director, Central America & the Dominican Republic, Office of the United States Trade Representative)
- Deborah Birnbaum (Attorney, Office of the Solicitor, United States Department of Labor)
- Carlos Quintana (International Relations Officer, Bureau of International Labor Affairs, United States Department of Labor)
- Sally Meyers (Political Officer, United States Embassy of Guatemala)

Guatemala was represented by:

- Marco Tulio Molina Tejeda (Deputy Permanent Representative, Permanent Mission of Guatemala to the WTO)
- Alan Yanovich (Senior Counsel, Aken Gump Strauss Hauer & Feld LLP)
- Brian Glenn Patterson (Counsel, Akin Gump Strauss Hauer & Feld LLP)
- Pablo Auyón (Legal Advisor, Division of Administration of Foreign Trade, Ministry of Economy)
- Alfredo Skinner Klée (Senior Partner, Arenales & Skinner-Klee)
- Rodolfo Estuardo Salazar Paniagua (Partner, Arenales & Skinner-Klee)
- Andrés Calderón (Paralegal, Arenales & Skinner-Klee)
- Sofia Galindo (Paralegal, Arenales & Skinner-Klee)
- Sergio Cojulún (Paralegal, Arenales & Skinner-Klee)
- Verena Kuhsiek (Paralegal, Arenales & Skinner-Klee)
- José Rodrigo Vielmann de León (Deputy-Minister, Ministry of Foreign Affairs)
- Luis Adolfo Schwank Peña (Director, International Affairs Division, Ministry of Labor)
- Guillermo Alejandro Ostreich (Advisor, Ministry of Labor<sup>11</sup>)
- Jesús Augusto Arbizú Hernández (General Labor Inspector, Ministry of Labor)
- Mario Iván Alfaro Vilela (Labor Director General, Ministry of Labor)

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<sup>11</sup> “Ministry of Labor” will be used as a shorthand for “Ministry of Labour and Social Welfare” throughout the Panel’s report.

- Mario Luis Prado López (Director of Promotion of Labor Legality, Ministry of Labor)
- María Eugenia Villagrán de León (General Prosecutor, Office of the General Prosecutor)
- Saúl Oliva (Chief of the Administrative Litigation Section, Office of the General Prosecutor)
- Carlos Luna Villacorta (Legal Advisor, Office of the General Prosecutor)

38. Following the hearing, on June 8, 2015, pursuant to Rule 8(f), the Panel conveyed to the disputing Parties a list of post-hearing questions.

39. At the June 2, 2015 hearing, the United States introduced new exhibits, which it supplemented under cover of a letter dated June 9, 2015. By letter of June 11, 2015, the Panel affirmed that Guatemala could address these new exhibits in its first post-hearing submission. By letter of the same date, Guatemala objected to the submission of certain new evidence by the United States – in particular, documents collected as Exhibit USA-244 – and urged the Panel to find these documents to be inadmissible in light of the late stage of the proceeding at which they were introduced. By letter of June 12, 2015, the United States opposed Guatemala's request. Guatemala replied by letter of June 17, 2015.

40. Also on June 17, 2015, the United States and Guatemala each submitted its Supplemental Written Submissions and its Responses to the Panel's post-hearing questions.

41. By letter of June 24, 2015, the Chair announced the Panel's decision to treat Exhibit USA-244 as inadmissible. The reasons for the Panel's decision are set out in section IV.B of this report.

42. On July 1, 2015, each disputing Party submitted its comments on the other Party's Supplemental Written Submission.

43. By letter of August 11, 2015 from the Chair, the Panel majority announced its proposal to modify the procedural timetable to make December 15, 2015 the new deadline for

the Panel to transmit its initial report to the disputing Parties. The Panel invited the disputing Parties to communicate any concerns with this new deadline by August 14, 2015. By letters of August 13 and 14, 2015, respectively, Guatemala and the United States affirmed that they did not object to the extension of time for the Panel to submit its initial report.

44. On September 9, 2015, the Responsible Office transmitted to the disputing Parties the dissent of one Panel member to the majority's proposal to extend the time for transmittal of the initial report. In the dissenter's view, such a proposal was not in order in light of the absence to date of a decision on Guatemala's request for a preliminary ruling with respect to the Panel's jurisdiction.

45. On November 4, 2015 Mr. Fuentes Destarac submitted his resignation from the Panel, effective immediately. On November 5, 2015 the Panel informed the disputing Parties by letter to the responsible office that it had suspended deliberations pending the appointment of a replacement for Mr. Fuentes Destarac. On November 30, 2015 the Panel was reconstituted, with Mr. Ricardo Ramírez replacing Mr. Fuentes Destarac, and resumed its work.

46. On February 18, 2016 the Panel informed the disputing Parties that it had provisionally concluded that no new hearing would be required, notwithstanding the replacement of Mr. Fuentes Destarac, and that it intended to send its initial report to the disputing Parties on or before June 22, 2016.

47. On April 26, 2016 the Panel requested from each disputing Party copies of certain documents upon which it had relied or to which it had referred in responding to the Panel's questions of June 5, 2015, either in its reply to questions from the panel and supplementary submission dated June 17, 2015, or in its comments to the panel dated July 1, 2015. The United States sent the requested information under cover of a letter dated May 2, 2016. Guatemala confirmed that it had referred in the relevant submissions to certain documents thus sent to the panel by the United States, and sent additional documents to which it had also referred, under cover of a letter to the Panel dated May 4, 2016. In that letter, Guatemala submitted that the Panel should not rely upon the documents provided by the United States as they had not been

properly introduced into the record in a timely fashion. The Panel addresses this objection in section IV.A below.

48. By letter dated June 7, 2016 the Panel informed the disputing Parties that, taking into account the number and complexity of issues to be decided, it would send its initial report to them on or before September 9, 2016. By letter dated August 30, 2016 the Panel informed the disputing Parties that it required additional time to complete its initial report, and expected to do so by September 26, 2016.

49. The Panel delivered its initial report to the disputing Parties on September 27, 2016.

50. On October 6, 2016 the United States wrote to the Panel Chair to communicate that “due to the volume of evidence cited within the initial report and the complexity of the Panel’s interpretive analysis, the disputing Parties have agreed, pursuant to Articles 20.10.2 and 20.13.6 of the [CAFTA-DR] that they would submit their written comments by December 12, 2016.” Guatemala confirmed its intention to submit comments by December 12, 2016 in a letter to the Panel Chair dated October 10, 2016. Each letter indicated that the disputing Parties would discuss an appropriate timetable for proceedings and would inform the Panel of that timetable once discussions had concluded.

51. The disputing Parties each delivered comments on the Panel’s initial report on December 12, 2016.

52. On January 15, 2017 the United States informed the Panel by letter that “[g]iven the current transition of Administrations in the United States, the United States hopes to be in a position to conclude discussions with Guatemala regarding the timetable for remaining proceedings and presentation of the final report... after the new Administration assumes office.” However, on January 16, 2017 Guatemala stated in a letter to the Panel Chair that since the submission of their comments the disputing Parties had been unable to reach an agreement on a revised timetable, and requested that the Panel proceed at its earliest convenience to provide the disputing Parties with its final report.

53. The Panel responded to the disputing Parties by letter dated February 10, 2017, indicating that in the absence of an agreement between the disputing Parties on a timetable for proceedings it would establish one pursuant to Rule 34. The Panel went on in that letter to indicate that it intended to deliver its final report by April 7, 2017.

54. On April 3, 2017 the Panel wrote to the disputing Parties to inform them that it would require further time to consider and respond to the comments of the disputing Parties on its initial report.

55. The Panel has read and considered thoroughly all of the comments of the disputing Parties, and modified its initial report to the extent that it considered required in light of those comments.

56. The Panel feels compelled to note that it has had concerns about the remuneration of Panel Members throughout the almost three years since proceedings resumed on September 19, 2014. Although these matters are part of the procedural history of this proceeding (and therefore could be addressed here), the Panel has opted to address them separately, in a letter accompanying this Final Report. The Panel considers this letter to be a document issued by the Panel and, in accordance with Rule 13, that it is public.

57. Having reviewed the procedural history of this proceeding, we now turn to the merits. We start with the matter of our jurisdiction, which has been put in question by Guatemala and which, in any event, the Panel would need to examine even if Guatemala had not put it in question, since the Panel is competent to pronounce on the merits of this dispute only insofar as it has the authority – that is to say, jurisdiction – to do so.

## **II. Jurisdiction**

58. At issue in this proceeding are claims by the United States that Guatemala has breached its obligation under Article 16.2.1(a) of the CAFTA-DR. That provision states:

A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

59. The United States contends that Guatemala has failed to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of the CAFTA-DR.<sup>12</sup>

60. In its written and oral submissions, the United States alleged three ways in which Guatemala has failed to effectively enforce its labor laws. As set forth in its Initial Written Submission, the United States argued that Guatemala had failed to effectively enforce its labor laws:

- a) By failing to secure compliance with court orders requiring employers to reinstate and compensate workers wrongfully dismissed for union activities, and to pay a fine for their retaliatory action;
- b) By failing to properly conduct investigations under the Guatemalan Labor Code (GLC) and by failing to impose the requisite penalties when Ministry of Labor inspectors identified employer violations; and,
- c) By failing to register unions or institute conciliation processes within the time required by law.<sup>13</sup>

61. In its panel request, however, the United States did not use these terms to identify its claims, and that is the basis for Guatemala's objection to our jurisdiction.

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<sup>12</sup> It is undisputed that the CAFTA-DR entered into force as between the United States and Guatemala on July 1, 2006.

<sup>13</sup> US Initial Written Submission ("US IWS"), para. 17.

**A. The Disputing Parties' Arguments**

62. In its Preliminary Ruling Request, Guatemala argued that “[t]he panel request submitted by the United States in this dispute was drafted in such extremely broad and vague terms that it fails to present the problem clearly.”<sup>14</sup> Referring to the mandatory elements of a panel request as prescribed by Article 20.6.1 of the CAFTA-DR, Guatemala contended that “the United States panel request fails to set out the ‘reasons for the request’, fails to identify ‘the measure or other matter at issue’ and fails to indicate the ‘legal basis for the complaint’.”<sup>15</sup> Moreover, Guatemala argued that it had suffered prejudice as a result of the U.S. failure to meet the pleading requirements of Article 20.6.1, inasmuch as it lacked adequate notice of the case it must answer.<sup>16</sup>

63. In view of the foregoing, Guatemala asked the Panel “to find that this dispute is not properly presented before it, as the United States panel requests [*sic*] does not meet the minimum requirements to present the problem clearly.”<sup>17</sup>

64. In its Initial Written Submission, the United States opposed Guatemala’s request. It argued that its panel request met the pleading requirements of Article 20.6.1 of the CAFTA-DR.<sup>18</sup> The United States discussed, among other points, the contrast between the requirements of that provision and the allegedly more detailed pleading requirements in Article 6.2 of the World Trade Organization (“**WTO**”) Understanding on the Settlement of Disputes (“**DSU**”).<sup>19</sup> And, in response to Guatemala’s due process argument, the United States argued that conformity with

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<sup>14</sup> PRR, para. 3.

<sup>15</sup> PRR, para. 4.

<sup>16</sup> PRR, paras. 118-25.

<sup>17</sup> PRR, para. 126.

<sup>18</sup> US IWS, paras. 255-78.

<sup>19</sup> US IWS, paras. 279-85.

Article 20.6.1 does not depend “on a party’s ability to respond to the complaining party’s claims in subsequent submissions.”<sup>20</sup>

65. This debate continued to play out over the course of the disputing Parties’ subsequent written submissions and at the hearing. The disputing Parties’ arguments focused primarily on the text of the U.S. panel request and the question of the level of precision that Article 20.6.1 requires when it states that a panel request shall “set out the reasons for the request, including identification of the measure or other matter at issue and an indication of the legal basis for the complaint.”<sup>21</sup>

66. At the hearing, the United States made an additional point. It argued that to the extent Guatemala believed the U.S. panel request to be insufficiently precise, it had an obligation to “seasonably and promptly” bring the alleged deficiency to the attention of the United States. The United States relied on the WTO Appellate Body report in *US – Tax Treatment for “Foreign Sales Corporations”* for this proposition.<sup>22</sup> The United States argued that Guatemala had ample opportunity to raise its concerns during the over-three-year period between the August 2011 submission of the U.S. panel request and the resumption of proceedings in September 2014, yet it did not do so. The United States elaborated on this argument in its post-hearing responses to questions posed by the Panel.<sup>23</sup>

67. In reply, Guatemala contended that by stating its concerns with the U.S. panel request on October 10, 2014, “soon after the Panel resumed its work and adopted the timetable for these proceedings,” it had acted in a timely fashion.<sup>24</sup> Guatemala noted an absence of any

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<sup>20</sup> US IWS, para. 288.

<sup>21</sup> See Guatemala Initial Written Submission (“**GTM IWS**”), paras. 29-40; US Rebuttal Submission (“**US RS**”), paras. 293-303; Guatemala Rebuttal Submission (“**GTM RS**”), paras. 443-69.

<sup>22</sup> Appellate Body Report, *US – Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/AB/R, para. 166 (adopted 20 March 2000) (principle of good faith “requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes”), cited in U.S. Responses to the Panel’s Questions Following the Hearing (“**US Responses**”), para. 62.

<sup>23</sup> US Responses, paras. 61-70.

<sup>24</sup> Guatemala’s Supplementary Submission and Responses to the Panel’s Questions Following the Hearing (“**GTM Responses**”), para. 29.

provision in the Rules requiring it to state its objection at an earlier point in the proceeding.<sup>25</sup> It also argued that its timing was consistent with common WTO practice, wherein a party is considered to have timely made a Preliminary Ruling Request if it does so by no later than the deadline for the first written submission.<sup>26</sup>

## **B. Analysis of the Panel**

68. We begin our analysis by recalling the standard arbitral panel terms of reference set forth in Article 20.10.4 of the CAFTA-DR:

To examine, in the light of the relevant provisions of this Agreement, the matter referenced in the panel request and to make findings, determinations, and recommendations as provided in Article 20.10.6 and 20.13.3 and to deliver written reports referred to in Article 20.13 and 20.14.

69. Accordingly, the panel request defines the subject matter over which we have jurisdiction. In their written and oral submissions, both disputing Parties have relied heavily on reports of the WTO Appellate Body and dispute settlement panels to the extent that these may help shed light on interpretation of the CAFTA-DR. Bearing in mind that the Appellate Body and WTO panels were not clarifying provisions of the CAFTA-DR, we will take into account, where appropriate, WTO Appellate Body and dispute settlement panel reports.

70. In this respect, for our assessment we are mindful of the following principles drawn from Appellate Body reports:

- The panel request “establishes and delimits” the jurisdiction of a panel and it serves the due process objective of notifying the respondent of the nature of the dispute. When a particular measure is not identified, such measure is outside of the scope of the dispute.

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<sup>25</sup> GTM Responses, para. 29.

<sup>26</sup> GTM Responses, paras. 30-34.

Consequently, the clear identification of the specific measures in the panel request is “central” to determining the matter covered.<sup>27</sup>

- Defects in a panel request cannot be “cured” in a subsequent submission of a party to a dispute.<sup>28</sup>
- Assessing whether a request complies with the jurisdictional requirements should be based “on the panel request as a whole” and “in light of attendant circumstances”.<sup>29</sup>

71. Under Article 20.6.1 of the CAFTA-DR a panel request must contain at least two elements: (1) an “identification of the measure or other matter at issue,” and (2) an “indication of the legal basis for the complaint.”

72. Guatemala’s procedural objection concerns the first of these elements.<sup>30</sup> According to Guatemala, the United States did not identify the measure or other matter at issue with the precision required by Article 20.6.1 and, therefore, “the matter referenced in the panel request” (and, consequently, the matter within our terms of reference) is a null set.

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<sup>27</sup> Appellate Body Report, *European Communities – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, paras. 786 and 790 (adopted 1 June 2011). See also Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, para. 219 (adopted 22 February 2012), as modified by Appellate Body Reports WT/DS394/AB/R/WT/DS395/AB/R/WT/DS398/AB/R.

<sup>28</sup> We note that although subsequent submissions cannot cure defects in a panel request, they can nevertheless be used to confirm the meaning of the words used in such request. See Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, para. 220 (adopted 22 February 2012), as modified by Appellate Body Reports WT/DS394/AB/R/WT/DS395/AB/R/WT/DS398/AB/R; Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, para. 418 (adopted 17 December 2010); Appellate Body Report, *European Communities – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, paras. 642 (adopted 1 June 2011).

<sup>29</sup> Appellate Body Report, *US – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, para. 127 (adopted 19 December 2002).

<sup>30</sup> Guatemala also argues that the United States failed to indicate the legal basis for its complaint. See, for example, GTM IWS, paras. 45-49. However, as discussed below, we easily find that the United States indicated as the legal basis for its complaint a breach by Guatemala of its obligation under Article 16.2.1(a) of the CAFTA-DR.

73. The starting point of our assessment should be the text of the U.S. panel request. The request is set forth in a two-page letter from the United States Trade Representative to Guatemala's Minister of Economy. For ease of reference, we quote the substance of that letter in full:

Dear Minister Velásquez:

The United States hereby requests the establishment of an arbitral panel pursuant to Article 20.6.1 of *The Dominican Republic-Central America-United States Free Trade Agreement* (CAFTA-DR) to consider whether the Government of Guatemala is conforming to its obligations under Article 16.2.1(a) of the CAFTA-DR.

On July 30, 2010, the United States requested consultations with the Government of Guatemala to discuss issues and matters related to Guatemala's obligations under Article 16.2.1(a) of the CAFTA-DR, as well as under Chapter Sixteen of the CAFTA-DR more broadly. Article 16.2.1(a) of the CAFTA-DR requires that "[a] Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement." Consultations meetings were held in Guatemala City, Guatemala, in September and December 2010, but those consultations meetings and numerous other communications failed to resolve this matter.

Article 16.6.6 of the CAFTA-DR provides that "[i]f the matter concerns whether a Party is conforming to its obligations under Article 16.2.1(a), and the consulting Parties have failed to resolve the matter within 60 days of a request ... the complaining Party may request ... a meeting of the commission under Article 20.5 and, as provided in Chapter Twenty (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter." The United States and Guatemala failed to resolve the matter within 60 days of the United States consultations request and, therefore, on May 16, 2011, the United States requested a meeting of the Free Trade Commission (Commission) pursuant to Article 20.5.2 of the CAFTA-DR. The Commission meeting occurred on June 7, 2011, in Guatemala City in which you, Ambassador Sapiro, and other representatives of the U.S. and Guatemalan governments participated. The meeting of the Commission and subsequent discussions between the two Parties also failed to resolve this matter.

Article 20.6 of the CAFTA-DR provides that “[i]f the consulting Parties fail to resolve a matter within ... 30 days after the Commission has convened pursuant to Article 20.5 ... any consulting Party that requested a meeting of the Commission with regard to the measure or other matter in accordance with Article 20.5 may request in writing the establishment of an arbitral panel to consider the matter.” Article 20.6 further specifies that “[t]he requesting Party shall deliver the request to the other Parties, and shall set out the reasons for the request, including identification of the measure or other matter at issue and an indication of the legal basis for the complaint.”

The matter at issue and legal basis for this complaint is Guatemala’s failure to conform to its obligation under Article 16.2.1(a) with respect to the effective enforcement of Guatemalan labor laws related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work.

The United States has identified a number of significant failures by Guatemala to effectively enforce labor laws, including: (i) the failure of Guatemala’s Ministry of Labor to investigate alleged labor law violations; (ii) the failure of the Ministry of Labor to take enforcement action after identifying labor law violations; and (iii) the failure of Guatemala’s courts to enforce Labor Court orders in cases involving labor law violations.

These failures constitute a sustained or recurring course of action or inaction by the Government of Guatemala. Guatemala’s sustained or recurring failure to effectively enforce its labor laws is in a matter affecting trade between the Parties.

Pursuant to Article 20.6.2 of the CAFTA-DR, an arbitral panel shall be established upon delivery of this request.

Sincerely,

Ron Kirk

74. The request is eight paragraphs long. The first four paragraphs recite procedural history. At the heart of the matter are the fifth, sixth, and seventh paragraphs. According to the

United States,<sup>31</sup> the matter at issue is identified, as required by Article 20.6.1, in the fifth paragraph, which states:

The matter at issue and legal basis for this complaint is Guatemala's failure to conform to its obligations under Article 16.2.1(a) with respect to the effective enforcement of Guatemalan labor laws related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work.

75. We do not agree with the U.S. position that that statement alone is an adequate identification of the measure or other matter at issue. That position is problematic for a couple of reasons. First, the quoted sentence conflates the distinct concepts of “measure or other matter at issue” and “legal basis for the complaint.” While the pleading requirements in Article 20.6.1 are not developed in detail, the provision does treat “identification of the measure or other matter at issue” and “indication of the legal basis for the complaint” as two distinct elements of a panel request, each serving a distinct purpose.

76. We understand the phrase “measure or other matter at issue” to refer to the conduct about which the Party requesting a panel is complaining.<sup>32</sup> Such conduct may consist of a “measure,” which the CAFTA-DR defines as including “any law, regulation, procedure, requirement, or practice,”<sup>33</sup> or it may consist of an “other matter at issue” – that is, an act or omission that may not meet the definition of “measure” but nevertheless is considered to breach obligations under the CAFTA-DR. In either case, the measure or the other matter at issue is the object of the requesting Party's complaint.

77. We understand “legal basis for the complaint” to refer to the CAFTA-DR obligation that is alleged to be breached by the measure or other matter at issue.

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<sup>31</sup> See US IWS, para. 270; US RS, para. 293.

<sup>32</sup> This seems to be the disputing Parties' understanding as well, since both recognize that a “measure” under the CAFTA-DR would include “conduct” of a government. See US IWS, para. 266 and GTM IWS, para. 31. We also take note of the Panel's finding in *El Salvador – Tariff Treatment for Goods Originating from Costa Rica* that: “it is likely that a measure takes the form of a positive conduct (action) or negative (omission)”. *El Salvador – Tariff Treatment for Goods Originating from Costa Rica*, CAFTA-DR/ARB/2014/CR-ES/18, para. 4.40 (18 November 2014).

<sup>33</sup> CAFTA-DR, Art. 2.1.

78. When taken together, the measure or other matter at issue and the legal basis for the complaint describe *what* is being challenged and *why* it is being challenged, and they constitute a claim. But each element taken alone constitutes only part of a claim and fails to inform either the responding Party or the Panel of the essence of the complaint. Likewise, conflating the two elements by treating the measure or other matter at issue and the legal basis of the complaint as one and the same fails to convey the essence of the complaint and thus fails to make any particular complaint under a given CAFTA-DR article distinguishable from a generic complaint under that article. Therefore, we agree with the WTO Appellate Body that:

“[t]he specific measure to be identified in a panel request is the object of the challenge, namely, the measure that is alleged to be causing the violation of an obligation contained in a covered agreement. In other words, the measure at issue is *what* is being challenged by the complaining Member. In contrast, the legal basis of the complaint, namely, the claim pertains to the specific provision of the covered agreement that contains the obligation alleged to be violated.”<sup>34</sup>

79. We are well aware of the importance of correctly identifying the measure at issue and complying with the requirements of Article 20.6.1 of the CAFTA-DR for the purpose of determining the jurisdiction of the panel. We therefore agree with the only other CAFTA-DR dispute settlement panel, which considered it essential that “a measure [is] identified with *sufficient precision*, so that an arbitral panel has clarity of the scope of its *rationae materiae* jurisdiction and the other participating parties can exercise fully the defense of their interests” (emphasis added).<sup>35</sup>

80. We recall that Guatemala has urged us to rely on “WTO principles and jurisprudence” in resolving the question of our jurisdiction,<sup>36</sup> while the United States has noted differences between Article 20.6.1 of the CAFTA-DR and Article 6.2 of the DSU which, in its

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<sup>34</sup> Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, para. 130 (adopted 11 December 2006).

<sup>35</sup> *El Salvador — Tariff Treatment for Goods Originating from Costa Rica*, CAFTA-DR/ARB/2014/CR-ES/18, para. 4.45 (18 November 2014).

<sup>36</sup> PRR, para. 41.

view, make the comparison less relevant.<sup>37</sup> We acknowledge that there are differences between the provision before us and the analogous provision of the DSU, namely Article 6.2. Such variances could lead in other instances to different assessments and outcomes with respect to whether certain claims in a panel request are within the jurisdiction of a panel. However, inasmuch as both provisions treat the object of a panel request and the legal basis of the complaint as distinct elements of a pleading, the provisions are similar.<sup>38</sup>

81. Since the measure or other matter at issue and legal basis of the complaint are distinct elements of a panel request, we cannot accept the U.S. assertion that “Guatemala’s failure to conform to its obligations under Article 16.2.1(a) with respect to the effective enforcement of Guatemalan labor laws related to the right of association, the right to organize and bargain collectively, and acceptable conditions of work” constitutes *both* “matter at issue” *and* “legal basis for this complaint.”<sup>39</sup> As we see it, the fifth paragraph of the U.S. panel request states the legal basis for the complaint – *i.e.*, an alleged “failure [by Guatemala] to conform to its obligations under Article 16.2.1(a)” – but it does not identify the act or omission that is alleged not to conform to those obligations.

82. Moreover, as a potential identification of the measure or other matter at issue, the fifth paragraph of the U.S. panel request fails for another reason. It amounts to a paraphrasing of the text of Article 16.2.1(a) of the CAFTA-DR. That article prohibits a failure by a Party “to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.” Therefore, every claim of breach of Article 16.2.1(a) will be, by definition, a claim that a Party has “failed to conform to its obligations . . . with respect to the effective

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<sup>37</sup> US IWS, paras. 280-85.

<sup>38</sup> In *Australia – Measures Affecting the Importation of Apples from New Zealand*, the Appellate Body stated that “the two requirements in Article 6.2 of the DSU are distinct and ‘should not be confused’.” It recalled its earlier reports in *Guatemala – Cement I* and *EC – Selected Customs Matters*, in which it faulted panels for having “blurred the distinctions” between measures and claims. Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, para. 417 (adopted 17 December 2010) (quoting Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, para. 132 (adopted 11 December 2006)).

<sup>39</sup> See US IWS, paras. 276-278.

enforcement” of its labor laws. If formulating a complaint that way were sufficient to identify the measure or other matter at issue for purposes of Article 20.6.1, it would be impossible to distinguish one claim under Article 16.2.1(a) from another, unless the requesting Party happened to volunteer more information than is required. We do not interpret the pleading requirements of Article 20.6.1 to be so minimal as to allow a Party to make it impossible to distinguish one Article 16.2.1(a) claim from another.

83. The United States suggests that the fifth paragraph of its panel request is distinguishable from a generic claim of breach of Article 16.2.1(a) inasmuch as it limits the type of labor laws to which it is addressed.<sup>40</sup> Thus, whereas the term “labor laws” is defined in the CAFTA-DR by reference to five categories of “internationally recognized labor rights,”<sup>41</sup> the fifth paragraph of the U.S. panel request refers to only three of those categories (“the right of association, the right to organize and bargain collectively, and acceptable conditions of work”). The United States seems to argue that by excluding two categories of labor laws (prohibition on forced labor and minimum age for employment) it has defined the measure or other matter at issue with the requisite precision.

84. We disagree. If, as we already have found, paraphrasing the conduct addressed by the obligation in question is insufficient to identify the measure or other matter at issue, it cannot be the case that subtracting from the paraphrasing makes the identification sufficient. Whether the paraphrasing is complete or (as here) only partial, the requesting Party still is describing conduct by using the language of the obligation itself, making it impossible to distinguish a particular claim from a generic claim of breach of Article 16.2.1(a). There is nothing in the fifth paragraph of the U.S. panel request that attempts to identify *specific* conduct attributable to Guatemala whereby it failed to meet its obligation under Article 16.2.1(a), *i.e.*, “to effectively enforce its labor laws,” whether these laws refer to three categories or not.

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<sup>40</sup> See US IWS, para. 271.

<sup>41</sup> CAFTA-DR, Art. 16.8.

85. The United States also refers to the CAFTA-DR panel report in *El Salvador – Tariff Treatment for Goods Originating from Costa Rica*.<sup>42</sup> The United States contends that the identification of the measure at issue in the panel request in that case was no more precise than the identification of the measure at issue in the fifth paragraph of the U.S. panel request, and yet the panel found it to meet the requirements of Article 20.6.1.<sup>43</sup>

86. In *El Salvador—Tariff Treatment for Goods Originating from Costa Rica*, the panel request identified the measure at issue as “the non-application by El Salvador of the tariff reduction schedule established in the DR-CAFTA-DR to goods originating in Costa Rica, including goods produced under special export regimes.”<sup>44</sup> While in that case as in this one the requesting Party purported to identify the measure at issue by reference to the obligation at issue, there is an essential difference in context. In *El Salvador—Tariff Treatment for Goods Originating from Costa Rica*, the underlying CAFTA-DR obligation was an obligation to take a particular action, the precise elements of which were prescribed by the CAFTA-DR itself – *i.e.*, reduce tariffs according to a definitive schedule. Therefore, in complaining that El Salvador had failed to take the action that the CAFTA-DR required it to take, Costa Rica conveyed the essence of the matter at issue in a way that the United States did not do in the fifth paragraph of its panel request.

87. The underlying obligation in the present case is defined with much less precision. In contrast to the provision directing a Party to reduce tariffs according to a particular schedule, the obligation in question here is defined by reference to a Party’s own laws of a particular type (without identification of specific laws other than by reference to type of laws), and compliance is a function of not failing to effectively enforce those laws in a particular manner. Unlike the *El Salvador—Tariff Treatment for Goods Originating from Costa Rica* case, here, the bare-bones statement that the responding Party did not do what the CAFTA-DR instructed it to do says next

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<sup>42</sup> CAFTA-DR/ARB/2014/CR-ES/18 (18 November 2014) (cited at US RS, paras. 296-302).

<sup>43</sup> See US RS, para. 299.

<sup>44</sup> *El Salvador — Tariff Treatment for Goods Originating from Costa Rica*, CAFTA-DR/ARB/2014/CR-ES/18, para. 4.42 (18 November 2014).

to nothing about the conduct at issue in the complaint. For this reason, *El Salvador—Tariff Treatment for Goods Originating from Costa Rica* is distinguishable from the present case.

88. We observe that it is a generally accepted rule that matters related to jurisdiction are within the mandate of the adjudicators,<sup>45</sup> who are entitled to consider on their own initiative such issues to satisfy themselves that they have jurisdiction over the dispute at hand. In order to do so, we consider it useful to rely on the principles set out in paragraph 70. Additionally, we agree with the Panel’s finding in *El Salvador—Tariff Treatment for Goods Originating from Costa Rica* that “in order to verify the compliance with the requirements of an arbitral panel request ... it is necessary to analyze the panel request as a whole and not only the specific terms used in the panel request for that matter.”<sup>46</sup> Therefore, even though we consider that the fifth paragraph of the U.S. panel request does not adequately identify the measure or other matter at issue, we find it necessary to examine the request as a whole, bearing in mind the aforementioned principles and findings.

89. We note that the sixth paragraph states that the United States has identified “a number of significant failures by Guatemala to effectively enforce labor laws” and provides three examples of alleged failures. The seventh paragraph asserts that the failures previously identified “constitute a sustained or recurring course of action or inaction” and are “in a manner affecting trade between the Parties.” Like the fifth paragraph, those statements merely paraphrase Article 16.2.1(a) and cannot constitute an identification of the measure or other matter at issue. The eighth and last paragraph merely notes that pursuant to Article 20.6.2, the delivery of the panel request triggers establishment of the panel.

90. Therefore, if any part of the U.S. panel request identifies the measure or other matter at issue, it should be the sixth paragraph. In that paragraph, the United States states that it

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<sup>45</sup> See *Case Concerning the Administration of the Prince von Pless (Preliminary Objection)* (1933) P.C.I.J. Ser. A/B, No. 52, p. 15; Individual Opinion of President Sir A. McNair, *Anglo-Iranian Oil Co. Case (Preliminary Objection)* (1952) I.C.J. Rep., p. 116. See also Appellate Body Report, *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the US – Recourse to Article 21.5 of the DSU by the US*, WT/DS132/AB/RW, para. 36, (adopted 21 November 2001) and Appellate Body Report, *US – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, para. 54, (adopted 26 September 2000).

<sup>46</sup> *El Salvador – Tariff Treatment for Goods Originating from Costa Rica*, CAFTA-DR/ARB/2014/CR-ES/18, para. 4.41 (18 November 2014).

“has identified a number of significant failures by Guatemala to effectively enforce labor laws” and claims that the failures it has identified “includ[e]” three in particular. Those three are:

(i) the failure of Guatemala’s Ministry of Labor to investigate alleged labor law violations; (ii) the failure of the Ministry of Labor to take enforcement action after identifying labor law violations; and (iii) the failure of Guatemala’s courts to enforce Labor Court orders in cases involving labor law violations.

91. In this regard, we note that the U.S. panel request indicates that “[o]n July 30, 2010, the United States requested consultations with the Government of Guatemala to discuss issues and matters related to Guatemala’s obligations under Article 16.2.1(a) of the CAFTA-DR” and that “[c]onsultations meetings were held in Guatemala City, Guatemala, in September and December 2010, but those consultations meetings and numerous other communications failed to resolve this matter.” The panel request also states that “on May 16, 2011, the United States requested a meeting of the Free Trade Commission (Commission) pursuant to Article 20.5.2 of the CAFTA-DR. The Commission meeting occurred on June 7, 2011 ... [t]he meeting of the Commission and subsequent discussions between the two Parties also failed to resolve this matter.” The disputing Parties have also made reference to the procedural history underlying this dispute.<sup>47</sup>

92. The disputing Parties held consultations regarding Guatemala’s obligations under Article 16.2.1(a), prior to the panel request. During the Panel hearing Guatemala was asked if the discussions between 2011 and 2014, *i.e.*, after the panel request was submitted, had “something” to do with the subject matter of the panel request, to which Guatemala replied “[n]ot necessarily ... we received, certainly, notice of some of the claims, of the issues, that are raised in this dispute, but not all of them. We also had noticed [*sic*] of other issues that were not included in these United States’ submissions.”<sup>48</sup>

93. We are aware that the negotiation between the United States and Guatemala regarding labor issues was a long process that could have encompassed broader issues, however,

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<sup>47</sup> See GTM IWS, paras. 13-21 and U.S. IWS, paras. 9-16.

<sup>48</sup> Panel Hearing Transcription, p. 77.

it is difficult to conceive that after the panel request was submitted and three years had elapsed during which the disputing Parties engaged in consultations, the reasons for the request remained unknown or unclear for Guatemala, particularly considering that Guatemala recognizes it had notice of “some of the claims or the issues raised in the dispute.”<sup>49</sup> We consider this declaration relevant in the sense that while Guatemala may not have known with complete detail all the issues raised in the dispute, as a consequence of the consultations held in 2010 regarding its obligations under Article 16.2.1(a), the meeting of the Free Trade Commission, the panel request and the discussions held between 2011 and 2014 after the Panel had already been established, it must have understood the “reasons of the panel request.” We are therefore puzzled by the fact that Guatemala did not raise its concerns regarding the panel request until 2014. Moreover, in order to “address the United States’ concerns with a view to reaching a mutually agreed solution to the case”<sup>50</sup> Guatemala must have understood the United States’ concerns. We consider these facts are clearly “attendant circumstances” that should have a bearing on our overall assessment of whether the panel request identified the measure or other matter at issue.

94. Finally, we turn to the U.S. first submission to confirm the meaning of the panel request. In this regard, the three alleged failures identified in the panel request appear to correspond to two of the categories of claims later elaborated by the United States in its written and oral submissions.<sup>51</sup> As set forth in its submissions, the United States complained about failures of the Ministry of Labor and courts to take enforcement action in response to identified labor law violations.<sup>52</sup> The United States also complained about failures to properly investigate

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<sup>49</sup> *Ibid.*

<sup>50</sup> See GTM IWS, para. 17.

<sup>51</sup> We note that although subsequent submissions cannot cure defects in a panel request, they can nevertheless be used to confirm the meaning of the words used in such request. See Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, para. 220 (adopted 22 February 2012), as modified by Appellate Body Reports WT/DS394/AB/R/WT/DS395/AB/R/WT/DS398/AB/R; Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, para. 418 (adopted 17 December 2010); Appellate Body Report, *European Communities – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, para. 642 (adopted 1 June 2011).

<sup>52</sup> See, for example, US IWS, paras. 19-111; US RS, paras. 70-134.

alleged labor law violations.<sup>53</sup> Therefore, with respect to at least two categories of claims, the United States has identified the measure or other matter at issue. And by alleging a breach of Guatemala’s obligations under Article 16.2.1(a), it indicated the legal basis of its complaint. Accordingly, although the panel request is short on detail, the United States appears to have discharged its pleading obligation under Article 20.6.1 with respect to those two claims.

95. Guatemala argues that even as to the first two claims, the U.S. identification of the measure or other matter at issue is insufficiently precise. For example, Guatemala contends that the request does not identify with particularity the laws that Guatemala is alleged to have failed to effectively enforce.<sup>54</sup>

96. We disagree with Guatemala. While the U.S. identification of the failures about which it complains is short on detail, Article 20.6.1 does not require a particular level of detail. It merely requires an “identification of the measure or other matter at issue.” We find that the panel request satisfies that requirement with respect to the claims concerning enforcement action in response to violations, and investigation of alleged violations.

97. The request is sufficiently clear for Guatemala to have understood that the object of the U.S. complaint was a failure by Guatemala to respond appropriately to particular circumstances where applicable law allegedly required it to act. In our view, Article 20.6.1 did not require the United States to identify the specific laws in the panel request for it to identify the “measure or other matter at issue.” We also note that in *El Salvador—Tariff Treatment for Goods Originating from Costa Rica* the Panel dismissed a similar argument by El Salvador. In that case, El Salvador argued that there was a specific written measure that incorporated the tariff treatment given to imports from Costa Rica and that that measure should have been identified by Costa Rica if it was challenging compliance with the applicable tariff. In that case, the Panel determined that “[t]o the extent that a measure identified in its claim is a conduct attributable to

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<sup>53</sup> See US IWS, paras. 112-91; US RS, paras. 135-229.

<sup>54</sup> See PRR, paras. 63-65, 81-97; GTM IWS, paras. 29-40; GTM RS, paras. 443-469.

another party and reflects a specific content in light of the complaint as a whole, a panel request for an arbitral panel should fulfill the requirements of Article 20.6.1.”<sup>55</sup>

98. Guatemala’s substantial delay in objecting to the precision of the identification of the matter at issue in the U.S. panel request should also be considered as an “attendant circumstance” which bears important weight in our conclusion that the panel request complies with the requirement of Article 20.6.1, with respect to the U.S. claim regarding enforcement action for violations of law and its claim regarding investigations of alleged violations. In this regard, Guatemala was expected to seasonably and promptly call to the attention of the United States any alleged deficiencies in the U.S. panel request, particularly if it considered a specific claim to have been articulated with insufficient clarity or precision.<sup>56</sup>

99. This brings us to the third claim articulated by the United States in its submissions – *i.e.*, its claim that Guatemala also failed to “register unions or institute conciliation processes within the time required by law.” Unlike the other two claims, we see no language in the U.S. panel request that identifies this third category of conduct as a measure or other matter at issue. As that claim came to be elaborated over the course of the proceeding, it concerns conduct that is not covered by any of the three failures set forth in the sixth paragraph of the U.S. panel request. That is, the complained-of conduct is not a failure to investigate alleged labor law violations; nor is it a failure by the Labor Ministry to take enforcement action after identifying labor law violations; nor is it a failure of Guatemala’s courts to enforce Labor Court orders.

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<sup>55</sup> “The requirement established in the last paragraph of Article 20.6.1 is merely to identify a measure that, according to Article 20.2 (b), a party “considers” it may be incompatible with the Treaty. This last provision grants the faculty to the complaining party to initiate the dispute settlement procedure on the basis of its appreciation of what it “considers” is the measure causing it concern. To the extent that a measure identified in its claim is a conduct attributable to another party and reflects a specific content in light of the complaint as a whole, a panel request for an arbitral panel should fulfill the requirements of Article 20.6.1, last paragraph. However, compliance with the requirement of identification is without prejudice of the success that an identified measure may have with regard to the demonstration of the merits of the case.” *El Salvador – Tariff Treatment for Goods Originating from Costa Rica*, CAFTA-DR/ARB/2014/CR-ES/18, para. 4.57 (18 November 2014).

<sup>56</sup> “The [] principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member ... so that corrections, if needed, can be made to resolve disputes.” Appellate Body Report, *US – Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/AB/R, para. 166 (adopted 20 March 2000).

100. If the U.S. claim of failure to register unions or institute conciliation processes within the time required by law could be considered covered by the U.S. panel request at all, it would have to be by virtue of the word “including” at the beginning of the list of identified failures by Guatemala to effectively enforce labor laws. Article 20.10.4 of the CAFTA-DR contains a clear mandate “to examine ... the matter referenced in the panel request.” If we were to interpret broadly the term “including,” it would sweep in measures not expressly identified and would imply an authorization to a complainant to include new claims in its pleadings. Such interpretation would leave uncertain the scope of jurisdiction of the Panel, which in turn would hamper the respondent’s due process right to understand the matter with respect to which a violation is being alleged.<sup>57</sup>

101. As indicated above, we also agree with the principle that defects in a panel request cannot be “cured” in a subsequent submission of a Party to a dispute. The time frames within the CAFTA-DR dispute resolution process are short, and a Party complained against should not be deprived of any notice of the matter at issue to which it is entitled in order to begin preparing its defense.

102. For the foregoing reasons, we conclude that the alleged failure of Guatemala to register unions or institute conciliation processes within the time required by law was not a measure or other matter at issue identified in the U.S. panel request and therefore is outside our terms of reference. Before leaving this issue, however, we make two additional observations.

103. We recall our earlier observation that Guatemala had ample opportunity to seek clarification from the United States if it considered the identification of the measure or other matter at issue to be insufficiently precise. In the case of registration of unions and conciliation

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<sup>57</sup> We also note that the WTO Appellate Body and panels have found, phrases like “including” or “among others” that are meant to keep a list of identified measures open-ended fail to bring within a panel’s terms of reference measures that are not expressly identified in a panel request. See Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, para. 90 (adopted 16 January 1998) (“the convenient phrase, ‘including but not limited to’, is simply not adequate to ‘identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly’ as required by Article 6.2 of the DSU”); Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / and Corr.1, Annex F-1, para. 12 (adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R) (rejecting suggestion that phrase “among others” sweeps in measures other than those expressly listed in panel request).

processes, however, the problem is not a potential lack of precision, but the failure to identify the measure or other matter at issue at all. Guatemala hardly could have asked the United States to elaborate on its claim regarding union registration and institution of conciliation processes when the panel request did not even identify a failure in this regard as a measure or other matter at issue.

104. Furthermore, as the U.S. claim regarding union registration and institution of conciliation processes was elaborated over the course of this proceeding, we noted a concern regarding the temporal dimensions of the claim. The United States alleged three instances of failure to timely register unions. One such instance (related to the Mackditex company) involved acts or omissions starting in November 2010<sup>58</sup> – approximately three months after the United States requested consultations with Guatemala in the present dispute and nine months before it submitted its panel request. The other two instances (related to Koa Modas and Serigrafía) involved acts or omissions starting in December 2011 and August 2012, respectively,<sup>59</sup> – in both cases, *after* the United States submitted its panel request.

105. Therefore, as of the date the United States submitted its panel request, there was *only one* instance of alleged failure by Guatemala to timely register a union, according to the claim as it subsequently evolved.

106. In sum, we conclude that the U.S. claims regarding Guatemala's alleged failure to secure compliance with court orders and its alleged failure to conduct investigations and impose penalties are within our terms of reference. However, the U.S. claim regarding Guatemala's alleged failure to timely register unions and institute conciliation processes is outside the scope of the terms of reference and thus, beyond our jurisdiction.

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<sup>58</sup> See US IWS, paras. 202-06; US RS, paras. 240-42.

<sup>59</sup> See US IWS, paras. 207-11 and US RS, paras. 243-44 (Koa Modas); US IWS, paras. 212-15 and US RS 245-46 (Serigrafía).

### III. Interpretive Issues

107. We turn now to the merits of the first two claims (*i.e.*, the claims of failure to secure compliance with court orders and failure to conduct proper investigations and impose penalties). We start by considering the text of CAFTA-DR Article 16.2.1(a) in context and in light of the Agreement's object and purpose. In doing so, we will address several distinct interpretative questions, as follows:

- a. Which laws are encompassed by the obligation to not fail to effectively enforce "labor laws"? In particular, does the obligation pertain to laws susceptible to enforcement by judicial action, and not just to laws that are enforced by executive action?
- b. What is required for a Party not to fail to "effectively enforce" its labor laws?
- c. What is required for a failure to effectively enforce labor laws to constitute a "course" of action or inaction?
- d. What is required for a course of action or inaction to be "sustained or recurring"?
- e. What must be shown to establish that a failure to enforce labor laws through a sustained or recurring course of action or inaction is "in a manner affecting trade between the Parties"?
- f. How does subparagraph (b) of Article 16.2.1 relate to subparagraph (a)? In particular, is it a complaining Party's burden to show that the complained-of conduct is not the result of a "reasonable exercise of . . . discretion" or "a *bona fide* decision regarding the allocation of resources"? Or, is it a responding Party's burden to show that the complained-of conduct, even if otherwise contrary to subparagraph (a), is the result of a "reasonable exercise of . . . discretion" or "a *bona fide* decision regarding the allocation of resources"?
- g. What temporal limits are there on the claims within our terms of reference?

108. In considering these questions we address the submissions of the disputing Parties. The Panel also reviewed the written views of non-Parties (in particular, certain non-governmental entities) that it received. The Panel is required by Rule 62 to consider such written views only to the extent that they address issues of fact and law directly relevant to any legal or factual issue under its consideration. The written views of non-governmental entities tended to focus on the institutional, economic, social, and political context of the present dispute. Such views, while informative, were not directly relevant to the particular issues of legal interpretation that the Panel was required to decide. However, three non-governmental entities did submit views with respect to issues of legal interpretation faced by the Panel. The Cámara del Agro submitted the view that the Panel should take into account the weight, size and significance of employers at which alleged failures to effectively enforce labor laws had taken place within their economic sectors in determining whether any course of action or inaction was in a manner affecting trade.<sup>60</sup> The trade union federations, Confederation of Labor Unity of Guatemala (“**CUSG**”) and Labor Federation of Banking Employees and State Services (“**FESEBS**”), submitted that in accordance with Article 31 of the Vienna Convention on the Law of Treaties (“**VCLT**”), the Panel can take into account relevant rules of international law in interpreting and applying the CAFTA-DR, and that such relevant rules of international law include the International Covenant on Economic, Social and Cultural Rights, Conventions 87 and 98 of the International Labour Organization (“**ILO**”), and the American Convention on Human Rights, all of which Guatemala has ratified.<sup>61</sup> CUSG and FESEBS also submitted that the reduction of labor standards affects trade within the meaning of Article 16.2.1(a) because it confers artificial competitive advantages.<sup>62</sup> The Panel considers each of these arguments at relevant junctures in its analysis below.

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<sup>60</sup> Cámara del Agro (Chamber of Agriculture) Submission, Guatemala City, Guatemala (April 27, 2015), p.8.

<sup>61</sup> CUSG and FESEBS Submission, Guatemala City, Guatemala (April 27, 2015), pp. 1-2.

<sup>62</sup> *Ibid*, p.6.

**A. “Labor Laws”**

**1. The Disputing Parties’ Arguments**

109. Guatemala raises a question concerning the scope of the obligation under CAFTA-DR Article 16.2.1(a). In particular, Guatemala argues that the obligation that a Party “not fail to effectively enforce its labor laws” pertains only to conduct of the Party’s executive branch and, therefore, does not pertain to acts of the judiciary or other non-executive bodies. It bases this argument on the definition of “labor laws” in Article 16.8, which refers to “statutes or regulations, or provisions thereof,” that are directly related to specified “internationally recognized labor rights.” The term “statutes or regulations” is defined in turn to mean, with respect to Guatemala, “laws of its legislative body or regulations promulgated pursuant to an act of its legislative body that are enforceable by action of the executive body.”

110. Guatemala contends that the phrase “enforceable by action of the executive body” in the definition of “statutes or regulations” means that its obligation to “not fail to effectively enforce its labor laws” is addressed only to “action of the executive body.”<sup>63</sup> It finds support for this view not only in the definitions of “labor laws” and “statutes or regulations,” but also in the context provided by Article 16.2.1(b) which, it states, refers to discretionary actions of a type taken by a Party’s executive branch agencies.<sup>64</sup> Guatemala also purports to find support in other provisions in CAFTA-DR Chapter 16 that refer expressly to acts of a Party’s judiciary.<sup>65</sup>

111. Based on the foregoing understanding of the scope of Article 16.2.1(a), Guatemala argues that U.S. claims regarding conduct of Guatemala’s Public Ministry and its labor courts are not covered by the obligation.<sup>66</sup>

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<sup>63</sup> See GTM IWS, paras. 128 and 140.

<sup>64</sup> See GTM IWS, para. 144.

<sup>65</sup> See GTM IWS, paras. 145-50.

<sup>66</sup> See GTM IWS, paras. 180-92, 399-400.

112. The United States disagrees with Guatemala's interpretation of the scope of Article 16.2.1(a). According to the United States, the phrase "enforceable by action of the executive body" in the definition of "statutes or regulations" serves only to determine whether a particular measure qualifies as a statute or regulation and, hence, a "labor law." However, once a measure so qualifies, according to the United States, any failure to effectively enforce the measure, regardless of whether the failure is attributable to executive bodies or other entities, may give rise to a breach of Article 16.2.1(a).<sup>67</sup>

113. The United States argues that nothing in the text of Article 16.2.1(a) limits the kind of conduct that could constitute a failure to effectively enforce labor laws.<sup>68</sup> Moreover, it contends that context evidences the Parties' recognition that enforcement of labor laws is something that may be accomplished (or neglected) not only by executive bodies, but by other organs of the State as well. For example, Article 16.3 refers to "administrative, quasi-judicial, judicial, or labor tribunals" playing a role in the enforcement of a Party's labor laws.<sup>69</sup> Accordingly, the United States concludes that its claims related to the conduct of Guatemala's Public Ministry, its labor courts, and other allegedly non-executive branch entities fall within the scope of Article 16.2.1(a).

## **2. Analysis of the Panel**

114. Having considered the Parties' arguments and construed the text of Article 16.2.1(a) in accordance with the ordinary meaning of its terms in context and in light of the CAFTA-DR's object and purpose, we conclude that the obligation is not limited to conduct of Guatemala's executive body.

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<sup>67</sup> See US RS, paras. 40-46.

<sup>68</sup> See US RS, para. 40.

<sup>69</sup> See US RS, para. 43.

115. The definitions in Article 16.8 merely prescribe the characteristics a statute or regulation must have in order to qualify as a “labor law.” Among other characteristics, the statute or regulation must be “enforceable by action of the executive body.” “Enforceable” means “[c]apable of being enforced.”<sup>70</sup> Thus, for a statute or regulation to be “enforceable by action of the executive body,” all that is required is that it be capable of being enforced by action of the executive body. This does not exclude the possibility of participation of judicial or other bodies in the law’s enforcement.

116. Accordingly, if a statute or regulation is capable of being enforced by action of the executive body, and if it meets the other definitional criteria, then it is a “labor law” for purposes of all of the provisions of CAFTA-DR Chapter 16. With respect to Article 16.2.1(a), in particular, a Party then has the obligation to “not fail to effectively enforce” that law “through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties.” Article 16.2.1(a) prescribes no limits on the kind of conduct or omission that could constitute a failure to effectively enforce such a law and thereby breach a Party’s obligation. Nor does the requirement that the law be capable of enforcement by the executive body mean that action or inaction by other bodies will not trigger such liability.

117. Conversely, Article 16.2.1(a) does not require that action be taken by an executive organ in order to achieve effective enforcement. If a Party achieves effective enforcement of its labor laws through conduct of its judiciary or other non-executive branches of the State, the mere fact that it has not relied on the executive body does not cause it to be in breach of Article 16.2.1(a).

118. Context supports our conclusion. For example, Article 16.3.1 provides that “[e]ach Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to tribunals for the enforcement of the Party’s labor laws.” It goes on to specify that “[s]uch tribunals may include administrative, quasi-judicial, judicial, or labor tribunals, as provided in the Party’s domestic law.” In other words, “tribunals” may include “judicial” or other non-executive organs, and the CAFTA-DR Parties recognized

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<sup>70</sup> *The Oxford English Dictionary*, 2<sup>nd</sup> ed, *sub verbo* “enforceable”.

that such “tribunals” play an essential role in the “enforcement” of labor laws – so much so, that they required a Party to provide “appropriate access” to such tribunals for “the enforcement of the Party’s labor laws.” The definition of “labor laws” in article 16.8 applies equally to Article 16.3.1. A definition of “labor laws” that extended only to laws enforced by executive organs would render Article 16.3.1 nonsensical.

119. Given the disputing Parties’ acknowledgement of the role of tribunals in the enforcement of labor laws, we cannot construe Article 16.2.1(a) as excluding the possibility of a failure of effective enforcement through the action or inaction of such tribunals.

120. Our conclusion also is supported by the CAFTA-DR’s object and purpose. As relevant here, that object and purpose include a commitment to “protect, enhance, and enforce basic workers’ rights,”<sup>71</sup> to “promote conditions of fair competition in the free trade area,”<sup>72</sup> and to “strive to ensure that . . . the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by [each Party’s] law.”<sup>73</sup> These commitments are consistent with an interpretation of Article 16.2.1(a) that does not draw distinctions based on the identity of the enforcing body. By contrast, we fail to see how an interpretation that does draw such distinctions and that excludes certain actions from the Article 16.2.1(a) obligation based on the identity of the enforcing body would advance the objectives of protecting, enhancing, and enforcing basic workers’ rights, promoting conditions of fair competition, or striving to ensure the protection of internationally recognized labor rights. As we see it, such an interpretation would have the very opposite effect, as it would shelter from the obligation conduct that, as discussed above, the Parties unquestionably understood to be relevant to the enforcement of labor laws.

121. For all of the foregoing reasons, we conclude that Article 16.2.1(a) requires a Party to “not fail to effectively enforce its labor laws,” regardless of which organs of the State – whether executive or non-executive – are responsible for enforcement.

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<sup>71</sup> CAFTA-DR, Preamble.

<sup>72</sup> CAFTA-DR, Art. 1.2.1(c).

<sup>73</sup> CAFTA-DR, Art. 16.1.1.

**B. “Not Fail to Effectively Enforce”**

122. This dispute calls for us to examine whether Guatemala has complied with its obligation under Article 16.2.1(a) of the CAFTA-DR and therefore to interpret the phrase “*not fail to effectively enforce*” contained therein.

**1. The Disputing Parties’ Arguments**

123. The United States submits that “enforce” means to “compel,” such as to compel obedience or to require the operation, observance, or protection of law.”<sup>74</sup> Additionally, it considers that the terms “effectively” and “effective” mean “with great effect” and “productive of results.”<sup>75</sup> Therefore, according to the United States, in order to “effectively enforce” a law, “a government must compel compliance with the law in a way that produces results, putting an end to the conduct that was contrary to the law.”<sup>76</sup>

124. Regarding the term “fail”, the United States submits that it means “to “miss attainment” or to “fall short” of the obligatory outcome, or to “neglect” the obligation.”<sup>77</sup> Overall, in the view of the United States, the obligation established by Article 16.2.1(a) “requires each Party to follow through with its commitment to put an end to conduct contrary to law; it must attain compliance.”<sup>78</sup>

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<sup>74</sup> US IWS, para. 29.

<sup>75</sup> US IWS, para. 29.

<sup>76</sup> US IWS, para. 29. The United States considers that “effective enforcement is more than just taking action.” See Panel Hearing Transcription, pp. 6 and 18.

<sup>77</sup> US IWS, para. 29.

<sup>78</sup> US IWS, para. 29. In this sense, the United States argues that the Parties to the CAFTA-DR committed themselves to “compel compliance with its labor laws so as to enforce those laws with substantial effect or result”, consequently when a Party does not remediate labor laws violations it fails to “effectively enforce them”. See US IWS, para. 32, US RS, para. 38 and footnote 186 to paragraph 144 of the US RS.

125. Guatemala contends that the ordinary meaning of “enforce” is to “[c]ompel observance of or compliance with ... to [c]ompel the occurrence or performance of; impose (a course of action) on a person ... [c]ompel the observance of (a law, rule, practice, etc.); support (a demand, claim, etc.) by force”.<sup>79</sup> Regarding the term “effectively”, Guatemala considers it to mean “[c]oncerned with or having the function of accomplishing or executing”.<sup>80</sup> Therefore, Guatemala considers that under Article 16.2.1(a) “a Party may not to [*sic*] neglect to compel observance of or compliance with its labor laws in a manner that accomplishes or executes.”<sup>81</sup>

## 2. Analysis of the Panel

126. We begin our analysis with the text of the provision at issue. Article 16.2.1(a) of the CAFTA-DR provides:

A Party shall *not fail to effectively enforce* its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement. (Emphasis added)

This article establishes an obligation in a negative form, *i.e.*, what the parties “shall not” do.

127. We agree with the disputing Parties that the ordinary meaning of the term “enforce” is to “compel compliance or obedience.” The ordinary meaning of the term “fail” is “to be or become deficient in; to fall short in performance or attainment.”<sup>82</sup>

128. Regarding the term “effectively”, there is common ground between the disputing Parties; the United States refers to the phrases “productive of results” or “with great effect”, and

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<sup>79</sup> GTM IWS, para. 122.

<sup>80</sup> GTM IWS, para. 122.

<sup>81</sup> GTM IWS, para. 123.

<sup>82</sup> *The Oxford English Dictionary*, 2<sup>nd</sup> ed, *sub verbo* “fail”.

Guatemala to the terms “accomplishing” or “executing.” However, there is a relevant nuance in the interpretation offered by the United States, which is that in its view “the obligation to ‘not fail’ to effectively enforce requires each Party to follow through with its commitment to put an end to conduct contrary to law; it must attain compliance.”<sup>83</sup> On its face, this understanding of the obligation appears to equate not failing to effectively enforce with attaining perfect compliance. If any instances of non-compliance are allowed to persist, then a Party has not achieved effective enforcement; the instances of non-compliance, in the view of the United States, *ipso facto* imply a failure to effectively enforce labor laws. Guatemala does not seem to share that interpretation.

129. With the submissions of the disputing parties in mind, the Panel now turns to consider the relationship between effective enforcement and compliance. Clearly, there is some connection.

130. The word “effectively” must be given a distinct meaning from the word “enforce.”<sup>84</sup> That the CAFTA-DR drafters modified the word “enforce” by placing the word “effectively” before it reflects an understanding that inherent to enforcement is an element of discretion (an understanding also reflected in paragraph (b) of Article 16.2.1) and that, accordingly, there may be different levels of enforcement. In recognition of that fact, merely requiring that a Party enforce its labor laws would not have accomplished the labor-related objectives articulated in the CAFTA-DR. Rather, to fulfill those objectives, the drafters required that a Party not fail to *effectively* enforce its labor laws. Under customary rules of treaty interpretation these terms must of course be interpreted in their context and in light of the object and purpose of the CAFTA-DR.

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<sup>83</sup> US IWS, para. 29.

<sup>84</sup> In this respect, the Appellate Body has stated that “[i]n light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to ‘read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.’” Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, para. 81 (adopted 12 January 2000). See also Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, para. 81 (adopted 12 January 2000). “One of the corollaries of the ‘general rule of interpretation’ in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.” Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, p. 23 (adopted 20 May 1996).

131. The context of the word “effectively” includes Article 16.1.1, which expresses the Parties’ shared commitment to “strive to ensure that [the] labor principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by [each Party’s] law.” It also includes the CAFTA-DR Preamble, which expresses the Parties’ resolve to “protect, enhance, and enforce basic workers’ rights.” This context supports an interpretation of Article 16.2.1(a), and in particular the term “effectively enforce,” as requiring enforcement in a manner that promotes the protection by law of internationally recognized labor rights.

132. But that still leaves open the question of the relationship between effective enforcement and compliance – in particular, the level of compliance that must be achieved in order to conclude that enforcement is promoting the protection of internationally recognized labor rights, and how a Party or a dispute settlement Panel is to know whether that level of compliance has been achieved.

133. Answering that question ultimately will depend on the facts and circumstances of a given case. But the text and context of Article 16.2.1(a) do lead us to certain generally applicable propositions.

134. **First**, effective enforcement generally will be evident in results – in particular, compliance by employers with a Party’s labor laws as defined in CAFTA-DR Article 16.8. As the United States notes, “effectively” can mean “productive of results.” Guatemala similarly refers to effective enforcement as being “*in a manner that accomplishes or executes.*”<sup>85</sup> We agree with the disputing Parties that production of results is the quality that makes enforcement action effective. Moreover, the context – notably, the objective of ensuring that internationally recognized labor rights are protected by law – makes it obvious that the result to be produced is employer compliance with labor laws.

135. **Second**, since effective enforcement of labor laws is enforcement that results in employer compliance with such laws, effective enforcement generally will require that when enforcement authorities find an employer to be out of compliance they will take appropriate

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<sup>85</sup> GTM IWS, para. 123.

action to bring it into compliance. We believe this second proposition follows logically from the first.

136. **Third**, if a Party is effectively enforcing its labor laws, its enforcement authorities will both detect and remedy non-compliance with the law sufficiently that employers will reasonably expect that other employers will comply with the law. The absence of that expectation will tend to suggest a failure of effective enforcement.

137. **Lastly**, individual instances of non-compliance do not *ipso facto* prove that enforcement is ineffective. A given case of employer non-compliance in the face of inaction or deficient action by enforcement authorities certainly could indicate a failure of effective enforcement. However, this is not necessarily always the case. For example, an employer may be non-compliant simply because it is not aware of its legal obligations, through no fault of enforcement authorities. Further, there may be cases where the institutions responsible for the enforcement of labor laws impose significant fines or even criminal sanctions, without ultimately achieving full compliance that remedies the violation committed by a recalcitrant employer. There may be other cases in which an employer fails to comply with certain legal obligations, but the trajectory of its conduct demonstrates an overall record of improving compliance such that the authorities exercise their discretion by not penalizing every single instance of non-compliance. Conversely, high rates of compliance do not always prove that there is effective enforcement. A law that demands little of its subjects seldom requires enforcement. The effectiveness of enforcement may only be evident where non-compliance is likely in its absence.

138. In our view, interpreting the phrase “effectively enforce” as requiring a Party to achieve perfect compliance by each and every employer would impose an unreasonable burden not mandated by Article 16.2.1(a). Under such a standard, it is hard to imagine that any Party ever would be able to comply with its obligations under the Agreement.

139. For the above reasons, we consider that the phrase “*not fail to effectively enforce*” in Article 16.2.1(a) imposes an obligation to compel compliance with labor laws (or, more precisely, not neglect to compel or be unsuccessful in compelling such compliance) in a manner that is sufficiently certain to achieve compliance that it may reasonably be expected that

employers will generally comply with those laws, and employers may reasonably expect that other employers will comply with them as well.

**C. “Sustained or Recurring Course of Action or Inaction”**

140. We turn now to examine the phrase “sustained or recurring course of action or inaction” as used in Article 16.2.1(a) of the CAFTA-DR.

**1. The Disputing Parties’ Arguments**

141. The United States submits that the ordinary meaning of the term “sustained” is “maintained at length without interruption, weakening, or losing in power or quality: prolonged, unflagging.”<sup>86</sup> Consequently, a “sustained course” is “a consistent or ongoing course of action or inaction.”<sup>87</sup> Guatemala also considers that “sustained” means “[c]ontinuing for an extended period or without interruption ... [t]hat has been sustained; esp. maintained continuously or without flagging over a long period.”<sup>88</sup>

142. Regarding the term “recurring”, the United States contends that it means “coming or happening again” ... “‘to recur’... means ‘to happen, take place or appear again: occur again usu. after a stated interval or according to some regular rule; occur or appear again; periodically, or repeatedly’.”<sup>89</sup> Additionally, the United States maintains, this terms implies the occurrences are related.<sup>90</sup> For the United States, a recurring course of action differs from a sustained course of

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<sup>86</sup> US IWS, para. 88.

<sup>87</sup> *Ibid.*

<sup>88</sup> GTM IWS, para. 130.

<sup>89</sup> US IWS, para. 89.

<sup>90</sup> US IWS, para. 89.

action or inaction in the interruption between occurrences.<sup>91</sup> On the other hand, Guatemala also submits that the term “recur” means to “[o]ccur or appear again, periodically, or repeatedly.”<sup>92</sup>

143. Finally, for the United States the term “course” means “a “manner of conducting oneself” or a “way of acting: behavior.”<sup>93</sup> Therefore, “a course of action can be understood as conducting oneself in an active or affirmative manner, whereas a course of inaction is conducting oneself without acting, or through omission.”<sup>94</sup> According to the United States, these meanings as well as with those of the term “recurring” “indicate a degree of relatedness among the actions or inactions that makes up the course.”<sup>95</sup>

144. Guatemala on the other hand argues that the term “course” means “[h]abitual or regular manner of procedure; custom, practice ... [a] line of conduct, a person’s method of proceeding” and “[a] procedure adopted to deal with a situation,” “[t]he route or direction followed by a ship, aircraft, road, or river” and “[t]he way in which something progresses or develops.”<sup>96</sup> For Guatemala, the use of the words “course of” before the terms “action or inaction” “reinforces the notions of repetition and consistency that are conveyed by the terms “sustained” and “recurring.”<sup>97</sup> It implies “a composite obligation on the relevant party which occurs only after a series of acts or inactions take place establishing a pattern as opposed to isolated individual unrelated acts as such.”<sup>98</sup> Moreover, Guatemala considers that Article

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<sup>91</sup> US IWS, para. 89.

<sup>92</sup> GTM IWS, para. 130.

<sup>93</sup> US IWS, para. 87.

<sup>94</sup> US IWS, para. 87.

<sup>95</sup> US RS, para. 51.

<sup>96</sup> GTM IWS, para. 134.

<sup>97</sup> GTM IWS, para. 134.

<sup>98</sup> GTM RS, para. 107.

16.2.1(a) “is intended to capture a deliberate policy of action or inaction adopted by the relevant Party.”<sup>99</sup>

## **2. Analysis of the Panel**

145. The word “sustained” implies that something is consistent and conveys the notion of continuity over time, whereas the word “recurring” implies “repetition.” The use of the disjunctive “or” implies that the course can be either sustained or recurring.

146. This seems to be the disputing Parties’ understanding of “sustained” and “recurring” as well, although we take note that according to the United States neither “sustained” nor “recurring” requires conduct to occur over a “prolonged period.”<sup>100</sup>

147. Both terms are used to qualify the subsequent terms “course of action or inaction.” Therefore, not every failure to effectively enforce labor laws through a course of action or inaction will be subject of a challenge under Article 16.2.1(a), but only a failure to effectively enforce through a course of action or inaction that is “sustained” or “recurring.”

148. Regarding the term “course”, we observe that the disputing Parties put forward several definitions that vary according to the context. There is common ground between them that a “course” involves connected “behavior”, with Guatemala referring to a course as a “line of conduct or behavior” and the United States referring to it as “a way of acting: behavior.” We agree with the disputing Parties in this respect. A “sustained or recurring course of action or inaction” must mean more than merely sustained or recurring actions or inactions. Otherwise the term “course” would be redundant. The use of the term “course” indicates that actions or instances of inaction must be connected in the way that a “line of conduct or behavior” is connected. The linkage constituting a line of conduct is manifest in sufficient similarity of behavior over time or place to indicate that the similarity is not random, but rather connected. In

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<sup>99</sup> GTM IWS, para. 135; Panel Hearing Transcription, pp. 34 and 113.

<sup>100</sup> US RS, para. 48.

the context of Article 16.2.1(a) the relevant behavior is of course that of institutions responsible for enforcement of labor laws. When read together with the meanings of “sustained” and “recurring”, we therefore consider a “sustained or recurring course of action or inaction” to be composed of (i) a repeated behavior which displays sufficient similarity, or (ii) prolonged behavior in which there is sufficient consistency in sustained acts or omissions as to constitute a line of connected behavior. By contrast, where there are isolated instances of conduct with no apparent link among them other than the fact that each such instance may be a failure to effectively enforce labor laws, there is no “line” and hence no “course” of action or inaction. A particular omission might be sustained over a period of several months and a particular action might recur twice. However, in order for such an omission or action to be a “sustained or recurring course,” a line of connected behavior must be discernible. Otherwise, they would simply be sustained or recurring actions or inactions.

149. Apart from the existence of a consistency that distinguishes a course of action or inaction from a random collection of actions or inactions, Guatemala argues that the existence of a course implies deliberateness or intentionality on the part of the Party concerned. We disagree. Giving Article 16.2.1(a) such an interpretation would read alien elements into the text, which would clearly contradict the applicable rules of interpretation.<sup>101</sup> We agree with the WTO Appellate Body that “the principles of treaty interpretation ‘neither require nor condone’ the importation into a treaty of ‘words that are not there’ or ‘concepts that were not intended.’”<sup>102</sup>

150. Paragraph (b) and the overall structure of Article 16.2.1 support our conclusion. As mentioned above, paragraph (b) reflects a recognition that governments may have constrained choices to make with respect to investigatory, prosecutorial, regulatory and compliance matters as well as to the allocation of resources on labor matters considered to have higher priorities. Therefore, paragraph (b) treats as compliant a course of action or inaction that otherwise would

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<sup>101</sup> “Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretive process: ‘interpretation must be based above all upon the text of the treaty.’ The provisions of the treaty are to be given their ordinary meaning in their context.” Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp. 11-12 (adopted 1 November 1996).

<sup>102</sup> Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, para. 45 (adopted 16 January 1998).

not be compliant, provided that a failure to effectively enforce labor laws results from a reasonable exercise of discretion or a *bona fide* decision regarding the allocation of resources.

151. The purpose of paragraph (b) would be defeated if a course of action or inaction ordinarily contrary to paragraph (a) necessarily reflected an intent by a Party not to effectively enforce its labor laws. Put another way, it must be possible for there to be a course of action or inaction that ordinarily would be contrary to paragraph (a) but that may be justified (*i.e.*, rendered not contrary to paragraph (a)) by virtue of the factors described in paragraph (b). But if, as Guatemala argues, conduct ordinarily contrary to paragraph (a) required an intention to fail to effectively enforce a Party's labor laws, then paragraph (b) would become irrelevant, since it would be impossible for a Party's conduct to reflect such intent and yet also reflect the intent described in paragraph (b). This anomaly further supports our rejection of the argument that a "course" of action or inaction implies intentionality.

152. To summarize, we consider the phrase "*sustained or recurring course of action or inaction*" in Article 16.2.1(a) to mean a line of connected, repeated or prolonged behavior by an enforcement institution or institutions. The connection constituting such a line of behavior is manifest in sufficient similarity of behavior over time or place to indicate that the similarity is not random. A "sustained or recurring course of action or inaction" is thus composed of (i) a repeated behavior which displays sufficient similarity, or (ii) prolonged behavior in which there is sufficient consistency in sustained acts or omissions as to constitute a line of connected behavior by a labor law enforcement institution, rather than isolated or disconnected instances of action or inaction. Whether a Party meets its burden of proving the existence of a sustained or recurring course of action or inaction should be assessed according to the circumstances of a particular case. We turn to the question of how a disputing Party may prove sufficient similarity to demonstrate a line of connected behavior by enforcement institutions at various junctures in Part IV below.

**D. “In a Manner Affecting Trade Between the Parties”**

**1. “In a Manner Affecting Trade”**

**a. The Disputing Parties’ Arguments**

153. The United States submits that the phrase “in a manner affecting trade” must be interpreted according to the ordinary meaning of the words in context and in light of the object and purpose of the CAFTA-DR.<sup>103</sup> With respect to the ordinary meaning of the relevant terms, the United States refers the Panel to English language dictionary definitions of the terms “manner”, “affecting” and “trade.” It proposes that “manner” means “a way of doing something or the way in which something is done or happens”, that “affecting” means “to influence; make a material impression” or “to change”, and that “trade” includes “commerce” or “buying and selling or exchange of commodities for profit, especially between nations.”<sup>104</sup> The United States submits that this meaning of “trade” is a broad concept that comprises cross-border economic activity generally and competition between and among cross-border actors.<sup>105</sup>

154. The United States also refers to WTO dispute settlement panel and Appellate Body interpretations of the term “affecting [the] internal sale, offering for sale, purchase, or transportation” in Article III:4 of the GATT 1994, and the term “affecting trade” in Article I:1 of the General Agreement on Trade in Services (GATS).<sup>106</sup> The United States observes that in these instances the term “affecting” has been given a broad scope of application, so as to include measures that might adversely affect conditions of competition between domestic and imported

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<sup>103</sup> US IWS, para. 97, referring to Article 31 of the VCLT, United Nations Treaty Series, Vol. 1155, p. 331 (May 23, 1969).

<sup>104</sup> US IWS, paras. 97 and 98.

<sup>105</sup> US IWS, para. 98.

<sup>106</sup> US IWS, paras. 100 and 101, citing GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833-7S/60 (adopted 23 October 1958); Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 220 (adopted 25 September 1997); Appellate Body Report, *US – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW (adopted 29 January 2002); Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, (adopted 25 September 1997).

products on the internal market for the purposes of GATT 1994 Article III:4, and any measure bearing upon conditions of competition in the supply of a service, for the purposes of GATS Article I:1. According to the United States, a similar reading of “in a manner affecting trade” is supported by the context of Article 16.2.1 and by the purpose of the CAFTA-DR. The United States points to Article 1.2 of the Agreement, which includes among the objectives of the Agreement “to promote conditions of fair competition in the free trade area.”<sup>107</sup>

155. In light of all this, the United States submits that “in a manner affecting trade” means “that has a bearing on, influences or changes cross-border economic activity, including by influencing conditions of competition within and among the CAFTA-DR Parties.”<sup>108</sup>

156. The United States also contends that an econometric analysis of the effects on trade of a failure to effectively enforce labor laws is not required by the text, context or object and purpose of the CAFTA-DR<sup>109</sup> and reiterates that interpreting Article 16.2.1(a) as prohibiting a Party from influencing conditions of competition between the CAFTA-DR Parties through a failure to effectively enforce labor laws is consistent with the objective in Article 1 to “promote conditions of fair competition in the free trade area.”<sup>110</sup> Finally, the United States submits that there is no reason to limit a “conditions of competition” analysis to situations in which a comparison between the treatment of domestic and imported products is required.<sup>111</sup>

157. Guatemala proposes, also referring the panel to English language dictionary definitions, that the term “manner” means “the way in which something is done or happens; a method of action; a mode of procedure”, that the term “affect” means “to influence, make a material impression upon” and to “have an effect upon”, and that the ordinary meaning of “trade” is “the action of buying and selling goods and services.”<sup>112</sup> Guatemala submits that

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<sup>107</sup> US IWS, para. 102.

<sup>108</sup> US IWS, para. 103.

<sup>109</sup> US RS, para. 59.

<sup>110</sup> US RS, para. 64.

<sup>111</sup> US RS, paras. 66-67.

<sup>112</sup> GTM IWS, paras. 136-137.

therefore there must be a relationship of cause and effect between a course of action or inaction and a trade effect,<sup>113</sup> and that Article 16.2.1(a) requires an “unambiguous showing that the challenged conduct has an effect on trade between the Parties.”<sup>114</sup>

158. Guatemala disagrees that interpretations of GATT 1994 Article III:4 and GATS Article I:1 are relevant to interpreting CAFTA-DR Article 16.2.1(a). It argues that while there is a basis for expansive interpretations of “affecting” in GATT 1994 Article III:4 and GATS Article I:1, there is “no basis for an expansive interpretation of affecting trade in Article 16.2.1(a).”<sup>115</sup> Guatemala submits further that an assessment of compliance with GATT 1994 Article III:4 requires a comparison between treatment accorded to an imported product and treatment accorded to a like domestic product, that modifications to conditions of competition are relevant only to this comparison, and that since no such comparative exercise is required by CAFTA-DR Article 16.2.1(a) an assessment of the impact of conduct on conditions of competition is simply not pertinent.<sup>116</sup>

159. Guatemala also argues that because the phrase “in a manner affecting trade” is linked to the phrase “a sustained or recurring course of action or inaction” in the previous clause, and because that clause requires intent on the part of a Party complained against, a complaining Party must demonstrate that “the intended consequence is to affect trade between the Parties.”<sup>117</sup>

160. Following the hearing, the Panel asked the Parties the following question: “What must the evidence show in order to demonstrate that a failure to effectively enforce labor laws is “in a manner affecting trade between the Parties”?”

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<sup>113</sup> GTM IWS, para. 137. Guatemala goes on to contend that trade effects would not include effects on investment, as various provisions in the CAFTA-DR, including Article 16.2.2, use the term “investment” separately from the term “trade”. GTM IWS, para. 137.

<sup>114</sup> GTM IWS, para. 458.

<sup>115</sup> GTM IWS, para. 458.

<sup>116</sup> GTM IWS, para. 459.

<sup>117</sup> GTM IWS, para. 461.

161. The United States responded that a complaining Party must present evidence demonstrating (1) that there is trade between the Parties; and (2) that based on the responding Party's failure to effectively enforce its labor laws, there has been a modification to conditions of competition.<sup>118</sup> The United States further pointed out that where in such cases a measure affects conditions of competition it does not matter that the measure has not resulted in observable trade effects.<sup>119</sup> Finally, the United States contended that demonstrating actual trade effects is not reasonable or feasible in the context of labor disputes under the CAFTA-DR. It pointed out that it does not have access to the internal books and records of Guatemalan companies, and that therefore, in its view, even if it were possible to identify a reduction in the price of a good it would be impossible to show that it was due to a failure to enforce Guatemala's labor laws.<sup>120</sup>

162. In its response to the Panel's question Guatemala reiterated its earlier arguments that there must be a trade effect and that the cause of the trade effect must be the course of action or inaction established by the complaining Party.<sup>121</sup>

163. In response to the argument put forward by the United States that demonstrating actual trade effects is not reasonable or feasible, Guatemala argued that the United States need not have access to the internal books of Guatemalan companies to prove trade effects because it had many other lines of enquiry that it could have pursued, including import values reported to United States Customs,<sup>122</sup> or economic studies.<sup>123</sup> Specifically, Guatemala contended that the United States could have tried to show that the price of merchandise from the relevant companies was lower than the price of imports from other companies or than average import prices. In the alternative, Guatemala submitted, the United States could have requested information from U.S.

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<sup>118</sup> US Responses, para. 23.

<sup>119</sup> US Responses, para. 27.

<sup>120</sup> US Responses, para. 29.

<sup>121</sup> GTM Responses, para. 17.

<sup>122</sup> Guatemala Final Submission ("**GTM Final**"), paras. 54 and 66.

<sup>123</sup> GTM Final, para. 64.

companies that purchased the goods from relevant Guatemalan companies, or could have asked the Guatemalan companies themselves for the information.<sup>124</sup>

**b. Analysis of the Panel**

164. There is no material difference between the definitions of the term “manner” proposed by the disputing Parties. Both disputing Parties rely upon definitions of “manner” that include the way in which something is done or happens. Both disputing Parties also rely upon definitions of “trade” that include “cross-border exchange of goods and services.” The Panel sees no reason to depart from such definitions. The core interpretive issue before us is what meaning to give to the phrase “affecting trade.” Both disputing Parties rely upon definitions of “affecting” that include the notions of influencing or making a material impression upon that which is affected. The crux of the difference between the disputing Parties lies in their views with respect to what types of consequences of a course of action or inaction can be considered to affect trade.

165. One disputing Party contends that a course of action or inaction is “in a manner affecting trade” if it modifies conditions of competition, while the other contends that it is “in a manner affecting trade” only if it causes a change in prices of or trade flows in particular goods or services.

166. The rules of interpretation set forth in the VCLT, which guide our interpretative exercise, require that the words of the Agreement be interpreted according to their ordinary meaning in context and in light of the object and purpose of the CAFTA-DR.<sup>125</sup> CAFTA-DR Article 1.2.2 directs the Parties to interpret and apply the Agreement in light of its objectives, set out in paragraph 1 of Article 1.2, and in accordance with applicable rules of international law. A dispute settlement panel should of course do the same.

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<sup>124</sup> GTM Final, para. 66.

<sup>125</sup> VCLT, United Nations Treaty Series, Vol. 1155, p. 331 (May 23, 1969), Article 31.

167. We begin by considering the plain meaning of “affecting trade.” Both disputing Parties acknowledge that to “affect” is to “influence” or “make a material impression.” We agree. Action or inaction that is in a manner “affecting trade” must influence or make a material impression upon some aspect of trade, that is, upon the cross-border exchange of goods and services.

168. This means that an interpretation of Article 16.2.1(a) that treated as a violation every failure, through a sustained or recurring course of action or inaction, to effectively enforce labor laws simply because it occurred in a traded sector, or with respect to an enterprise engaged in trade, would not be consistent with its wording. It would require no proof of influence or material impression upon the cross-border exchange of goods and services. It would simply require proof of some effect on an employer or economic sector engaged in trade. This is not the same thing as an effect on trade. Had the CAFTA-DR Parties wished to cover every failure to enforce through a sustained or recurring course of action occurring in a traded sector or with respect to enterprise engaged in trade, they could easily have done so using clearer language.<sup>126</sup> A failure to effectively enforce labor laws must affect some aspect of trade. The question is which effects on trade bring a matter within the scope of Article 16.2.1(a).

169. To understand what “in a manner affecting trade” means in Article 16.2.1(a), we must examine how this phrase fits into the Article, and how this provision fits into the broader Agreement. In Article 16.2.1(a) the phrase “in a manner affecting trade” modifies the obligation to not fail to effectively enforce labor laws, through a sustained or recurring course of action or inaction. It effectively limits the obligation’s scope. This limitation must be understood in light of the context and purposes of the obligation within the CAFTA-DR, and the purposes of the Agreement.

170. Chapter 16 of the CAFTA-DR begins with a “statement of shared commitment” to, among other things, “strive to ensure that the ... internationally recognized labor rights set forth in Article 16.8 are recognized and protected by [each Party’s] law.” This broad statement of commitment is followed by obligations entitled Enforcement of Labor Laws (Article 16.2), and

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<sup>126</sup> See, for example, Articles 29 and 36 of the North American Agreement on Labor Cooperation, 32 I.L.M. 1499, which use the term “in a manner that is trade-related.”

Procedural Guarantees and Public Awareness (Article 16.3). These in turn are put into operation by implementation mechanisms in the form of Institutional Arrangements (Article 16.4), Cooperation and Capacity Building Mechanisms (Article 16.5), and Cooperative Labor Consultations (Article 16.6). The structure of Chapter 16 thus indicates that the obligations and mechanisms following the statement of shared commitment in Article 16.1 give effect to it. As one of those obligations, Article 16.2.1(a) gives effect to the CAFTA-DR Parties' commitment to strive to ensure that the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by law. The shared commitment in Article 16.1 is consistent with the resolve of the Parties stated in the Preamble to the Agreement to "enforce basic worker rights," and to "build on their respective international commitments in labor matters."

171. The objectives of the Agreement include, in Article 1.2.1(c), to "promote conditions of fair competition in the free trade area."<sup>127</sup> The objective of "promoting fair conditions of competition in the free trade area" is consistent with limiting the Article 16.2.1(a) obligation to those failures to effectively enforce labor laws that are in a manner affecting trade. Addressing failures to effectively enforce labor laws that are not in a manner affecting trade, while perhaps desirable for other reasons, presumably would do little if anything to promote conditions of fair competition "in the free trade area."

172. A failure to effectively enforce labor laws may affect costs, risks or potential liabilities associated with production processes so as to provide a potential competitive advantage to producers that fail to comply with labor laws. At a minimum, labor laws, like other regulations, tend in their ordinary operation to impose administrative costs on employers. Such costs arise from record keeping requirements, and from requirements that enterprises take account of labor laws in their management practices, dedicating management resources to doing so. In addition, the operation of labor laws may raise labor costs in the near or longer term, for example by requiring the payment of a minimum wage, by requiring the payment of a premium wage rate for overtime, by requiring the purchase of equipment to protect the health and safety of employees, by enabling employees to bargain collectively for higher wages and benefits or more

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<sup>127</sup> Article 16.2.1(a) does not serve in any direct manner any of the other Agreement objectives identified in Article 1.2.1.

consistent application of workplace laws and contract terms, or by increasing the risk that they will do so.

173. A failure to effectively enforce labor laws may relieve an employer or group of employers of such costs or risks. Depending on their nature and extent, such effects could provide a competitive advantage to such employer(s). Such an advantage would enable the employer or employers in question to make economic gains at the expense of employers who are in compliance with the law. This may in turn incentivize other employers not to respect the rights in question, weakening their protection by law.

174. Each of these consequences in turn could affect international trade to the extent that a failure to enforce provided a competitive advantage to an employer or employers engaged in export or competing with imports, thus affecting conditions of competition in international trade. In that event, the employer or employers in question would stand to benefit in trade at the expense of employers subject to effective enforcement, and international trade would operate to transmit incentives that tend to undermine efforts to recognize and protect labor rights through domestic law. Without limiting the meaning of the term “fair” in Article 1.2.1(c), we conclude that in light of the Parties’ resolve recorded in the Agreement Preamble to “protect, enhance and enforce basic worker rights,” and their shared commitment to strive to ensure that internationally recognized labor rights are protected by law, such consequences must be understood as affecting “fair” conditions of competition for the purposes of Article 1.2.1(c) and thus for the purposes of the Agreement.

175. Treating a failure to enforce through a sustained or recurring course of action or inaction that confers some competitive advantage in trade as “affecting trade” for the purposes of Article 16.2.1(a) is thus consistent with the ordinary meaning of the term “affecting” in the context of the Article, a coherent account of how Article 16.2.1(a) serves the objectives of the Agreement, and the focus of the Agreement’s objectives and obligations on trade.

176. By contrast, for reasons elaborated below, limiting the ambit of Article 16.2.1(a) to failures to effectively enforce labor laws that produced effects on prices or quantities sold in international trade would exclude certain failures to enforce in a way that would not be

consistent with the Agreement's objectives. Further, it would often make proof of trade effects practically impossible. Such outcomes would be inconsistent with the specific objectives set out in Article 16.1, the resolution in the Preamble to protect basic and internationally recognized labor rights, and the Agreement objective in Article 1.2.1(c) to "promote fair conditions of competition."

177. A failure to effectively enforce labor laws will not necessarily result in lower prices or altered trade flows. Cost savings resulting from a Party's failure to effectively enforce may or may not be passed on to customers. They may instead be retained as increased profits. Further, even if they were passed on to customers, they may be counteracted by price effects in the opposite direction due to a myriad of factors such as currency exchange rate fluctuations, increases in costs of material inputs, capital equipment or transportation. Excluding failures to effectively enforce from the scope of Article 16.2.1(a) simply because such failures do not directly and obviously result in changes in the volume or price of traded goods would be to ignore important ways in which failures to effectively enforce labor laws may be "in a manner affecting trade." Such exclusions would reduce the concept "in a manner affecting trade" to the narrower concept "in a manner affecting the price or volume of traded goods." Such a limited interpretation of "in a manner affecting trade" is not supported by the CAFTA-DR's objectives of ensuring that labor rights are protected by law, or promoting fair conditions of competition, or any other purpose identified in Article 1.2.

178. Further, attempting to establish that an effect on prices is due to a failure to enforce and not to such other factors would often be so fraught with difficulty as to make proof of trade effects impossible. Even if information on final product or service prices is available to a CAFTA-DR Party through public sources, information on such matters as costs of material inputs, capital equipment or transportation will typically not be publicly available, but rather only available from the employer or employers allegedly benefitting from the alleged failure to enforce. As discussed in our preliminary ruling of February 17, 2015, the Agreement and the Rules do not grant powers to a panel to compel disclosure of such information. Nor do they grant such powers to any other body. A complaining Party may therefore find itself unable to obtain economic information from the relevant employers. Further, even if such information were available, the effects of a failure to effectively enforce labor laws may be impossible to quantify

with sufficient precision to attribute any particular price reduction or increase in sales volumes to them.

179. A requirement of proof of trade flow distortions would have similar consequences. A failure to effectively enforce labor laws may divert or distort trade and thus affect trade flows, but this is not a necessary consequence. If a Party, for example, fails to effectively enforce its labor laws in a way that lowers cost structures of firms operating within its territory, and competing firms in other CAFTA-DR countries respond by lowering wages sufficiently to maintain their market share, there may be no obvious effects on trade flows, and yet the conduct would have affected trade. A requirement to show a change in trade flows would thus exempt failures to effectively enforce from the ambit of Article 16.2.1(a) for reasons that are contrary to its purpose.

180. Therefore, we cannot agree with Guatemala's interpretation of "in a manner affecting trade."

181. In contrast to Guatemala's argument for a relatively narrow interpretation of the phrase "in a manner affecting trade," the United States makes an argument for a relatively broad interpretation of that phrase. The U.S. argument relies in part on WTO Appellate Body and dispute settlement panel reports in proceedings involving the national treatment obligation set forth in Article III:4 of the GATT 1994 and the scope provision in Article I:1 of the GATS.<sup>128</sup> That line of argument warrants comment.

182. The United States considers GATT 1994 Article III:4 and GATS Article I:1 relevant, because like CAFTA-DR Article 16.2.1(a), those provisions use the term "affecting," and the Appellate Body and dispute settlement panels have had occasion to construe that term.<sup>129</sup> In particular, GATT 1994 Article III:4 provides:

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<sup>128</sup> See US RS, para. 60 ("The World Trade Organization ('WTO') panels that have considered the word 'affecting' have applied a broad plain text meaning."); see also US Responses, para. 25 (referring to "numerous statements by WTO panels" on the meaning of "affecting" in Article III:4 of the GATT 1994).

<sup>129</sup> See US IWS, para. 99 (noting that international dispute settlement tribunals "have found occasion to interpret 'affecting trade' such that it may encompass any measures having a bearing on conditions of competition").

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements **affecting** their internal sale, offering for sale, purchase, transportation, distribution or use. (Emphasis added.)

183. GATS Article I:1 provides:

This Agreement applies to measures by Members **affecting** trade in services. (Emphasis added.)

184. According to the United States, the term “affecting” as used in these agreements has been interpreted broadly to mean “having a bearing on conditions of competition.”<sup>130</sup>

185. The difficulty with the U.S. reliance on Appellate Body and panel reports dealing with GATT 1994 Article III:4 and GATS Article I:1 is that the term “affecting” serves a different function in those provisions than in CAFTA-DR Article 16.2.1(a). As the Appellate Body explained in its *US – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU* report, in GATT 1994 Article III:4, the word “affecting” “serves to define the scope of application of Article III:4.” It “assists in defining the types of measure that must conform to the obligation not to accord ‘less favourable treatment’ to like imported products, which is set out in Article III:4.”<sup>131</sup> Likewise, “[t]he word ‘affecting’ serves a similar function in Article I:1 of the [GATS], where it also defines the types of measure that are subject to the disciplines set forth elsewhere in the GATS but does not, in itself, impose any obligation.”<sup>132</sup>

186. In CAFTA-DR Article 16.2.1(a), however, the word “affecting” is used in a phrase whose role is not merely to define the type of measure that must conform to an obligation. Rather, that phrase forms an essential part of the obligation itself. The type of measure covered by Article 16.2.1(a) is “labor laws.” “In a manner affecting trade” is one prong of the obligation to which such measures are subject – *i.e.*, an obligation to [i] not fail to effectively enforce those

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<sup>130</sup> *Ibid.*

<sup>131</sup> Appellate Body Report, *US – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, para. 208 (adopted 29 January 2002).

<sup>132</sup> *Ibid.*, para. 209.

measures [ii] through a sustained or recurring course of action or inaction [iii] in a manner affecting trade between the Parties [iv] after the date of entry into force of CAFTA-DR.

187. The difference between the function performed by “affecting” in GATT 1994 Article III:4 and GATS Article I:1, on the one hand, and CAFTA-DR Article 16.2.1(a), on the other, is significant. A dispute settlement panel considering whether conduct is of the type that affects the “internal sale, offering for sale, purchase, transportation, distribution or use” of products or the type that “affects trade in services” is confronted with a very different inquiry from a panel considering whether conduct is “in a manner affecting trade.” In the former case, a panel simply is examining the nature of the conduct itself to determine whether, as a threshold matter, it is of a type that brings it within the scope of the relevant obligations. The question is not how the conduct in fact operates, but whether it is of a kind that “*might* adversely modify the conditions of competition.”<sup>133</sup> To the extent that this particular issue is a source of controversy at all, the controversy usually is over the question of whether the conduct should be considered to “affect” trade (or internal sale, offering for sale, purchase, transportation, distribution or use) even if it is not purportedly intended to regulate trade (or internal sale, offering for sale, purchase, transportation, distribution or use).<sup>134</sup> That question tends to be addressed relatively quickly, with the focus of the relevant reports being on other issues – often, for example, whether the products being compared in a national treatment claim are in fact “like products” and whether treatment accorded to imported products is, in fact, “less favourable” than treatment accorded to like domestic products.<sup>135</sup>

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<sup>133</sup> Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R / WT/DS340/R / WT/DS342/R / Add.1 and Add.2, (adopted 12 January 2009), upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, para. 7.251 (emphasis added).

<sup>134</sup> *Ibid.*

<sup>135</sup> GATT dispute settlement panels and the Appellate Body have based findings that a measure fails to afford “treatment no less favorable” to imported products on determinations that the measure in question created an advantage for domestic products, or an incentive or burden disfavoring imported ones, and thus affected the internal sale, use or distribution of imported products. See Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, para 7.307 (adopted 5 April 2002). See also Appellate Body Report, *US – Tax Treatment for “Foreign Sales Corporations” Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, paras 211- 213 (adopted 29 January 2002); Panel Report, *Canada –Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, paras 10.81- 10.82 (adopted 11 February 2000); Panel Report, *China – Publications and Audiovisual Products* WT/DS363/R (adopted 12 August 2009); Panel Report, *China –*

188. Conversely, in the CAFTA-DR Article 16.2.1(a) context, a panel is required to address how particular conduct in fact operates – *i.e.*, whether that conduct is “in a manner affecting trade.” The recognition by the Appellate Body and panels interpreting “affecting” in GATT 1994 Article III:4 and GATS Article I:1 that the word has “a broad scope of application”<sup>136</sup> does little to help understand what “affecting” means in a context where determining whether or not there has been a breach of an obligation requires determining whether conduct is in a manner affecting trade. In other words, acknowledging the potential breadth of the term “affecting” does not guide a panel in determining, as a factual matter, what would be required to establish that conduct is “in a manner affecting trade.”

189. For the foregoing reason, we find the WTO dispute settlement reports discussing GATT 1994 Article III:4 and GATS Article I:1 to be minimally useful to our present purpose. We do not disagree with the general proposition the United States draws from those reports that a circumstance may affect trade if it has effects on conditions of competition. But that general proposition does not assist in determining whether a course of labor law enforcement action or inaction affects trade, whether by affecting conditions of competition or otherwise.

190. In sum, we find that a failure to effectively enforce a Party’s labor laws through a sustained or recurring course of action or inaction is “in a manner affecting trade between the Parties” if it confers some competitive advantage on an employer or employers engaged in trade between the Parties.<sup>137</sup> For the avoidance of doubt, we affirm that this determination does not depend upon the weight or significance of that employer within its particular economic sector.<sup>138</sup>

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*Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R, paras. 7.256-7 (adopted 12 January 2009).

<sup>136</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 220 (adopted 25 September 1997).

<sup>137</sup> The absolute or relative size of an employer is not relevant to this analysis. In this regard, the Panel disagrees with the views of the Cámara del Agro. The Cámara del Agro’s view is that the “weight, relevance, and size” of the companies should be taken into consideration. See Cámara del Agro Submission, Guatemala City, Guatemala (April 27, 2015), p.8.

<sup>138</sup> The Panel therefore disagrees with the views of the Cámara del Agro. The Cámara del Agro’s view is that the “weight, relevance, and size” of the companies should be taken into consideration. See Cámara del Agro Submission, Guatemala City, Guatemala (April 27, 2015), p.8.

191. We turn now to the question of what must be shown by a complaining Party to establish that such a failure to effectively enforce confers a competitive advantage on a participant or participants in trade between the Parties and thus is in a manner affecting trade.

192. Whether any given failure to effectively enforce labor laws affects conditions of competition by creating a competitive advantage is a question of fact. We return to the question of how a complaining Party may prove such advantage in the context of considering the particular facts of this case in Part IV below. For now we confine ourselves to the following observations that bear on our analysis of the evidence in the record of this proceeding.

193. First, a competitive advantage does not necessarily result from every failure to effectively enforce labor laws. While we ordinarily would expect a failure to effectively enforce labor laws to have some effect on employer costs, such effects may in some cases be too brief, too localized or too small to confer a competitive advantage. A failure to enforce labor laws, even when through a sustained or recurring course of action or inaction, may, for example, affect only a small number of workers for a short period of time and thus may not be sufficient to confer a competitive advantage to an employer or employers engaged in trade.

194. Second, in considering the evidence in the record of this proceeding, we determined that proof of competitive advantage did not require evidence drawn from employer records. We considered that for a given set of facts, competitive advantage may be inferred on the basis of likely consequences of a failure or of failures to effectively enforce labor laws, or other aspects of the totality of the circumstances.

195. Third, on the record before us, proving competitive advantage did not require proof of cost or other effects with any particular degree of precision. We considered that we need only determine that a competitive advantage has accrued to a relevant employer to find that there is an effect on conditions of competition. We did not need to determine the precise extent of that advantage.

196. Thus our enquiry into whether a failure to enforce labor laws is such as to confer a competitive advantage in trade between the CAFTA-DR Parties focused principally on (1) whether the enterprise or enterprises in question export to CAFTA-DR Parties in competitive

markets or compete with imports from CAFTA-DR Parties; (2) identifying the effects of a failure to enforce; and (3) whether these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises.

197. Before leaving this question, we note Guatemala's argument that "in a manner affecting trade" like "course of action or inaction"<sup>139</sup> implies intentionality. For reasons set out in Section III.C, the Panel does not agree that "course of action or inaction" implies a deliberate intent to fail to effectively enforce labor laws. That is, a failure to effectively enforce labor laws through a sustained or recurring course of action or inaction does not depend on a Party's intent. The same is true of "in a manner affecting trade." A course of conduct may be in a manner affecting trade whether or not a Party intends it to be so. As Guatemala points out in its rebuttal submission,<sup>140</sup> the third clause of Article 16.2.1(a) deals with the consequences of a course of conduct described in the second and first clauses. If those clauses do not require a demonstration of intent, the third clause necessarily does not either.

## **2. "Between the Parties"**

### **a. The Disputing Parties' Arguments**

198. In their relatively brief submissions on the issue, the disputing Parties advocate divergent interpretations of the phrase "between the Parties." In its Initial Written Submission the United States treats the expression "between the Parties" as equivalent to "within and among the CAFTA-DR Parties."<sup>141</sup> Guatemala contends in its Initial Written Submission that because the term "the Parties" is not qualified in any way, it must be understood as referring to all of the States that are Party to the CAFTA-DR, and that therefore a course of action or inaction must have an effect on FTA trade as a whole and not simply on trade flows between two Parties. Guatemala submits that "[i]f the drafters had intended Article 16.2.1(a) to address effects on

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<sup>139</sup> See Section III.C, *supra*.

<sup>140</sup> GTM RS, para. 117.

<sup>141</sup> US IWS, para. 103.

bilateral trade, they would have referred instead to “trade with another Party” or “trade with the Party invoking Article 16.2.1(a).”<sup>142</sup>

199. In its Rebuttal Submission the United States asserts that “a correct reading [of between the Parties] is that trade must be affected between any of the CAFTA-DR Parties, which would necessarily include at least two Parties.”<sup>143</sup> Guatemala responds in its rebuttal submission that the term “between the Parties” can only be interpreted as referring to all the CAFTA-DR Parties, and that the reading proposed by the United States cannot be reconciled with the specific language chosen by the CAFTA negotiators.<sup>144</sup>

200. In its oral statement at the hearing, the United States in turn replies that “[s]uch a reading... would undermine Article 16.2.1(a) by providing that a Party had no obligation under this Article where trade is affected, even severely distorted, between two, three, four, five, or six Parties, but rather only where a particular product or service is traded among all the Parties.”<sup>145</sup>

201. In its final submission, Guatemala reiterates its earlier arguments with respect to this issue.<sup>146</sup>

#### **b. Analysis of the Panel**

202. The interpretation proposed by Guatemala would limit the application of Article 16.2.1(a) to situations in which a failure to effectively enforce affected trade relations between all seven CAFTA-DR Parties. This would obviously limit the extent to which Article 16.2.1(a) could serve the purposes discussed above. There is nothing in the text of Chapter 16, Article 1.2.1, or the Preamble to the Agreement suggesting an Agreement object or purpose that would be served by giving Article 16.2.1(a) such a restricted application.

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<sup>142</sup> GTM IWS, para. 138.

<sup>143</sup> US RS, para. 68.

<sup>144</sup> GTM RS, para. 123.

<sup>145</sup> US Oral Statement, para. 31.

<sup>146</sup> GTM Final, para. 56.

203. This would not matter if, as Guatemala submits, the term “between the Parties” could only be interpreted as referring to all the CAFTA-DR Parties. That is not the case. If Guatemala’s contention were correct, the word “between” could refer only to the entire set of Parties jointly, and not severally and individually. To the contrary, “between” “is still the only word available to express the relation of a thing to many surrounding things severally and individually, *among* expressing a relation to them collectively and vaguely.”<sup>147</sup> It is therefore semantically correct to interpret the phrase “between the Parties” in Article 16.2.1(a) to refer to trade severally and individually between the CAFTA-DR Parties. That interpretation is consistent with the purposes of Article 16.2.1(a). It is therefore the interpretation that we adopt.

**E. Relationship Between Subparagraphs (a) and (b) of Article 16.2.1**

204. It will be recalled that Article 16.2.1 reads in its entirety as follows:

- (a) A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.
- (b) Each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.

205. Guatemala contends that a panel examining a claim under Article 16.2.1(a) must examine the challenged conduct against Article 16.2.1(b) before arriving at a definitive conclusion as to whether a Party is in violation of the former, and that to establish a violation a complaining Party must prove that the exercise of discretion by the Party complained against has

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<sup>147</sup> *The Oxford English Dictionary*, 2<sup>nd</sup> ed, *sub verbo* “between”.

been unreasonable or that a decision regarding the allocation of resources has been improper.<sup>148</sup> The Panel itself raised at the hearing and in post-hearing questions the question of whether subparagraph (b) should be read as a limitation on the obligation under subparagraph (a) or whether it should be read as an exception to that obligation. The answer could be relevant to the allocation of the disputing Parties' respective burdens. To establish that Guatemala has breached its obligation under subparagraph (a), must the United States show that its course of action or inaction does not reflect a reasonable exercise of discretion and does not result from a *bona fide* decision regarding the allocation of resources? Or is it Guatemala's burden to show, as justification for conduct that otherwise would be contrary to its obligation under subparagraph (a), that a course of action or inaction reflects a reasonable exercise of discretion or results from a *bona fide* decision regarding the allocation of resources?

206. In its responses to post-hearing questions, the United States argued that subparagraph (b) "affords the responding Party a justification." Hence, according to the United States, it is the responding Party that must invoke subparagraph (b) as a defense to a *prima facie* showing that it has acted contrary to the obligation in subparagraph (a). The United States described this as a "reasonable assignment of the burden of proof in light of which Party has access to the relevant information."<sup>149</sup>

207. Guatemala, on the other hand, argued that subparagraph (b) is not a justification but a limitation on the obligation set forth in subparagraph (a).<sup>150</sup> Guatemala relied in particular on the express cross-reference to subparagraph (a) in the text of subparagraph (b). Thus, subparagraph (b) describes a circumstance under which the Parties understand that "a Party is in compliance with subparagraph (a)." Following this logic, Guatemala contends that "it is for the complaining party to establish that the exercise of discretion has been unreasonable or that a decision regarding the allocation of resources is improper."<sup>151</sup>

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<sup>148</sup> GTM IWS, para. 143.

<sup>149</sup> US Responses, paras. 1-8.

<sup>150</sup> GTM Responses, para. 2.

<sup>151</sup> GTM Responses, para. 4.

208. Having considered the disputing Parties' arguments and construed the text of Article 16.2.1 according to its ordinary meaning, in context and in light of the object and purpose of the CAFTA-DR, we conclude that subparagraph (b) should be understood as articulating a possible justification for conduct that otherwise would be contrary to subparagraph (a). Thus, in the context of a dispute settlement proceeding, it is for the responding Party (here, Guatemala) to demonstrate that conduct alleged to be contrary to subparagraph (a) is not, in fact, contrary to that provision for reasons contemplated by subparagraph (b).

209. It is true that subparagraph (b) does not use language that ordinarily would signal that one provision is an exception to another provision or a justification for conduct that otherwise would be considered to breach the first provision. Elsewhere in the CAFTA-DR, the Parties *did* use such language. For example, in the Exceptions Chapter (Chapter 21), the Parties used phrases like "Nothing in this Agreement shall be construed..." or "Nothing in this Agreement shall affect..." to signal the presence of an exception.<sup>152</sup> But in subparagraph (b) of Article 16.2.1, the operative phrase is, "Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where..." As Guatemala argues, that phrase could be construed as imposing a limitation, narrowing the obligation articulated in subparagraph (a) rather than excusing conduct that otherwise would be contrary to subparagraph (a).

210. However, although subparagraph (b) may not employ language usually associated with an exception or a justification, we find that functionally the provision operates as an exception or a justification. Subparagraph (b) becomes relevant only to the extent that a Party's conduct might be considered inconsistent with subparagraph (a) when read by itself. Where there is no doubt that such conduct is consistent with subparagraph (a) read by itself, there is no reason to refer to subparagraph (b) to determine whether a Party is in compliance with its obligation. Precisely because subparagraph (b) becomes relevant only in the face of a possible violation, its relationship to subparagraph (a) is inherently that of an exception or justification.

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<sup>152</sup> See, for example., Arts. 21.2, 21.3.2 and 2.5. Also, Art. 21.1 incorporates by reference certain provisions from the GATT 1994 and the GATS, both of which use the phrase "nothing in this Agreement shall be construed..." to signal an exception.

211. Moreover, in the dispute settlement context, we see no basis for imposing on the complaining Party the burden of proving that the responding Party has exercised its discretion unreasonably or that its course of action does not result from a *bona fide* decision regarding the allocation of resources. As a practical matter, allocating the burden of proof this way would require the complaining Party to prove a negative based on evidence we generally would expect to be in the possession of the responding Party. Exercises of discretion and rationales for the allocation of resources are matters that we understand to relate to the deliberative and decision making process of a government. In our experience, it would be unusual for a foreign government to be privy to such matters.

212. For the foregoing reasons, we conclude that it is not for the complaining Party to prove that the responding Party's conduct falls outside the limits of subparagraph (b). Rather, if the responding Party believes that otherwise potentially non-compliant conduct is compliant when considered in the light of subparagraph (b), then it is for the responding Party to put forward evidence establishing that point.

#### **F. Temporal Issues**

213. A number of the events cited by the United States in support of its claims occurred after August 9, 2011, the date on which the United States transmitted its request for the establishment of an arbitral panel to Guatemala. This is the case with certain allegations related to the claim concerning failures to register labor unions,<sup>153</sup> which we have dismissed for being outside the scope of the panel request. But it also is the case with allegations related to the claim of failure to conduct proper investigations and pursue penalties.<sup>154</sup> This raises the question of how these events should be taken into account in our assessment of the U.S. claims.

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<sup>153</sup> See US IWS, paras. 207-11 (alleging events at Koa Modas from Dec. 2011 to June 2012), 212-15 (alleging events at Serigrafia from Aug. 2012 to Nov. 2012).

<sup>154</sup> See US IWS, paras. 146-50 (alleging events at Tiki Industries from Dec. 2011 to Feb. 2012); paras. 151-53 (alleging events at REPSA from Dec. 2011 to Feb. 2012); paras. 154-56 (alleging events at NAISA from Dec. 2011 to Feb. 2012); paras. 162-63 (alleging events at Alianza in Mar. 2013); paras. 166-72 (alleging events at Koa Modas from Mar. 2013 to July 2014); paras. 173-74 (alleging events at Santa Elena in June-July 2014); paras. 175-77 (alleging events at Serigrafia from June 2012 to Jan. 2013).

214. Neither disputing Party raised the temporal aspects of our jurisdiction in its written submissions. However, the issue was discussed at the hearing.<sup>155</sup> Both disputing Parties agreed that the relevant date for determining whether Guatemala breached Article 16.2.1(a) is the date of the panel request. Thus, as the United States put it, “the Panel needs to determine whether Guatemala was engaged in the relevant course of an action on the date the United States requested the Panel.”<sup>156</sup> Guatemala agreed that “the conduct that is the subject of the complaint must have been in existence at the time of the panel request, as long as it occur[r]ed after the entry into force of the CAFTA-DR.”<sup>157</sup>

215. It follows from the Parties’ agreement that the existence of a breach cannot be established on the basis of events alleged to have occurred after the date of the panel request. If a breach existed on the date of the panel request, that breach must be established on the basis of events that occurred on or before that date. What relevance, then, should we assign to evidence of events occurring *after* the date of the panel request?

216. Such evidence cannot establish the existence of breaching conduct that was not already in existence as of the date of the panel request. The United States suggested, however, that such evidence may demonstrate the continuation of breaching conduct.<sup>158</sup> We agree.

217. The concept of a continuing breach of an obligation is well established in international law. Thus, for example, Article 14(2) of the International Law Commission’s *Articles on Responsibility of States for Internationally Wrongful Acts* recognizes that a breach “having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.” In a similar vein, the WTO

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<sup>155</sup> Panel Hearing Transcription, p. 67-70.

<sup>156</sup> Panel Hearing Transcription, p. 68.

<sup>157</sup> Panel Hearing Transcription, p. 70.

<sup>158</sup> Panel Hearing Transcription, p. 69.

Appellate Body has recognized the potential relevance of evidence post-dating a panel request where an alleged breach is continuing in nature.<sup>159</sup>

218. Accordingly, in considering whether the United States has established a breach of Guatemala's obligation under CAFTA-DR Article 16.2.1(a), we will examine only evidence of conduct on or before the date of the U.S. panel request. However, we may examine evidence of conduct post-dating the panel request in considering whether breaching conduct in existence on the date of the panel request continued thereafter.

#### IV. Determinations

219. We turn now to the determinations required by our mandate. The United States alleges that by:

- [R]epeatedly failing to compel compliance with court orders to reinstate and compensate workers unlawfully dismissed in the context of union organizing activities and conciliation proceedings, and to impose sanctions for such unlawful dismissals;<sup>160</sup> and
- [R]epeatedly failing to conduct proper inspections in response to *bona fide* complaints of employers' violations of laws related to acceptable conditions of work or not conducting inspections properly so as to determine whether an employer has violated Guatemalan labor laws or failing to impose penalties upon discovering violations<sup>161</sup>

Guatemala has, through a sustained or recurring course of action or inaction, failed to effectively enforce its labor laws in a manner affecting trade. In support of each of these

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<sup>159</sup> See Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, para. 188 (adopted 11 December 2006) (“While there are temporal limitations on the measures that may be within a panel’s terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel’s terms of reference may pre-date or post-date the establishment of the panel.”).

<sup>160</sup> US IWS, para. 94.

<sup>161</sup> US IWS, paras. 112, 114, 132 and 134.

allegations, the United States presents evidence that it contends demonstrates multiple instances of such failures to effectively enforce labor laws at particular times against particular employers, over a time period spanning several years. The position of the United States is that, taken together, these instances constitute a course of action or inaction violating Article 16.2.1(a).<sup>162</sup>

220. Guatemala submits that the United States has failed to make a *prima facie* case and requests that the Panel therefore reject its claims in their entirety.<sup>163</sup> Specifically, Guatemala contends that the United States has failed to provide a factual basis for each of its allegations, either by submitting no evidence to meet its burden of proof with respect to one or more requirements of Article 16.2.1(a), or by submitting evidence lacking probative value. While Guatemala does submit evidence in response to the case presented by the United States, its most extensively argued position is that the United States has failed to make a *prima facie* case.

221. Under Rule 65 the burden of proof lies on the complaining Party.<sup>164</sup> As Guatemala submits and the United States does not dispute, “a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favor of the complaining party,”<sup>165</sup> and “a panel must be satisfied that a complaining party has made a *prima facie* case of violation, even if the defending Party does not contest the facts and legal claims.”<sup>166</sup>

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<sup>162</sup> US IWS, paras. 94 and 183.

<sup>163</sup> GTM IWS, para. 471.

<sup>164</sup> “A complaining Party asserting that a measure of the Party complained against is inconsistent with its obligations under the Agreement, that the Party complained against has otherwise failed to carry out its obligations under the Agreement, or that a benefit that the complaining Party could reasonably have expected to accrue to it is being nullified or impaired in the sense of Article 20.2(c) (Scope of Application) shall have the burden of establishing such inconsistency, failure to carry out obligations, or nullification or impairment, as the case may be.”

<sup>165</sup> GTM RS, para. 26, citing Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, para. 104 (adopted 13 February 1998).

<sup>166</sup> GTM RS, para. 30, citing Panel reports in *US – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, paras. 7.7-7.11 (adopted 20 February 2007); *US – Measures Relating to Shrimp from Thailand*, WT/DS343/R, paras. 7.20-7.21 (adopted 1 August 2008); and *US – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R, paras. 7.6 – 7.7 (adopted 18 February 2010).

222. With respect to the evidentiary requirement to make a *prima facie* case, we agree with the United States that “[t]o establish a *prima facie* case, a [complaining party] must adduce evidence sufficient to raise a presumption that what is claimed is true,”<sup>167</sup> a proposition with which Guatemala does not take issue. Both disputing Parties acknowledge that the precise amount and type of evidence that will be required to establish a *prima facie* case “will necessarily vary from measure to measure, provision to provision, and case to case.”<sup>168</sup> Both disputing Parties also agree that a complaining party must submit evidence of facts constituting the basis of its *prima facie* case, and cannot establish a fact on the basis of assertion, assumptions, conjecture or remote possibilities.<sup>169</sup>

223. Below we consider whether the United States has established its factual allegations with respect to each of the two sets of claims falling within our terms of reference: (1) the alleged failures to compel compliance with court orders; and (2) the alleged failures to conduct inspections as required and to impose obligatory penalties. The Rules anticipate that both disputing Parties will submit their evidence prior to the Panel making any determination (as opposed to the Panel’s first reviewing only the complaining Party’s evidence to determine whether such evidence, in the absence of rebuttal, would be sufficient to establish that Party’s claims). That is in fact what took place. We considered it appropriate to examine all of the record evidence relevant to any of our determinations, and therefore assessed the evidence presented by the United States in light of any evidence presented in response by Guatemala. The determination of whether the United States had met its burden under Rule 65 to establish that

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<sup>167</sup> US RS, para. 11, citing Appellate Body Report, *US — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, p. 14 (adopted 23 May 1997).

<sup>168</sup> US RS, para. 11 and GTM RS, para. 26, both citing Appellate Body Report, *US — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, p. 14 (adopted 23 May 1997).

<sup>169</sup> GTM RS, para. 27 and US RS, para. 11, both citing *El Salvador - Tariff Treatment for Goods Originating from Costa Rica*, CAFTA-DR/ARB/2014/CR-ES/18, para. 4.40 (18 November 2014). “The Panel observes that neither Chapter 20 of the Treaty or its Rules of Procedure establish a standard for the review of facts. However, the Panel is aware that the imperatives of due process and impartiality, that govern all jurisdictional and/or adjudicative activity, impose the requirement of establishing and examining the facts on the basis of facts known or admitted by the Parties, positive evidence or reasonable indicia. The existence of a fact cannot be established on the basis of mere allegations, conjectures, assumptions or remote possibilities. The examination must be neutral and impartial, avoiding subjective or biased assessments.”

Guatemala had acted inconsistently with its obligation under CAFTA-DR Article 16.2.1(a) was thus an assessment of whether the record evidence established what the United States alleged.

224. Although the Rules codify the widely accepted proposition that the Party asserting a claim or a defense has the burden of proving that claim or defense (see Rules 65 and 66), they do not prescribe a particular standard of proof. Similarly, in WTO dispute settlement, the DSU does not prescribe a particular standard of proof. A WTO Appellate Body and several panel reports have applied a “balance of the probabilities” standard.<sup>170</sup> We have done so here. Thus, if the record evidence constituted proof that the factual allegations of the United States were more likely than not correct, we found that the United States had met its burden of proof. Conversely, if the record evidence did not constitute proof establishing that the allegations made by the United States were more likely than not correct, then we found that the United States had failed to meet its burden of proof.

225. We begin with some general observations on the scope of the Panel’s mandate and the fact-finding procedures available to it.

226. Article 20.13 of the CAFTA-DR directs the Panel to base its report on the submissions and arguments of the disputing Parties, as well as on relevant provisions of the

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<sup>170</sup> In *US – Subsidies on Upland Cotton—Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, para. 301 and 321 (adopted 20 June 2008), the Appellate Body states: “We now turn to examine the United States’ arguments regarding the Panel’s consideration of this evidence in order to determine whether the evidence as assessed by the Panel makes one of the two probable outcomes that emerge from the quantitative evidence *more likely than not*” ... “We recall that we have found that the quantitative data give rise to opposite conclusions with similar probabilities as to the binary outcome in item (j). The Panel’s finding on the structure, design, and operation, in the light of the two plausible outcomes with similar probabilities that emerge from the quantitative evidence, provides a sufficient evidentiary basis for the conclusion *that it is more likely than not* that the revised GSM 102 programme operates at a loss. Therefore, we consider that Brazil has succeeded in establishing that the revised GSM 102 programme is provided at premiums that are inadequate to cover its long-term operating costs and losses.” (emphasis added). See also, Panel Report, *US – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.14 (adopted 27 January 2000); Panel Reports, *US – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R, para. 6.38 (adopted 26 September, 2000), and *US – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R, para. 6.25 (adopted 26 September 2000); Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, paras. 11.12 and 11.52 (adopted 16 February 2001); Panel Report, *US – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R, para. 8.19 (adopted 1 February 2002); Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW2, WT/DS113/RW2, para. 5.67 (adopted 17 January 2003).

Agreement and any information available to it by virtue of Article 20.12. Therefore, a Panel's mandate is circumscribed by the claims put forward by the disputing Parties. Rule 35 stipulates further that the Panel "shall consider exclusively the issues raised in the proceeding." The Panel may also consider the written views submitted following the Initial Written Submissions of the disputing Parties by non-governmental entities, but only to the extent that they address issues of fact and law directly relevant to any legal or factual issue under consideration by the Panel, that is, the issues raised by the disputing Parties in their Initial Written Submissions.<sup>171</sup>

227. The scope of matters that the Panel may examine is therefore strictly defined by the particular claims made by the disputing Parties in their submissions, and the Panel may examine only the factual and legal issues raised by such claims. In this case, the Panel's mandate is to determine whether the United States has proven that Guatemala violated Article 16.2.1(a) through the acts and omissions alleged in the two claims summarized immediately above. Our mandate does not extend to examining the functioning of the Guatemalan labor courts or labor inspectorate outside of the particular failures to effectively enforce labor laws alleged by the United States. The Panel, therefore, has not conducted an examination of the overall functioning of the Guatemalan labor courts and labor inspectorate or many other matters raised in the written views of non-governmental entities. The United States advanced no claims in its submissions with respect to such matters.

228. Subject to limited exceptions, the Panel is bound to examine the claims of the disputing Parties on the basis of evidence that they choose to present to it. As discussed in our preliminary ruling of February 26, 2015, the Rules impose no duty upon the Parties to produce information at the request of the Panel. While under Rule 49 a Panel may at any time during the proceedings address questions in writing to one or more of the participating Parties, a Party is not required in responding to such questions to add to the factual record. The Panel may seek information or technical advice from a person or body that it deems appropriate, but only with the consent of the disputing Parties.<sup>172</sup>

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<sup>171</sup> See Rules 54, 58, 59 and 62.

<sup>172</sup> CAFTA-DR, Article 20.12. These dispositions are in contrast with Article 13 of the WTO DSU, which empowers dispute settlement panels to seek information and advice from any person or body that they deem appropriate, and

229. The procedures adopted by the CAFTA-DR Parties anticipate that evidence will be submitted in documentary form in advance of the hearing. They do not provide for the calling of witnesses at a hearing, as discussed in our preliminary ruling of February 26, 2015. Moreover, CAFTA-DR dispute settlement procedures provide limited opportunity and means for the Panel or the disputing Parties to probe the foundations of documentary evidence. The Rules do not contemplate examination of witnesses at a hearing. By the time that the hearing takes place the factual record is largely complete, subject to any permissible response to evidence accompanying rebuttal submissions or to Panel questions during or immediately following the hearing.<sup>173</sup>

230. In light of the above considerations it is apparent that the CAFTA-DR and the Rules contemplate that the Party that bears the burden of proof with respect to a particular matter – whether the claimant with respect to a claim or the respondent with respect to an affirmative defense – must take into account the limitations of the Rules as they pertain to presentation of evidence and the development of the factual record. In deciding how to support a claim or defense through the submission of testimonial evidence, a Party must be mindful that there will be no opportunity to test that evidence through cross-examination, and that the Panel cannot require the production of evidence or conduct further investigation into any factual matter without the agreement of the disputing Parties.<sup>174</sup> Before a Panel can conclude that evidence proves anything, the Panel must determine that it is sufficiently reliable to do so. A Party must

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requires disputing Parties to respond promptly and fully to a Panel request for such information as the Panel considers necessary and appropriate. See, for example, "[i]t is clear from the language of Article 13 that the discretionary authority of a panel may be exercised to request and obtain information, not just 'from any individual or body' within the jurisdiction of a Member of the WTO, but also from *any Member*, including *a fortiori* a Member who is a party to a dispute before a panel. This is made crystal clear by the third sentence of Article 13.1, which states: '*A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.*'" Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, para. 185 (adopted 2 August 1999).

<sup>173</sup> Under the Rules 49 and 50 a Panel may at any time during the proceedings address questions in writing to one or more of the participating Parties, and participating Parties are afforded an opportunity to provide written comments on any reply that a participating Party submits. Rules 51 and 8 anticipate that ordinarily any written questions from the Panel will be delivered within three days of the date of the hearing.

<sup>174</sup> While under Rule 34 the panel may make such procedural adjustments as may be required in the proceeding, as discussed in our preliminary ruling of February 26, 2015 this power is limited to situations in which there is an element of legal and factual necessity, such as a requirement of due process. An incomplete factual record does not present such a requirement, because a case must be decided on the basis of whether a Party has met its burden of proof.

prove the foundations of factual observations contained in testimonial statements sufficiently that the Panel can conclude with confidence that those observations are reliable. If a Party does not demonstrate the reliability of evidence supporting a particular claim or defense, the Panel must simply conclude that Party has not met its burden of proof in that regard. As discussed immediately above, the CAFTA-DR and the Rules leave the definition of issues and development of the factual record largely in the hands of the disputing Parties. Furthermore, the Rules emphasize the responsibility of the Party complaining to prove its case, as they expressly place the burden of establishing inconsistency with or failure to carry out Agreement obligations upon the complaining Party.<sup>175</sup>

231. In this proceeding, the United States as complaining Party sought to establish its case, in large part, on the basis of declarations by individuals attesting to particular instances of action or inaction by Guatemalan authorities, each taking place with respect to particular employers. According to the United States, in all cases the declarants wished to remain anonymous and indeed were promised anonymity.<sup>176</sup> Consequently, declarants' names were redacted from written statements and other documents and replaced with a letter or series of letters to distinguish one declarant from another. As discussed immediately below, the Panel determined that the probative value of such evidence depends not only upon the particular information contained in a given declaration, but also upon its consistency with and the extent of corroboration by other evidence. In many instances, the declarations lack detail sufficient to enable a ready determination of the events described therein. The Panel has made an effort to determine whether other record evidence corroborates statements contained in written declarations sufficiently to allow the Panel to find that particular facts are established on a balance of probabilities.

232. Having completed this work, the Panel feels compelled to note the difficulty of the task in view of the parameters set by the Rules. The Rules set forth the basic procedures for conducting a dispute settlement proceeding. But they do not prescribe rules of evidence. Nor do they prescribe procedures for the appearance of witnesses and the testing of evidence through

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<sup>175</sup> See Rule 65.

<sup>176</sup> US Supplementary Written Submission, para. 12.

examination by the Panel and opposing counsel. Moreover, the Rules contemplate that in the ordinary case, each written submission and accompanying documents will be submitted within a relatively brief period (in each case, less than a month) following submission of the previous written submission.<sup>177</sup> These limitations have made it extremely challenging for the Panel to carry out its mandate where the evidence proffered in support of the complaining Party's claims consists primarily of many pages of anonymous declarations and other redacted documents.

233. The Panel intends these observations as context to help the disputing Parties to understand the significant fact-finding challenges that the Panel faced.

234. Turning to a different aspect of how the Panel analyzed the submissions it received, as noted at the outset of Part III above, the Panel read carefully the written views of non-governmental entities that it received, but is required by Rule 62 to consider written views only to the extent that they address issues of fact and law directly relevant to any legal or factual issue under its consideration. As discussed immediately above, those legal and factual issues are defined by the scope of the submissions of the disputing Parties. In this case, the relevant factual issues arise out of a set of specific instances of alleged failures by responsible authorities to enforce labor laws at particular worksites. None of the written views of non-governmental entities addressed those specific instances. Rather, they spoke to various aspects of the economic, institutional, social, historical and political context of this dispute. As will become evident below, the context in which alleged instances of failure to enforce took place was seldom probative of whether and to what extent the particular instances in question took place.

235. The Panel's determinations are set out below. We note that the contents of many exhibits presented to the Panel were designated as confidential information by a disputing Party, in accordance with Rules 20 to 23. Paragraph 6 of Appendix 2 to the Rules provides that the Panel may not disclose such information in its report, but may state conclusions drawn from it. In presenting our determinations, we therefore present only information drawn from any non-confidential summary of a confidential exhibit provided by a disputing Party, and any conclusions that we have drawn from confidential information. Most of the non-confidential

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<sup>177</sup> See Rule 8.

summaries of exhibits are very brief. This of course limits the extent to which we can discuss how we analyzed the evidence contained in exhibits designated as confidential.

236. Before making its determinations, the Panel must address three specific evidentiary issues, as follows.

A. **Evidentiary Issues**

1. **The Probative Value of Redacted Evidence**

237. We consider first the arguments by Guatemala that the Panel should categorically attribute no probative value to documents redacted by the United States.

238. A considerable number of exhibits submitted in evidence by the United States are redacted so as to remove information that identifies workers who furnished statements that the United States submitted in evidence, or that allegedly could lead to their identification. The information includes the names of the workers, labor inspectors, judges and case numbers of the matters in question.

239. The United States affirms that it made these redactions in response to concerns by the workers in question that they would be subject to reprisals should their identities become known in the course of these proceedings.<sup>178</sup> Guatemala does not accept this justification for the redactions. It notes that information as to the identities of the workers in question could be designated as confidential under the Rules. This would restrict its distribution to approved persons, prevent its disclosure to the public and require its destruction following these proceedings.<sup>179</sup>

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<sup>178</sup> US RS, para. 14.

<sup>179</sup> GTM RS, paras. 34-38.

240. In preliminary proceedings Guatemala argued that the redactions were not made in good faith and asked the Panel to instruct the United States to disclose the information redacted from its evidence. In a ruling dated February 26, 2015, the Panel concluded that it did not have authority to do so, and observed:

The information provided to the panel by the United States is that the workers in question appear not to have accepted the confidentiality provisions of the Rules as sufficient protection of their identities, and to have made non-disclosure of their identities a condition upon which they provided their evidence. While this is regrettable, we cannot conclude, without more, that it reflects bad faith on the part of the United States to have offered assurances to the workers in question that it would not disclose their identities in the course of these proceedings.<sup>180</sup>

241. Nor can we accept, without more, Guatemala's argument that we should infer that the United States chose not to submit the redacted information because doing so would harm its case.<sup>181</sup>

242. Guatemala contends that according probative weight to this redacted evidence would violate Guatemala's due process rights, because the anonymity of statements and the redaction of identifying information make it extremely difficult for it to verify the authenticity of documents, including declarations, or the accuracy of their contents. Guatemala submits that this deprives it of the opportunity to respond to such documents, and thus to adequately prepare its defense.<sup>182</sup>

243. In its preliminary ruling of February 26, 2015 the Panel addressed similar arguments. In concluding that it would be premature to exclude the redacted evidence as a preliminary matter, the Panel made the following observations that remain apposite to this stage of the proceedings:

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<sup>180</sup> Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence, February 26, 2015, para. 39.

<sup>181</sup> GTM IWS, para. 178.

<sup>182</sup> GTM IWS, paras. 171 and 177.

[A] respondent in a CAFTA Chapter 20 dispute settlement proceeding is entitled to an adequate opportunity to respond to evidence submitted against it.

[A]n adequate opportunity to formulate a response to evidence submitted by an opposing party... is a logical extension of the right to an adequate opportunity to respond to evidence, and therefore also an element of due process. If the redactions substantially impair either opportunity, allowing the United States to submit the redacted evidence at issue would violate applicable due process norms.

If the redactions entirely prevented Guatemala from locating files documenting the handling of cases that are the subject of allegations in the written submission of the United States, they might substantially impair Guatemala's ability to adequately respond to the case against it.

To the extent that the redaction of information makes the location of necessary evidence burdensome and time-consuming but not impossible, the appropriate response of the panel is to consider an extension of time.<sup>183</sup>

244. In that preliminary ruling the Panel also addressed the argument that Guatemala may be precluded by the anonymity of witnesses from examining characteristics or personal motives that may affect the reliability of their evidence, and that this would deprive it of due process. The Panel first noted that not all redacted evidence presents these concerns:

... [T]ribunals should treat anonymous evidence with caution. The anonymity of a witness may conceal possible motives or characteristics of the witness that affect the reliability of his or her evidence. If the reliability of a witness remains unexamined, a decision can be unfair.

On the other hand, not all anonymous evidence necessarily presents these problems. When an anonymous witness simply presents information readily verifiable through other sources, the credibility of the witness in question may not be a

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<sup>183</sup> Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence, February 26, 2015, paras. 47, 48, 52 and 54.

material issue because parties can readily verify the accuracy of the information.<sup>184</sup>

It then ruled that an opportunity to examine witnesses was not required by due process in the context of these proceedings, as concerns about the motives or characteristics of anonymous witnesses could be addressed by other means:

That the CAFTA Rules do not provide for the cross-examination of witnesses is not contrary to fundamental procedural fairness.

[E]ven when the credibility of a written statement by an author not available for examination is in issue, the prejudice to a Party seeking to challenge that statement may be fully addressed by a tribunal's partially or fully discounting the weight attached to the statement in question, or by excluding it from the record. The panel can keep under review the question of the treatment of evidence from anonymous sources and may revisit the question of the admissibility and probative value of such evidence if and when its credibility becomes an issue.<sup>185</sup>

245. The Panel concluded in its February 26, 2015 ruling that while Guatemala had demonstrated that locating the evidence in question was burdensome it had not demonstrated that it was impossible.<sup>186</sup> The Panel also ruled that it had no basis upon which to conclude at that stage of the proceedings that Guatemala was precluded from verifying or refuting the material allegations contained in the redacted exhibits submitted by the United States.<sup>187</sup> It therefore declined to exclude the evidence in question, but granted Guatemala an extension of time. In its subsequent argument Guatemala continued to assert that locating evidence in response to the redacted exhibits was burdensome, but did not provide any basis upon which the Panel could conclude that it was impossible for practical purposes to do so. In fact, Guatemala located and produced significant evidence in response to the redacted exhibits submitted by the United States. For this reason, and because we have no basis upon which to conclude that none of the

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<sup>184</sup> *Ibid*, paras. 57-58.

<sup>185</sup> *Ibid*, paras. 67-68.

<sup>186</sup> *Ibid*, para. 53.

<sup>187</sup> *Ibid*, para. 56.

information contained in the redacted exhibits is independently verifiable or otherwise reliable, we conclude that there is no basis upon which to categorically exclude the redacted evidence submitted by the United States. Rather, the Panel will consider on an instance-by-instance basis whether probative value should be accorded to redacted evidence, or whether redacted evidence should be discounted because of prejudicial effects outweighing a low probative value.

246. In doing so, we will take a cautious approach to relying upon redacted evidence. We will be mindful that the redaction of identifying information from a statement may limit or prevent investigation of any motivation on the part of the author, in making his or her statement, as well as other circumstances surrounding the statement.<sup>188</sup> It also prevents investigation of such matters as whether the individual in question had an opportunity to witness carefully the events to which he or she testifies. Under these circumstances, the probative value of anonymous statements will depend upon the presence of sufficient indicia of reliability, such as the availability of corroboration, verifiability in reliable independent sources, contemporaneity, extent of reliance upon information reported to rather than directly observed by the declarant, proof that testimony was spontaneous rather than suggested, or the presence of an oath or solemn affirmation of truthfulness. It will also often depend upon whether the evidence contains particulars as to time, place, identity of individuals or the contents of statements that suggest clear recollection and afford an opportunity to investigate events and provide evidence in response. When the identity of a statement's author is redacted, such considerations sound with even greater force, and a panel must find clear indicia of reliability before accepting statements as establishing that their contents are more likely than not to be true.

## **2. Admissibility and Probative Value of the ICSID Secretary General's Statement**

247. The United States presented along with its Rebuttal Submission Exhibit USA-170.<sup>189</sup> The United States indicated that “[a]s an additional measure, the United States asked the Secretary-General of the ICSID to conduct an independent review of unredacted versions of the

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<sup>188</sup> GTM IWS, paras. 167-171.

<sup>189</sup> Declaration of the ICSID Secretary-General (March 11, 2015).

materials the United States has submitted in this proceeding.”<sup>190</sup> In that statement the Secretary-General states that she observes, on the basis of a review of unredacted versions of redacted documents submitted by the United States to the Panel, correspondences between the names of persons making statements submitted to the Panel and the names of persons on other documents, such as court orders.

248. By letters dated March 19 and April 17, 2015, Guatemala objected to the admissibility of this exhibit on the grounds that admitting it would violate the Rules and *ipso facto* breach Guatemala’s due process rights. Guatemala argued that having voluntarily disclosed the information to members of the general public, the United States should be precluded from continuing to claim confidentiality. It went on to say that the United States was essentially asking the Panel to abdicate its fact-finding responsibilities in favor of outside persons. Guatemala also indicated that it was not consulted and did not agree to the involvement of the Secretary-General in these proceedings; therefore, it asked the Panel to instruct the United States to provide the same full, non-redacted version of the exhibits. The United States responded by letter dated April 6, 2015 that the exhibit provided confirmation by a neutral person, the Secretary-General, that the redactions were made consistently across several documents, but did not address the content or other aspects of other exhibits. The United States argued that the information at issue was not submitted to the Panel, it was not designated as confidential under the Rules and that the United States had not made a claim of confidentiality in the sense that would trigger the procedures for the treatment of confidential information. The United States continued to say that the information was provided to the Secretary-General and her staff in confidence and not as members of the general public. The United States affirmed that it asked the Secretary-General and her staff to sign confidentiality agreements, and they did so. According to the United States, independent and impartial examination of information not submitted to an arbitral tribunal is an accepted practice in international arbitration.

249. Guatemala argued in its Rebuttal Submission that the actions by the United States reflected that the real reasons for refusing to provide non-redacted exhibits to the Panel or to Guatemala was not a “concern about confidentiality, safety or security of the individuals

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<sup>190</sup> US RS, para. 25.

providing the information, but rather a desire to prevent Guatemala from being given the full opportunity to defend its interests and to prevent the Panel from objectively assessing the matter before it.”<sup>191</sup> According to Guatemala, the Panel should not “reward the United States for obstructing Guatemala’s defense,” therefore it requested that we not attribute probative value to any of the redacted exhibits and anonymous statements submitted by the United States, including the affidavit provided by the ICSID Secretary-General.<sup>192</sup>

250. By letter dated May 5, 2015, the Panel informed the disputing Parties that it had considered the letters submitted by them and that for the reasons set out in its decision of February 26, 2015, a majority of the Panel had found that the Panel did not have the authority to require the United States to provide the Panel and Guatemala the information it had chosen not to submit, including the information disclosed to the ICSID Secretary-General and her staff. The Panel stated as well that the admissibility and probative value of all evidence submitted by the disputing Parties, including the declaration of the ICSID Secretary-General, would be determined in light of the submissions of the disputing Parties and their arguments at the hearing.

251. In our decision of February 26, 2015, we determined that a Party to dispute settlement proceedings under Chapter 20 of the CAFTA-DR has a prerogative to submit evidence as it sees fit in support of its position, that the Rules do not preclude a Party from submitting evidence in the form of anonymous witness declarations, nor do they require a Party to supplement the submission of witness declarations by providing personal identifier or other information that could help to put such declarations in context. We determined as well that the Rules impose no affirmative obligation on CAFTA-DR disputing Parties to assist the fact-finding process.<sup>193</sup> Moreover, as we stated in that decision, we cannot conclude that non-disclosure by the United States reflects bad faith on its part.<sup>194</sup>

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<sup>191</sup> GTM RS, para. 76.

<sup>192</sup> GTM RS, para. 83.

<sup>193</sup> *Ibid*, paras. 41 and 42.

<sup>194</sup> *Ibid*, para. 39.

252. As we mentioned in our decision of February 26, 2015, Rules 15 and 16 deal only with information already contained in such documents and not with whether any particular information must be included in them. The redaction of information from documents presented to both the Panel and the other disputing Party is not a subject addressed by the Rules.<sup>195</sup> The United States chose to submit redacted information to the Panel in support of its claims. Taking into account our findings that a Party to dispute settlement proceedings under Chapter 20 of the CAFTA-DR has a prerogative to submit evidence as it sees fit in support of its position as well as our findings with regard to the redacted information presented by the United States, we have no reason to second guess the ulterior motives or concerns of the United States in presenting its evidence in a certain way to the Panel and to Guatemala while providing the ICSID Secretary-General with non-redacted versions with the objective of corroborating certain facts.

253. However, while we have no difficulty finding that Exhibit USA-170 is admissible in this dispute settlement proceeding, we did have some difficulty determining what probative value to give the factual assertions made therein. To understand our dilemma, it is important to recall why the United States introduced Exhibit USA-170 in the first place.

254. The United States case is based to a significant degree on statements of workers and labor officials who, according to the United States, provided their statements on the understanding that their identities could and would be kept confidential not only from the public, but also from Guatemala and this Panel. To respect this demand for confidentiality, the United States redacted the names of witnesses not only from declarations by those witnesses, but also from other supporting documents. It replaced each name with an identifying letter or series of letters. This method of presenting its evidence posed a problem, because if witness X authored a declaration and stated that he was the subject of a court order or other supporting documentation adduced by the United States, Guatemala and the Panel would have no way to verify the alleged name correspondence.

255. To seek to prove the relationship between documents and declarants, in connection with its Rebuttal Submission, the United States asked the Secretary-General to

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<sup>195</sup> *Ibid*, paras. 43 and 44.

conduct what the United States describes as “an independent review of unredacted versions of the materials the United States has submitted in this proceeding.”<sup>196</sup> The result of that review is Exhibit USA-170, a declaration by the Secretary-General vouching for name correspondences between various documents. According to the United States, “the results of the Secretary-General’s review were provided to Guatemala and the Panel ... to further reflect that the Panel may rely upon the information provided in the U.S. exhibits as being true and accurate.”<sup>197</sup>

256. Guatemala does not agree. In its Rebuttal Submission, it complains that “the United States wants its own hand-selected outside persons to evaluate the veracity of the evidence it is submitting in these CAFTA-DR proceedings, when that evaluation clearly falls within the in-delegable functions of this Panel.”<sup>198</sup>

257. In our view, the United States did not ask the Secretary-General to evaluate the veracity of the evidence placed before her. Rather it sought to add to the factual record by submitting her observations of correspondences between redacted elements of documents already in the record.

258. The Secretary-General’s statement has some probative value. The United States has a duty to carry out its obligations under the CAFTA-DR, including the conduct of this dispute settlement proceeding, in good faith.<sup>199</sup> It is appropriate to presume that it observed this duty in the manner in which it presented documents to the Secretary-General for her review. In our analysis of the record evidence below, we find as fact a number of correspondences reported in that statement, where details in documents alleged to be linked to one another tend to support such linkage.

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<sup>196</sup> US RS, para. 25. The United States also submitted, as Exhibit USA-188, the file of redacted exhibits it states that it provided to the ICSID Secretary-General.

<sup>197</sup> US RS, para. 25.

<sup>198</sup> GTM RS, para. 77.

<sup>199</sup> See VCLT, United Nations Treaty Series, Vol. 1155, p. 331 (May 23, 1969), Article 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

259. Nonetheless, we have misgivings about receiving this information in this way. It could have been added to the record in a manner more consistent with CAFTA-DR procedures. We consider it important as an institutional matter to express our concerns with the U.S. unilateral decision to engage the Secretary-General to vouch for those correspondences and then to urge that we accept her findings as fact. In our view, this was not an ideal way to deal with the problem presented by the reliance on redacted evidence.

260. The correspondence between declarants' names and names appearing in supporting documents is an important factual element of the U.S. *prima facie* case. To directly verify correspondences, the Panel would have needed to review the unredacted documents and then compare them to the redacted documents. Yet rather than permit the Panel to do that itself, the United States tasked the ICSID Secretary-General to do that and then, based on the Secretary-General's report, the United States asked the Panel to find the information in question (*i.e.*, the name correspondences) to be "true and accurate."<sup>200</sup> In other words, the United States asked the Panel to make a finding of fact based not on its own review of the best available evidence, but rather on the declaration of a third party.

261. We appreciate the problem with which the United States was confronted given its decision to treat declarants' identities as confidential. There are other ways, however, in which it might have addressed this problem that would have been consistent with the letter and spirit of Chapter 20 of the CAFTA-DR and the Rules. For example, the United States could have asked the Panel to perform an *in camera* review of the documents to verify the alleged name correspondences. To avoid that approach amounting to an *ex parte* communication, each Party could have designated a single observer to participate in the *in camera* review. To ensure confidentiality, strict safeguards could have been put in place, including prohibitions on photocopying and note-taking.

262. Alternatively, the United States could have proposed that the Panel designate a third party to vouch for the correspondences, with both disputing Parties participating in the establishment of that third party's terms of reference. While we have no reason to doubt the

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<sup>200</sup> US RS, para. 25.

credibility of the ICSID Secretary-General or to question the diligence with which she performed the task the United States assigned to her, the fact remains that the task was assigned unilaterally by the United States with no input from either the Panel or the responding Party. In saying this, we do not in any way disparage the Secretary-General (an official whom we hold in the highest regard), but simply describe the reality of the circumstance created by the U.S. approach.

263. If the United States had asked the Panel to appoint a third party to review name correspondences and had proposed the Secretary-General as that third party, the situation would have been different. In that case, both disputing Parties and the Panel would have participated in the decision whether to appoint a third party, whom to appoint, and what terms of reference to prescribe. If following such consultations the Panel had decided to appoint the ICSID Secretary-General, she now would be acting not at the behest of a single disputing Party, but at the behest of the Panel. As a matter of procedural fairness, that approach would have been preferable to the one actually pursued.

264. In fact, CAFTA-DR Article 20.12 expressly provides a mechanism for seeking information or technical advice from a third party, and Rules 70 through 77 spell out how this is to be done. Article 20.12 states:

On request of a disputing Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree.

265. Of course, proceeding in the manner contemplated by Article 20.12 would have required Guatemala to “so agree” to a proposal to appoint a third party to verify name correspondences. It is possible that Guatemala would have withheld its agreement. Since the United States did not make the request, however, we cannot assume this would have been the case.

266. In sum, we believe that there were other ways to address the name correspondence problem than for the United States to unilaterally appoint a third party to vouch

for correspondences. We believe those other ways would have been more consistent with the procedural fairness that Chapter 20 of the CAFTA-DR and the Rules seek to accomplish.

### **3. Admissibility and Relevance of Certain Statistics and Reports**

267. The evidence and argument of the United States with respect to both claims falling within the Panel's mandate focus on establishing particular instances of failure to effectively enforce, and on establishing that these particular instances constitute a course of action or inaction. The United States does not claim or seek to prove in its Initial Written Submission that the Guatemalan labor courts or inspectorate failed to enforce labor laws on a more widespread basis.<sup>201</sup> The United States nonetheless tenders with its Rebuttal Submission some evidence with respect to the overall functioning of Guatemala's labor law enforcement institutions. The Panel therefore must consider the relevance and probative value of such evidence. The Panel must also consider an objection by Guatemala to the admissibility of one such source of evidence. We begin by addressing that objection.

268. In paragraph 114 of its Rebuttal Submission the United States referred the Panel to statistical tables posted on the website of the Guatemalan Judiciary. The United States did not submit physical or electronic copies of the tables, but rather provided the Panel with a website link through which it said that the tables were available. That link later became inactive. The Panel therefore requested by letter to the disputing Parties dated April 26, 2016 that they supply copies of the tables in question. Guatemala objected by letter to the Panel dated May 4, 2016 to the admission of the tables into the record, on the grounds that their submission was untimely, and that admitting them would violate Guatemala's due process rights. The Panel does not agree. The United States referred the Panel to the information in question in a timely manner in its rebuttal submission. While the Panel would have preferred to receive this information in an

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<sup>201</sup> The United States contends in its response to the Panel's questions following the hearing, among other things, that "the inaction documented by the United States is not exceptional", and that it is "representative of a widespread problem". (Responses, para. 57). On its face this statement appears to expand the claims made by the United States in its Initial Written Submission and Rebuttal Submission. However, such an expansion following the submission of evidence and argument and after the oral hearing would clearly have been untimely.

electronic or paper format, nothing turns on the form of the document. The submission of the evidence was timely. Guatemala had ample time to respond to the assertions in the United States' rebuttal submission concerning the evidence contained in the tables. In any event, Guatemala supplied detailed commentary on that evidence, and additional statistical tables in response to it following the Panel's letter of April 26, 2016. The United States did not object to this evidence or argument. The Panel admitted and considered it.

269. We return to the relevance and probative value of evidence submitted by the United States with respect to the overall functioning of Guatemalan enforcement institutions. The Panel notes that the United States submitted such evidence only in rebuttal, and then only to cast doubt upon claims made by Guatemala in its Initial Written Submission or to corroborate evidence that the United States had submitted to demonstrate particular instances of failure to enforce. Specifically, in its Rebuttal Submission the United States referred the Panel to three sources of information concerning the functioning of Guatemala's labor law enforcement systems. First, as noted above, the United States referred the Panel to statistics posted on the website of the Guatemalan Judiciary. The United States claims that these statistics demonstrate a high rate of non-compliance by employers with court orders during the period between August 1, 2012 and September 4, 2014. It contends that these statistics "support the record presented by the United States,"<sup>202</sup> a record that it then says demonstrates that: (1) employers dismissed employees for violating a union contrary to specific Articles of the GLC; (2) the Guatemalan courts issued orders for reinstatement, back pay, and penalty fines; and (3) no effective action was taken by Guatemala to ensure compliance with the order or to otherwise ensure remediation of the violation.<sup>203</sup> Second, the United States refers the Panel in its Rebuttal Submission to reports by the ILO and by United Nations ("UN") officials that it says indicate widespread non-compliance with labor laws in the Guatemalan agricultural sector. It offers this evidence for the stated purpose of responding to Guatemala's claim in its Initial Written Submission that its "labor laws are strictly enforced" by its inspectorate.<sup>204</sup> Finally the United States refers the Panel

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<sup>202</sup> US RS, para. 114.

<sup>203</sup> US RS, para. 115.

<sup>204</sup> US RS, para. 159.

to an October 1, 2009 International Labour Office Technical Memorandum reporting on a diagnostic undertaken at the request of Guatemala's Ministry of Labor in the interest of improving labor inspection. The diagnostic observes numerous problems with respect to the functioning of Guatemala's labor inspectorate at that time. The United States does not seek, however, to prove the extent or duration the problems identified, but refers the Panel to the diagnostic simply to support its claim that "the ILO has noted similar evidence of inaction by the Ministry of Labor" to that tendered by the United States with respect to failures to enforce at particular employers.<sup>205</sup>

270. The Panel considers each of these reports to be admissible and probative for the purposes for which they were submitted. The Panel will consider this evidence if and to the extent that it sheds light on the likelihood that the particular instances of failure to effectively enforce alleged by the United States took place, or on whether they constitute a course of action or inaction by the Guatemalan courts or inspectorate. The Panel need not and should not consider whether the statistics of the Guatemalan Judiciary or intergovernmental agency reports establish widespread failures by the Guatemalan inspectorate or judiciary, since that is not the claim advanced by the United States in its pleadings.<sup>206</sup> We note that had the United States sought to prove claims of systemic or widespread failure on the basis of the reports in question, the Panel would have required additional information concerning the methodologies and sources of information underlying those reports. This would not have been out of any particular concern regarding those methods, but rather to ensure the completeness of any factual record upon which the Panel might draw conclusions.

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<sup>205</sup> US RS, para. 210.

<sup>206</sup> Neither is such a claim implicit in the pleadings of the United States. The United States does not contend that failures to enforce must be widespread or systemic to constitute a course of action or inaction. Nor, as discussed in section III.C, *supra*, do we conclude that a Party must so prove to establish a violation of Article 16.2.1(a).

## **B. The Claim of Failures to Ensure Compliance with Court Orders**

### **1. Temporal Issues**

271. In section III.F, *supra*, we concluded that the existence of a breach cannot be established on the basis of events alleged to have occurred after the date of the panel request. We also stated that in considering whether the United States has proven that Guatemala breached its obligations under CAFTA-DR Article 16.2.1(a), we will examine only evidence of conduct on or before the date of the U.S. panel request, *i.e.*, August 9, 2011 (while noting that we may examine evidence of conduct post-dating the panel request in considering whether breaching conduct in existence on the date of the panel request is continuing).

272. The United States contends, in support of its claim that Guatemala failed to effectively enforce labor laws directly related to the right of association and the right to organize and bargain collectively by not securing compliance with court orders, that on November 21, 2011, a labor court found that Mackditex, an apparel manufacturer, had wrongfully dismissed 17 workers who had initiated a conciliation process. The United States alleges that those workers have not been reinstated or paid, and that the court failed to refer the violations for criminal sanctions or to increase the fines.<sup>207</sup> In support of these allegations, the United States presented two joint statements dated June 25, 2014.<sup>208</sup> The United States also presented a document dated September 13, 2011 issued by a Guatemalan court acknowledging the existence of a collective conflict and prohibiting reprisals from the parties, a petition for reinstatement dated October 11, 2011,<sup>209</sup> a report from an inspector dated October 11, 2011,<sup>210</sup> and a reinstatement order dated November 21, 2011.<sup>211</sup> This last document appears to address a complaint filed by 17 workers.

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<sup>207</sup> US IWS, paras. 71-73; US RS, para. 101.

<sup>208</sup> Exhibits USA-18 and USA-19.

<sup>209</sup> Exhibits USA-64 and 65.

<sup>210</sup> Exhibit USA-66.

<sup>211</sup> Exhibit USA-67.

273. The reinstatement order concerning Mackditex was issued on November 21, 2011. This is after the United States presented its request for establishment of a panel on August 9, 2011. The order indicates that the dismissals took place in October 6, October 7 and October 8, 2011. The rest of the documents provided by the United States, aside from USA-18 and USA-19, refer to events that took place after August 9, 2011. Because a failure to effectively enforce labor laws cannot be established solely on the basis of events that occurred after the date of the panel request, we will not consider these alleged actions when analyzing initially whether the United States has established a breach of Article 16.2.1(a). Should the remaining evidence submitted by the United States establish such a breach, we will consider whether the evidence in respect of events at Mackditex proves a continuation of that breach.

274. We turn now to examine whether the United States has established that Guatemala failed to effectively enforce labor laws within the meaning of Article 16.2.1(a).

## **2. Whether Guatemala Failed to Effectively Enforce Its Labor Laws**

275. The United States contends that Guatemala has failed to effectively enforce labor laws within the meaning of Article 16.2.1(a) and Article 16.8 of the CAFTA-DR. The United States submits that the CAFTA-DR defines “statutes and regulations” with respect to Guatemala as the “laws of its legislative body or regulations promulgated pursuant to an act of its legislative body that are enforceable by action of the executive body,” and that in this case, the relevant “laws of [Guatemala’s] legislative body” are set out in the Guatemalan Labor Code (“**Labor Code or GLC**”),” which is a set of statutes originally passed into law by the Guatemalan legislature by decree in 1961 and supplemented or amended regularly through the legislative process.<sup>212</sup>

276. According to the United States, Guatemala has failed to enforce certain statutes and regulations directly related to the right of association and the right to organize and bargain collectively. The Articles of the GLC which the United States argues Guatemala has failed to

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<sup>212</sup> US IWS, para. 23.

enforce are the following: Articles 10, 62(c), 209, 223, 379 and 380. Since these provisions are directly related to the right of association and the right to organize and bargain collectively, the United States contends, they are labor laws within the meaning of Article 16.8.<sup>213</sup>

277. Guatemala, on the other hand, argues that Articles 16.8 and 16.2.1(a) must be understood as referring to enforcement of labor laws by the executive body.<sup>214</sup> Since the Public Ministry and the labor courts are not part of Guatemala's executive body, then the Public Ministry's alleged failure to pursue a criminal penalty and the actions or inactions of Guatemalan labor courts do not fall within the purview of Article 16.2.1(a) of the CAFTA-DR.<sup>215</sup>

**a. Whether Articles 10, 62(c), 209, 223, 379 and 380 are labor laws**

278. Article 16.8 of the CAFTA-DR defines "labor laws" for the purpose of Chapter 16. This provision states the following:

**labor laws** mean a Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:

- a. the right of association;
- b. the right to organize and bargain collectively;
- c. a prohibition on the use of any form of forced or compulsory labor;
- d. a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and

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<sup>213</sup> US IWS, paras. 21-28.

<sup>214</sup> GTM IWS, para. 128.

<sup>215</sup> GTM IWS, paras. 180-192.

- e. acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

(...)

**statutes or regulations** means:

for Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua, laws of its legislative body or regulations promulgated pursuant to an act of its legislative body that are enforceable by action of the executive body...

279. We recall our conclusion in section III.A that if a law or regulation is capable of being enforced by action of the executive body, and if it meets the other definitional criteria of Article 16.8, then it is a “labor law” for the purposes of all of the provisions of CAFTA-DR Chapter 16. Article 16.2.1(a) requires a Party to “not fail to effectively enforce its labor laws,” regardless of which organs of the State – whether executive or non-executive – happen to be responsible for enforcement.

280. Therefore, we must determine first whether Articles 10, 62(c), 209, 223, 379 and 380 are provisions of a “Party’s statutes or regulations, or provisions thereof” capable of being enforced by action of the executive body, and second whether they relate directly to internationally recognized labor rights in Article 16.8.

281. With regard to the first question, we note that the GLC was passed into law as Decree 1441 by the Congress of Guatemala in 1961.<sup>216</sup> The Code also indicates that it was to be published and enforced by the Executive.<sup>217</sup> We therefore conclude that the GLC is a law promulgated by Guatemala’s legislative body that is enforceable by the executive body. Articles 10, 62(c), 209, 223, 379 and 380 are provisions of such law. Accordingly, these Articles are provisions of “a Party’s statutes or regulations” within the terms of Article 16.8.

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<sup>216</sup> GLC, Exhibits USA-48 and USA-49.

<sup>217</sup> Exhibit USA-48, p. 1220 and Exhibit USA-49, p. 219. We note as well that according to Guatemala, “[t]he Executive is responsible for enforcing Guatemala’s Constitution and labor laws.” GTM IWS, para. 101.

282. We turn now to each of the provisions that form part of the U.S. claim. *Article 10* prohibits any kind of reprisal against workers that is designed to prevent them from exercising their rights or because they have exercised or attempted to exercise such rights. *Article 62(c)* prohibits employers from forcing or trying to force employees to withdraw from unions or legal groups to which they belong, or to join different groups or particular groups. *Article 209* provides that workers may not be dismissed for participating in a union, and that workers shall enjoy such protection from the moment they inform the General Labor Inspectorate (“GLI”) that they are forming a union. In the event of a failure, the worker shall be reinstated within twenty-four hours and the employer responsible shall be penalized with a fine. The employer must also pay the wages and economic benefits that the workers failed to receive. If the employer persists in this conduct for more than seven days, the fine incurred shall be increased by fifty percent.

283. Under *Article 223* employers may not dismiss members of the Executive Committee of a union or association absent good cause during their terms of office or during the 12-month period after their term has expired. This protection applies as well to the members of the provisional committee of a union or association that is in the organization process. *Article 379* refers to the conciliation process. According to this provision once a labor court is notified of a collective labor dispute, workers and employers are barred from taking reprisals against each other. If the employer violates this provision, a fine shall be imposed, and that fine will increase by fifty percent if the conduct persists for more than seven days. Finally, *Article 380* provides that after the submission of the list of demands in a collective labor dispute, any termination of employment must be authorized by the judge. In the event of failure to comply with this provision the judge shall impose penalties and order the reinstatement of the worker or workers in question. The judge shall appoint a court employee to act as the executor of the order and shall enforce the reinstatement.<sup>218</sup>

284. The Articles referenced above are directly related to the rights of association and the right to organize and bargain collectively. This is clear from the text of the provisions. Therefore, the Panel considers that those provisions are labor laws within the meaning of Article 16.8 and for purposes of Article 16.2.1(a).

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<sup>218</sup> Exhibit USA-49 (Translation excerpt).

**b.      Whether Guatemala has failed to effectively enforce labor laws by not securing compliance with court orders**

285. We turn to examining whether the record evidence establishes that Guatemala has failed to effectively enforce its labor laws within the meaning of Article 16.2.1(a). We begin by recalling our earlier conclusion that the phrase “*not fail to effectively enforce*” in Article 16.2.1(a) imposes an obligation to compel compliance with labor laws (or, more precisely, not neglect to compel or be unsuccessful in compelling such compliance) in a manner that is sufficiently certain to achieve compliance that it may reasonably be expected that employers will generally comply with those laws, and employers may reasonably expect that other employers will comply with them as well.

286. We must determine whether the record evidence establishes that in instances concerning eight particular employers—Industria de Representaciones de Transporte Maritimo (ITM), Negocios Poruatrios S.A. (NEPORSA), Operaciones Diversas (ODIVESA), Representaciones de Transporte Maritimo, S.A (RTM), Fribo, Alianza, Avandia and Solesa—Guatemala failed to pursue enforcement of court orders in a manner sufficiently certain to achieve compliance.

**i.      ITM**

287. The United States argues that: on February 19, 2008 a labor court found that ITM had violated Article 209 of the GLC by dismissing 14 stevedores engaged in the formation of a union; ITM did not reinstate the workers; the labor court certified the stevedores’ cases to the Public Ministry but no criminal penalty was pursued; and the court failed to increase the penalties in response to the employer’s non-compliance, as required by law.<sup>219</sup>

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<sup>219</sup> US IWS, para. 54 and 55; US RS, para. 86.

288. In support of its claim, the United States presents six statements made in 2014.<sup>220</sup> On each statement, the name and identifying information (such as the age and position of the persons submitting the statements) are redacted. The wording of each statement is similar to the others and makes reference to similar events. Each person making a statement recounts that: he was dismissed from employment by ITM in February of 2008 because of his participation in a union; a judge of the court of first instance ordered his reinstatement by ITM; and that as of the date of the statement ITM had not carried out the reinstatement or paid any compensation or damages ordered by the judge. In five of the statements the worker identifies an attached reinstatement order, dated February 19, 2008, against ITM as being the order for his reinstatement. These orders appear to be official documents from a First Instance District Court (Juzgado de Primera Instancia) in Escuintla. Each was issued by the same judge. The name of the worker in question and court file number are redacted from each. Among the reinstatement orders, two are largely or partly illegible.

289. One statement also contains other official documents. The first is a report dated November 27, 2013 by the Human Rights Ombudsman's Office from which we can provisionally conclude that the defendant employer had not paid the fines imposed upon it, and that despite several attempts at reinstatement with which the employer had not complied, the defendant employer had not been referred for criminal prosecution for disobedience. The worker also attached to his statement a judgment dated in 2014 again ordering his reinstatement.<sup>221</sup> It would therefore seem that, with regard to this case, since 2008 there had been several attempts to reinstate the worker and that as of 2014 none had been successful.

290. The United States also submitted 14 reinstatement orders against ITM. Based on our review of this evidence, we conclude that the orders were issued by the same judge on behalf of a First Instance District Court in Escuintla on February 19, 2008, and that the legal bases for the orders include Articles 209, 223 and 380 of the GLC. Among the 14 orders, eight are

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<sup>220</sup> Exhibits USA-1 to USA-6.

<sup>221</sup> Exhibit USA-1..

illegible either completely or in part. The orders that are clearly legible indicate that the court ordered reinstatement with back pay and benefits and imposed a fine against ITM.<sup>222</sup>

291. Because of the redactions, the Panel is not able to directly determine whether the names of the six individual workers providing statements are among those on the 14 reinstatement orders. However, we note that the Declaration of the ICSID Secretary-General confirms that the names of the persons providing statements shown on the non-redacted versions of those statements correspond with the identifiers placed by the United States on the six redacted versions, and that the names of five of those persons are found on reinstatement orders among the set of 14 reinstatement orders provided by the United States.<sup>223</sup>

292. The United States also presented a table dated July 21, 2009 prepared by a labor union and received and read by an official or officials with the Guatemalan Ministry of Labor, which indicates the number of cases against ITM certified for criminal prosecution.<sup>224</sup> The six workers who provided a statement concerning ITM appear on that table as well, though the Panel cannot discern with which employer they are associated on the table.<sup>225</sup> The United States also submits an email from a member of a union confederation, UNSITRAGUA, stating that reinstatement of workers dismissed by stevedoring companies had not been made as of October 2014.<sup>226</sup>

293. Finally, the United States presented a second statement, dated March 5, 2015 with an attached table that contains information obtained by UNSITRAGUA on the status of cases in which reinstatement of workers had been ordered against various employers, including ITM.<sup>227</sup> The information contained in that statement and table is confidential. Five former workers of

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<sup>222</sup> Exhibit USA-55.

<sup>223</sup> Exhibit USA-170, paras. 6-11 and 20.

<sup>224</sup> Exhibit USA-56.

<sup>225</sup> Exhibit USA-170, para. 21.

<sup>226</sup> Exhibit USA-58.

<sup>227</sup> Exhibit USA-161.

ITM who provided a statement in these proceedings are, according to the ICSID Secretary-General, listed in the unredacted version of this table as well.<sup>228</sup>

294. The Panel considers that the evidence provided by the United States concerning ITM is sufficient to establish that the labor court of First Instance of Escuintla found that ITM violated labor laws and issued reinstatement orders to remedy those violations on February 19, 2008, and that the reinstatement orders of five workers dismissed by ITM had not been executed at the moment they made their statement in 2014. The statements of individual workers to this effect are corroborated by court orders attached to their statements and by court orders submitted by the United States upon which their names are found. Their statements are consistent with those of a union official compiling information about court proceedings into a table upon which their names are also found. Regarding these five cases, the Panel can conclude that six years after the reinstatement orders had been issued, Guatemalan labor courts were still unsuccessful in enforcing such orders in a manner sufficiently certain to achieve compliance. No compliance had been achieved as of that moment.

295. With respect to the other nine workers with respect to whom the United States alleges that orders against ITM were not enforced, the Panel has before it Exhibit USA-161, the above-described confidential statement and table of information concerning the status of reinstatement claims. The Panel also has two statements by workers recounting that other colleagues were dismissed and not reinstated.<sup>229</sup> Those two statements are somewhat vague and contradictory with respect to the number of colleagues involved with no specific information about other workers beyond these qualified assertions. The most detailed information before the Panel is therefore that set out in the statement and table dated March 5, 2015.

296. The Panel must consider whether this evidence proves that 14 reinstatement orders were issued against ITM in February, 2008 and remained valid and had not been enforced as of March, 2015.

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<sup>228</sup> Exhibit USA-170, para. 16.

<sup>229</sup> Exhibits USA-1 and USA-2.

297. There is nothing in Exhibit USA-161 indicating that its author witnessed the dismissals or issuance of the reinstatement orders personally. Rather, it appears that the table that it contains summarizes information that would have been contained on the face of the orders themselves. These statements about the contents of the orders must be approached with some caution. The Panel has no reason to doubt the honesty of its author. But since his or her identity is redacted, Guatemala had no opportunity to bring forth evidence relevant to his or her motivations. Perhaps more importantly, the evidence is subject to possible inadvertent error in the act of reporting information obtained from other sources. The Panel must therefore examine to what extent it is corroborated or supported by other indicia of reliability.

298. The most direct and reliable form of corroboration would have been for the author of the statement simply to identify the corresponding orders and attach them to the statement. This was not done however. As noted above, the United States did submit 14 reinstatement orders against ITM, on their own and in a separate exhibit, which is labeled in the record as Exhibit USA-55. This is the same number of orders as is listed in the table in USA-161. However, the redactions to the information contained in USA-161 remove identifying information including names and court file numbers from the description of the orders contained in the table. This makes it impossible to directly establish a correspondence between the orders referred to in the table contained in that exhibit and the 14 orders submitted in evidence by the United States in Exhibit USA-55. We must therefore consider whether the information contained in the table about the 14 orders against ITM can be corroborated.

299. The statements of workers (discussed above) describing their dismissal by ITM and the issuance of reinstatement orders in response provide some corroboration. Workers mention that several colleagues were dismissed at the same time, and that the labor court ordered their reinstatement. The date of dismissal noted on the reinstatement orders attached to their statements, where legible, is the same date of dismissal as is noted with respect to each order against ITM described in the table in USA-161, except for two of them, and the same date that is noted on each of the reinstatement orders or on the notice accompanying the orders in USA-55, except for one. However, as noted above, because the worker statements are imprecise with respect to the number of colleagues dismissed on the relevant date and subsequently reinstated,

they cannot corroborate a precise number of reinstated orders issued and subsequently not enforced.

300. Correspondence between information contained in the orders in USA-55 on the one hand, and the descriptions contained in USA-161 on the other does provide some further confirmation of information contained in the table attached to that exhibit. On 11 of the orders in USA-55 the date of dismissal is clearly legible, and corresponds to that listed in USA-161. The orders are all sufficiently legible that we can see that they concern demands for reinstatement against ITM. Of the orders that are fully legible, all state that they provide redress for unlawful dismissals and cite as their legal basis, among others, Article 209 and 380 of the GLC. This information corresponds with information contained in the table attached to USA-161, subject to one relatively minor discrepancy. We are prepared to conclude, on the basis of all the evidence reviewed above that the information set out in the table in USA-161 describing the date, content and subject matter of 14 orders issued by the labor court in February 2008 is accurate.

301. The next question that we must therefore consider is whether the record evidence establishes that each of those orders, and not simply the five orders with respect to which we have worker statements, remained in effect but had not been enforced as of March, 2015.

302. Each statement in the table reports its author's conclusion with respect to whether a particular worker had been reinstated, and with respect to whether the order for reinstatement remained valid and pending execution. Such conclusions are of course those of the author, based upon his or her observation of particular evidence. Before accepting them as proof, the Panel must reach its own decision, based in the record evidence, that they are in fact well-founded.

303. The Panel carefully considered the contents of USA-161. It cannot report those considerations here because the United States designated USA-161 as confidential in its entirety. We can only report the conclusions that we have drawn on the basis of those considerations.

304. There is very little in USA-161 to indicate upon what evidence its author based his or her conclusions. We do not have any concrete information with respect to the sources of the information in USA-161 that orders remained valid and pending execution. The Panel has no reason to doubt the honesty or good faith of the statement's author. But, absent corroborating

evidence, the Panel cannot simply accept the conclusions presented in USA-161 as to the status of the court orders without more concrete evidence as to the basis for those conclusions.

305. To provide such a basis, the United States could have submitted to the Panel a fuller description by the statement's author of the information upon which he or she based conclusions that the orders were not enforced and of how he or she obtained that information. Alternatively, the United States could have produced evidence of a recent search of court records. We note that with respect to other reinstatement orders it produced exactly such evidence.<sup>230</sup>

306. We turn to the question of whether the record offers sufficient corroboration of the relevant statements in USA-161. We must consider those statements in the context of the complete factual record. Two aspects of the record are potentially relevant: statistical evidence submitted by the United States, and documentary evidence submitted by Guatemala.

307. The Panel considered whether statistical evidence submitted by the United States regarding the enforcement of court orders in Guatemala might support a conclusion that each of the orders issued against ITM on February 19, 2008 remained valid and were not enforced thereafter.

308. The Panel has before it four tables that contain information concerning whether defendant parties complied with the orders of Guatemalan courts, upon the carrying out of certain enforcement procedures during the period between August 1, 2012 and September 4, 2014. The first table is entitled "Diligencia de Requerimiento de Pago No Cumple." We translate this to mean "Payment Demand Proceeding – Does Not Comply." The second table is entitled "Diligencia de Requerimiento de Pago Si Cumple." We translate this to mean "Payment Demand Proceeding – Does Comply." The third is called "Verificación de Requerimiento de Pago no Cumple." We translate this to mean "Payment Demand Verification – Does Not Comply." The fourth is called "Verificación de Requerimiento de Pago Si Cumple." We translate this to mean "Payment Demand Verification – Does Comply."

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<sup>230</sup> See Exhibit USA-63.

309. The United States claims, and Guatemala does not deny, that these tables were posted on the official website of the Guatemalan Judicial Branch. Their source would appear to be reliable.

310. The first table contains 1571 rows of information. The headings indicate that each row contains the following information: file number; the official (“Ministro”) assigned; the type of administrative proceeding; the dispute; the result; the defendant; the date of the proceeding; the date for any deposit of money; and the date of any verification. In every instance the type of proceeding is identified as “Requerimiento de pago,” a term that, as noted above, we translate into English as “Payment Demand.” In every instance the result is listed as “no cumple con el pago,” meaning “does not comply with the payment.” In a majority, but certainly not all of the proceedings the dispute is identified by a file number and a description of the matter as concerning a reinstatement.

311. The first table thus appears to provide information with respect to payment demands that had not been complied with by a defendant. That appears to be its purpose, since in every case the result is listed as “does not comply,” and the title of the table indicates that it presents matters in which the employer does not comply. The first table therefore indicates that in 1571 cases employers did not comply with payment demands made by authorities to enforce court orders between August 1, 2012 and September 4, 2014, and that many of those payment demands occurred in matters of reinstatement.

312. The second table contains 23 rows of information. It covers the same time period as the first. As with the first table, each row presents information regarding a particular case. The second table features the same headings as the first. In every instance the result in the second table is listed as “cumple con el pago,” meaning “complies with the payment.” The information in ten of the 23 rows indicates that the case described therein concerned a reinstatement order. The second table thus appears to provide information with respect to payment demands that had been complied with by a defendant. That appears to be its purpose, since in every case the result is listed as “does comply,” and the title of the table indicates that it presents matters in which the employer does comply. The second table therefore indicates that in 23 cases employers did comply with payment demands made by authorities to enforce court orders between August 1,

2012 and September 4, 2014, and that ten such cases concerned matters involving reinstatement orders as well.

313. The first table indicates that in a large number (1571) of cases defendants failed to comply with payment orders. The second indicates that during the same time period only in a relatively small number of cases (23) did defendants comply with payment orders. This indicates that the rate of compliance with payment orders during the relevant time was very low. Similarly, the third and fourth tables, taken together, appear to indicate that there were many more cases of non-compliance (193) upon verification of court orders for payment than of compliance (18) during the relevant time period, which is again August 1, 2012 to September 4, 2014.

314. Taken together, this information is indicative of problems with respect to the enforcement of court orders. While it pertains to a time period following the Panel request, it seems unlikely that any such problems would have arisen at that time without antecedents during the period before the Panel request. However, without more information the Panel can draw no conclusions about the likelihood of non-compliance with a reinstatement order in any particular case. Further statistical analysis would be required to determine whether the overall likelihood of non-compliance in response to the relevant proceedings within the population of cases shown on the tables could be extrapolated to other employers or to a different time period. There is no such analysis in the record. Further, the tables concern the enforcement of payment orders and not reinstatement orders. While it is true that back pay orders generally accompany reinstatement orders, and that many of the payment demands shown in the table arise in connection with reinstatement orders, the record evidence discussed below discloses that in some cases workers have been reinstated but that their back pay claims remained outstanding. The evidence with respect to the ITM orders is simply that reinstatement orders remained valid and pending execution.

315. The statistical evidence therefore does not provide enough information about the likelihood of failure to enforce any given reinstatement order for the Panel to draw an inference about the likelihood of a failure in any of the ITM cases.

316. Finally, we turn to the evidence concerning the ITM workers presented by Guatemala. We begin by noting that the Panel can not infer on the basis of the fact that Guatemala did not produce court records in respect of the workers in question that what the United States claims in respect of those workers is true. Rule 65 places the burden of proof on the United States. The United States has not demonstrated that those records were not available to it and that therefore such an inference might be appropriate. Nor did the United States request disclosure of such documents, or argue in its written submissions or oral statement that the Panel should draw an adverse inference from the fact that Guatemala did not present them in evidence. In these circumstances Guatemala remains entitled under Rule 65 of the Rules to insist in argument that the United States has not proven its case, and may choose not to adduce evidence without giving rise to an adverse inference.

317. Guatemala presents eleven official documents from 2010, 2012 and 2014. Two of them are illegible.<sup>231</sup> The legible documents state that reinstatement could not be executed since the worker did not appear or present himself before the court. Guatemala also presents a table of information regarding cases against particular employers.<sup>232</sup> Regarding ITM, the table states that reinstatement in 15 cases identified by Guatemala could not be carried out. In most of those cases the reason given for this is that the employee did not show up for reinstatement. In other cases, the reason given is that the employee provided the wrong address of the employer or voluntarily withdrew the request. It is Guatemala's contention that "in a majority of cases the reinstatement orders could not be executed because the employee did not show up for reinstatement," and that "in another case the employee voluntarily withdrew the reinstatement request and in two other cases the employees failed to provide information to the court that was necessary to execute the reinstatement."<sup>233</sup> Guatemala maintains that "given that the employees did not pursue their reinstatements, there was no basis for the Public Ministry to take criminal action against ITM."<sup>234</sup>

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<sup>231</sup> Exhibit GTM-52.

<sup>232</sup> Exhibit GTM-55.

<sup>233</sup> GTM RS, para. 141.

<sup>234</sup> GTM RS, para. 141.

318. The table described immediately above is not dated. Nor does it provide the dates of events to which the information on the status of each case refers, except with respect to one case where the table indicates that the employee failed to show up for reinstatement in 2014. Because of the redactions to the evidence submitted by the United States, the Panel cannot directly confirm whether the evidence submitted by Guatemala refers to the cases presented by the United States.

319. The table and Guatemala's submissions with respect to it are, however, significant in that they do not take issue with the claim of the United States that 14 reinstatement orders remained unenforced for the time alleged by the United States. Rather, they appear to acknowledge this and instead seek to show that any delay in or failure to enforce those orders was justified.

320. Given Guatemala's evidence and arguments, we are prepared to conclude that the 14 orders remained unenforced as the United States contends.

321. The evidence presented by Guatemala does not demonstrate that the labor courts were justified in not enforcing these orders. It is clear to the Panel that reinstatement of a worker can be a personal procedure where the worker needs to be present. However, for reasons set out immediately below, we do not consider that this relieves the authority of its obligation to execute the orders. In any event, in the case of the worker that failed to show up for reinstatement in 2014, it is difficult to conceive how, given that he remained without reinstatement six years after the dismissal, there had been proper action to enforce the order. Similarly, even though the Panel cannot confirm, because of the redactions, whether the other 11 documents refer to the cases presented by the United States, we note that in any event they were produced in 2010, 2012 and 2014, which is several years after the orders were issued.

322. The GLC mandates prompt and proactive enforcement of orders by the labor courts of first instance. Article 425 of the GLC makes a judge of first instance responsible for executing any order that he or she renders. Moreover, in each of the legible orders concerning ITM submitted to the panel, the court cites Article 380 of the GLC as a basis for its decision. Article 380 requires that if any dismissal takes place without following the procedures provided

therein, the judge must impose stipulated sanctions and order the immediate reinstatement of the dismissed worker. If the employer disobeys the order the judge is required to increase the sanction. If the employer's disobedience persists, Article 380 requires that the judge order the certification of the matter against the employer committing the infraction, for purposes of prosecution, without relieving the employer of the obligation to reinstate the affected employees. Article 380 further stipulates that the judge's reinstatement order must be rendered within 24 hours of the receipt of the employee's complaint by the court, and that in the order the judge must designate an employee of the court as executor of the order to make the reinstatement effective.

323. We recall our findings that effective enforcement will generally be evident in results, which will normally require that the authority take appropriate actions that bring the employer into compliance. It is difficult to conceive how there has been appropriate action to bring about compliance after several years have lapsed without it. The evidence provided by Guatemala does not demonstrate such actions or justify a failure to take them.

324. The period of time that elapsed without enforcement and without justification for lack of enforcement is in these instances sufficiently lengthy to constitute a failure to effectively enforce labor laws.

## **ii. NEPORSA**

325. The United States contends that: between June 2008 and September 4, 2008, a labor court found that NEPORSA had wrongfully dismissed 40 stevedores in retaliation for participating in a union; NEPORSA failed to reinstate the workers; and the labor court certified the stevedores' cases to the Public Ministry but no criminal penalty was pursued nor were the penalties increased.<sup>235</sup> In support of its claim, the United States presents four statements made in 2014.<sup>236</sup> The names and identifying information such as the age and position of the persons submitting the statements are redacted from each statement. The wording of the statements is

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<sup>235</sup> US IWS, paras. 56-57; US RS, para. 90.

<sup>236</sup> Exhibits USA-2, USA-4, USA-7 and USA-8.

similar and makes reference to similar events. Each recounts that: the worker making the statement was dismissed from employment by NEPORSA in 2008 because of his participation in a union; a judge of the court of first instance ordered his reinstatement; and that as of the date of the statement NEPORSA had not carried out the reinstatement or paid any compensation or damages ordered by the judge. The names of the persons providing the statements match the names of the non-redacted versions.<sup>237</sup> The statements have attached reinstatement orders from the relevant time period in 2008 against NEPORSA, although one of them is largely illegible. The remaining three orders appear to be official documents from a First Instance District Court (Juzgado de Primera Instancia) in Escuintla, each issued by the same judge. The names and record numbers on the orders are also redacted.

326. Two other statements of March 23, 2010 are provided.<sup>238</sup> They do not include a reinstatement order. These statements indicate there were massive dismissals in May 2008 by NEPORSA. They indicate respectively that around 70 and 150 workers were fired at that time, and that at the moment the statements were made the reinstatement orders had still not been executed.

327. The Panel also considered reinstatement orders bearing 3 different dates between June and September 2008 against NEPORSA, provided by the United States.<sup>239</sup> The legal bases for the orders include Articles 209, 223 and 380 of the GLC. The United States indicates that it presents 40 orders, one for each of the 40 stevedores. Based on its review of these documents, the Panel can confirm 39 orders. Among the 39 orders around 10 are blurry and illegible in part. The remaining 29 appear to be official documents from a First Instance District Court (Juzgado de Primera Instancia) in Escuintla, all issued by the same judge. The names and record numbers are redacted. The names of the four workers that provided their statement in 2014 appear among the names on these orders.<sup>240</sup>

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<sup>237</sup> Exhibit USA-170, paras. 7, 9, 12 and 13.

<sup>238</sup> Exhibits USA-174 and USA-183.

<sup>239</sup> Exhibit USA-57.

<sup>240</sup> Exhibit USA-170, para. 22.

328. The United States also presented a table dated July 21, 2009 prepared by a labor union, and appearing to have been received and read by an official or officials with the Guatemalan Ministry of Labor that indicates the number of cases against NEPORSA certified for criminal prosecution.<sup>241</sup> The names of the four workers that provided a statement in 2014 appear in that table.<sup>242</sup> In addition, the United States submitted an email from a member of a union confederation, UNSITRAGUA, stating that reinstatement of workers dismissed by stevedoring companies in the Port of Quetzal had not been carried as of October 2014. The author of the email says that there are more than 70 such cases.<sup>243</sup>

329. Finally, Exhibit USA-161 (discussed above) describes 39 cases involving reinstatement orders issued against NEPORSA. It also describes three additional cases but provides less information with respect to them. The Panel cannot determine whether these three cases are included within the 39 cases or if they are additional, because the date of dismissal is missing from the table and we cannot establish correspondence with the orders submitted in evidence due to the redactions to those orders and the table. Among the 39 cases, the descriptions of 38 indicate that there had been no reinstatement, and that the orders were valid but remained pending execution. It seems that the six former workers of NEPORSA that provided a statement between 2010 and 2014 are included among those listed in the unredacted version of that table.<sup>244</sup>

330. The Panel considers that the evidence provided by the United States concerning NEPORSA is sufficient on its own to establish that: a labor court found that NEPORSA dismissed six workers unlawfully and issued reinstatement orders to those workers in 2008, and that the reinstatement orders of four workers dismissed by NEPORSA had not been executed at the moment they made their statements in 2014. Regarding these cases, the Panel can conclude

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<sup>241</sup> Exhibit USA-56.

<sup>242</sup> Exhibit USA-170, para. 21.

<sup>243</sup> Exhibit USA-58.

<sup>244</sup> Exhibit USA-170, para. 16.

that six years after the reinstatement orders had been issued, Guatemalan labor courts remained unsuccessful in enforcing such orders in a manner sufficiently certain to achieve compliance.

331. We note that the statements of two workers made in 2010 do not include reinstatement orders and that according to the evidence presented by the United States, they are not included in the 39 reinstatement orders provided. We are operating with redacted evidence and cannot determine whether their names are among those found on the reinstatement orders submitted in evidence. We also cannot confirm whether they are among the cases described in Exhibit USA-161. We note that the reinstatement orders provided were issued on particular dates in June, August, and September of 2008. The numbers of orders submitted in evidence carrying each date seem to match the dates and numbers indicated in Exhibit USA-161, except that one order among the reinstatement orders submitted in evidence carries a date in August, while USA-161 appears to describe it as issued on another date in August. This could be a clerical mistake.

332. As in the case of ITM, the Panel considered whether Exhibit USA-161 could serve as a basis to determine whether and for how long the court orders were not enforced. For the reasons given above we do not consider Exhibit USA-161 to provide on its own sufficient proof that reinstatement orders were not enforced in cases other than the four cases where the Panel has evidence in the form of personal worker statements to that effect which are supported by identified orders.

333. Guatemala presents a table of cases which indicates that in 25 cases the employee did not appear before the Court, or that reinstatement could not be carried out since the employee did not show up.<sup>245</sup> The table does not have a date and therefore the Panel cannot know when it was made. Nor does it contain dates of events to which the information on the status of each case refers. However, Guatemala presented in addition 22 official documents from 2011, 2012 and 2013 which state that reinstatement could not be executed since the worker did not appear or present himself or herself before the court.<sup>246</sup> As mentioned above, because of the redactions, the Panel cannot confirm directly whether the evidence submitted by Guatemala refers to the cases

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<sup>245</sup> Exhibit GTM-55.

<sup>246</sup> Exhibit GTM-54.

presented by the United States. Nonetheless, we note that Guatemala contends that this evidence “shows that the reinstatement could not proceed because the employees failed to appear when the reinstatement was going to be executed or failed to appear in court,” and thus that “the failure to reinstate could not be attributed to the Guatemalan labor courts.” Guatemala thus effectively acknowledges that 25 of the workers were not reinstated, but offers evidence that it contends justifies this situation.

334. Having considered all the record evidence, we conclude that Guatemalan labor courts failed to reinstate 25 NEPORSA workers after having ordered their reinstatement, in the circumstances alleged by the United States.

335. We find that the failure to enforce these reinstatement orders was not justified. As discussed with respect to ITM above, it is clear to the Panel that the reinstatement of a worker can be a procedure requiring the presence of the worker in question. But Guatemala has not demonstrated that a failure by a worker to appear relieves the court of its obligation to execute the orders. On the face of Article 380 of the GLC the labor court is obligated to execute its reinstatement order, to impose an increased sanction on an employer that fails to comply, and if non-compliance persists to refer the matter for criminal prosecution. We have no basis upon which to conclude that the failure of a worker to appear at a particular reinstatement proceeding relieves the court of these statutory responsibilities on an ongoing basis. There is no evidence in the record supporting Guatemala’s contention to this effect. In any event, the 22 documents submitted by Guatemala in respect of former employees of NEPORSA were produced in 2011, 2012 and 2013. Once again it is difficult to conceive how such documents could support a conclusion that, years after the reinstatement was ordered, there had been appropriate actions to bring the employer into compliance. These documents could not demonstrate that the authority did not neglect to compel compliance of the orders or took sufficient action to remedy the situation.

### iii. ODIVESA

336. The United States contends that: on June 24, 2008 and August 25, 2008, a labor court found that ODIVESA had wrongfully dismissed on May 15, 2008 11 stevedores that had engaged in union-forming activities; as of October 15, 2014 six stevedores remained to be reinstated; and that the labor court did not refer the matter for criminal prosecution or increase the penalties as required by law.<sup>247</sup>

337. The United States presents two statements made in 2014 and one statement made in 2010.<sup>248</sup> On each the name and other identifying information such as age and position are redacted. The statements have the same format, their wording is similar, and the events narrated are similar. Each indicates that a labor court found that ODIVESA dismissed the worker unlawfully and ordered his reinstatement, and that as of the date of the statement that order had not been enforced and the amounts owing to him pursuant to the order remained unpaid. The names of the persons providing the statements match the names in the statements in the non-redacted versions of documents submitted in redacted form as exhibits.<sup>249</sup> Two of the three statements identify attached reinstatement orders dated June 24, 2008 against ODIVESA. These orders appear to be official documents from a First Instance District Court (Juzgado de Primera Instancia) in Escuintla, each issued by the same judge. The names of the workers and file numbers are redacted from the orders.

338. With one of the exhibits, which refers to another company as well, the United States presents a table with the status of proceedings on appeal.<sup>250</sup> There appear to be nine cases. According to the table, in three of them the court confirmed the resolution issued by the First Instance Court. The others were pending resolution as of the date of the statement. The document would seem to complement a document dated August 19, 2010 referring to RTM, another

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<sup>247</sup> US IWS, para. 58-60; US RS, para. 92.

<sup>248</sup> Exhibits USA-6, USA-9 and USA-10.

<sup>249</sup> Exhibit USA-170 paras. 11, 14 and 15.

<sup>250</sup> Exhibit USA-9.

employer. However, since the table is undated, contains no page numbers and is redacted, the Panel cannot determine whether the cases described therein involve ODIVESA or RTM.

339. As in the case of ITM and NEPORSA, the United States presents a table dated July 21, 2009 prepared by a labor union and apparently received and read by an official or officials within the Guatemalan Ministry of Labor.<sup>251</sup> This table indicates the cases concerning ODIVESA that were at that moment before a court of second instance. There are apparently 14 cases. One worker who provided a statement is listed in the unredacted version of that table.<sup>252</sup> In addition, as noted above, the United States submits an email from a member of a union confederation, UNSITRAGUA, stating that reinstatement of workers dismissed by stevedoring companies in the Port of Quetzal had not been made as of October 2014. He says that there are more than 70 such cases but provides no particulars with respect to them.<sup>253</sup>

340. The United States also presented thirteen reinstatement orders against ODIVESA.<sup>254</sup> Eight are dated June 24, 2008, and three are dated August 25, 2008. The legal bases for the orders include Articles 209, 223 and 380 of the GLC. The content of three are illegible either completely or in part. The names of two workers that provided a statement are found on unredacted copies of reinstatement orders.<sup>255</sup>

341. The Panel also considered, as in the cases of the other stevedoring companies, the statement dated March 5, 2015 and its attached table, in Exhibit USA-161.<sup>256</sup> Taken together with the other evidence described immediately above, this table supports conclusions that there were ten orders for reinstatement issued against ODIVESA, that each of the orders had been appealed by the employer but upheld on appeal, that as of the date of the statement there had

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<sup>251</sup> Exhibit USA-56.

<sup>252</sup> Exhibit USA-170, para. 21.

<sup>253</sup> Exhibit USA-58.

<sup>254</sup> Exhibits USA-59, USA-186 and USA-187.

<sup>255</sup> Exhibit USA-170, para. 23.

<sup>256</sup> Exhibit USA-161.

been no reinstatement in any of them; that in five cases a settlement had been reached, and that in five cases the reinstatement order remained valid but pending execution; and that a reinstatement order was confirmed on appeal. Two workers who provided a statement are listed on the unredacted version of that table.<sup>257</sup>

342. The evidence reviewed above indicates that reinstatement orders remedying violations of labor laws were issued against ODIVESA in 2008, and that the reinstatement orders of two workers dismissed by ODIVESA who provided statements to which orders were attached had not been executed at the moment they made their statement in 2014.

343. As in the case of ITM and NEPORSA the Panel considered whether Exhibit USA-161 could provide a basis upon which to determine that other orders against ODIVESA had not been enforced. For the reasons explained above we do not consider this table to provide a sufficient basis for a determination that labor courts failed to enforce court orders in cases other than the two with respect to which we have evidence from the workers supported by an identified court order.

344. With its Initial Written Submission Guatemala presented a document issued by an inspector who verified compliance with an order against ODIVESA. It states that there was a ruling of the Appellate Court in favor of ODIVESA concerning two workers (and an appeal resolution pending for a third worker), and that the reinstatement order was therefore invalidated.<sup>258</sup>

345. With its Rebuttal Submission Guatemala presented in addition excerpts of six appeal orders that invalidated reinstatement orders.<sup>259</sup> Only two carry dates, indicating that they were issued in 2009. One document is from the Constitutional Court and the rest are resolutions of appeals courts. Four of these excerpts refer to orders of June 24, 2008 and one to an order of August 25, 2008.

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<sup>257</sup> Exhibit USA-170, para. 16.

<sup>258</sup> Exhibit GTM-4.

<sup>259</sup> Exhibit GTM-53.

346. With its Rebuttal Submission Guatemala also presented a table of cases.<sup>260</sup> According to this table, in 13 cases concerning ODIVESA the appeal court invalidated a reinstatement order. In some cases, the table indicates that procedures were terminated because the Guatemalan Constitutional Court confirmed the Appeal Court's rulings. In others, it indicates that the employee submitted a request to terminate proceedings. This table is not dated and therefore the Panel cannot know when it was made. Nor does it contain the dates of events to which the information on the status of each case refers. It does not disclose the identity of its author, the source of the information that it presents, or when the rulings to which it refers were made.

347. In response, during the hearing, the United States sought to introduce documents demonstrating that the Constitutional Court affirmed the orders for the reinstatement of workers who had been dismissed by ODIVESA on May 15, 2008.<sup>261</sup> Guatemala objected to the admission of such evidence into the record on the basis that it was untimely.<sup>262</sup> Guatemala also sought to introduce evidence after the hearing purportedly demonstrating that one of the employees whose reinstatement order was allegedly upheld by the Constitutional Court later withdrew his reinstatement request, while two others failed to appear in court to execute their reinstatement orders.<sup>263</sup>

348. On the basis of its evidence, Guatemala contends that since (1) the orders with respect to three employees were overturned on appeal, (2) three more either withdrew or failed to act on their reinstatement claims, and (3) the United States appears to admit that five workers were reinstated, no worker with a valid claim to reinstatement and seeking reinstatement was in fact denied.<sup>264</sup>

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<sup>260</sup> Exhibit GTM-55.

<sup>261</sup> US Oral Statement, Panel Hearing Transcription, p. 13, Exhibits USA-237, USA-238, USA-239.

<sup>262</sup> Letter of Guatemala to the Panel dated June 11, 2015.

<sup>263</sup> GTM Final, para. 96. Exhibit GTM-59.

<sup>264</sup> GTM Final, paras. 97-98.

349. The Panel must first deal with Guatemala's objection to the admissibility of evidence submitted by the United States pertaining to the disposition of appeals in the cases of the ODIVESA workers. As noted above, Guatemala contends that the submission of this evidence was untimely. It does so on two grounds. First, Guatemala contends that the United States should have submitted such evidence with its initial written submission, since it knew that the orders in question had been subject to appeal, but instead chose not to submit the appeal records since they did not help its case. In the alternative, Guatemala contends that the United States had notice of the relevance of the appeals in Guatemala's initial written submission, and should therefore have submitted any evidence relevant to those appeals with its rebuttal submission.<sup>265</sup> We consider each argument in turn.

350. In its Initial Written Submission, the United States sought to demonstrate that despite a court order for the reinstatement of six workers issued in June of 2008, those workers had not been reinstated as of 2014 and the court had taken no steps to sanction non-compliance by the employer. Its evidence acknowledged that several orders were subject to appeal proceedings in 2009 or 2010, but did not directly address the disposition of those appeals. In its Initial Written Submission Guatemala made the argument that because the orders had been appealed the Panel could not conclude that they had not been effectively enforced. In its Rebuttal Submission the United States responded with a statement by a union official that to his knowledge each of the orders against ODIVESA had been appealed by the employer but upheld on appeal, that as of the date of the statement there had been no reinstatement in any of them, that in five cases a settlement had been reached, and that in five cases the reinstatement order remained valid but pending execution. With its Rebuttal Submission Guatemala then tendered the excerpts from appeal court orders and the table of case described above, seeking to demonstrate that the reinstatement orders had been dismissed on appeal. At the hearing, the United States sought in response to introduce evidence that the orders of the court of first instance were ultimately upheld by the constitutional court. Guatemala sought to introduce

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<sup>265</sup> Specifically, Guatemala points out that in its initial written submission it indicated that the evidence tendered by the United States showed that all 14 orders against ODIVESA were under appeal, and argued that because the orders were under appeal there was no basis upon which to conclude that labor courts should have increased penalties or referred the matters for criminal sanction, or indeed that they had failed to enforce the orders through inaction at all.

evidence following the hearing showing that in any event no worker with a valid claim to reinstatement and seeking reinstatement was in fact denied it.

351. We have no reason to think that the United States withheld evidence concerning the appeals because it was not helpful to its case. On the contrary, the evidence tendered with its Initial Written Submission disclosed the existence of the appeals, leaving the question of how they were disposed of without a direct answer. If anything, it would have aided the case of the United States to submit a full record of the final disposition of appeals with its Initial Written Submission.

352. A party should normally tender along with its initial written submission all evidence in support of its case that could be discovered with reasonable diligence. Where this is not done, a party opposite may object to the later tendering of such evidence, and where such later tendering prejudices the fairness or efficiency of the dispute settlement process, a panel can and should refuse to admit the evidence in question. In this case however, when the United States tendered additional evidence concerning the disposition of the appeals with its Rebuttal Submission, Guatemala did not object, but rather sought to introduce further evidence of its own.<sup>266</sup> The United States then responded by seeking to introduce further evidence at the hearing. It was only at this point that Guatemala raised a timeliness objection.

353. In these circumstances, the Panel does not accept the argument that the evidence in question should be ruled untimely because it was not submitted with the Initial Written Submission of the United States. As discussed above, there is no reason to think that the United States deliberately withheld it for advantage. Further, Guatemala failed to object to the tendering by the United States of additional evidence concerning the appeals at the rebuttal stage. Instead, it led the bulk of its own evidence with respect to the appeals in its own Rebuttal Submission. By its conduct Guatemala waived any right that it may have had to insist that this aspect of the case in chief of the United States be presented at the Initial Written Submission stage. The Panel agrees that it would have been preferable had both disputing Parties presented all relevant evidence concerning the appeals that could have been discovered with reasonable diligence in

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<sup>266</sup> GTM RS, paras. 145-147.

conjunction with their initial written submissions. Neither disputing Party having done so, and neither disputing Party having objected to this, it was too late for Guatemala to invoke such principles following the conclusion of rebuttal submissions.

354. Nor do we accept the alternative argument that because Guatemala's Initial Written Submission raised the issue of the appeals, the United States should be precluded from submitting any evidence with respect to them after the rebuttal stage. Guatemala's Initial Written Submission raised the issue, but provided very little evidence on this point.<sup>267</sup> The United States had notice of the issue at the time that it filed its Rebuttal Submission, but no notice of most of the evidence upon which Guatemala relies in connection with the appeals.

355. Guatemala contends that it submitted this evidence at the rebuttal stage because the redaction of evidence submitted by the United States made it difficult to locate. But denying the United States an opportunity to submit evidence in response to Guatemala's is not an appropriate response to those difficulties. We appreciate that the redaction of identifying information from the evidence submitted by the United States made responding to it burdensome. In our preliminary ruling of December 31, 2015 we extended timelines for delivery of Guatemala's Initial Written Submission in response to redactions. In our reasons for the decision we accepted the extension initially requested by Guatemala in response to the redactions as "a good faith and reasonable estimate of the time required to locate evidence in response to the redacted exhibits submitted by the United States."<sup>268</sup> We also indicated that if Guatemala were precluded by the redactions from verifying material evidence contained in redacted exhibits the Panel would consider whether further relief was required.<sup>269</sup> While Guatemala continued to maintain that the redactions made responding to the evidence of the United States burdensome, it did not seek to demonstrate to the Panel that they precluded a response on its part.

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<sup>267</sup> See Exhibit GTM-4.

<sup>268</sup> Preliminary Ruling ("PR"), para 86.

<sup>269</sup> PR, para. 56.

356. The United States did not object to the admission of court documents concerning the cases of the ODIVESA workers submitted by Guatemala following the hearing.<sup>270</sup> Accordingly, the Panel admits all of the evidence concerning the ODIVESA workers and must consider it.

357. The United States presents three appeal court decisions dated in or before May, 2011.<sup>271</sup> The first appeal resolution seems to concern two workers. It confirms a resolution that suspends the effects of other resolutions issued in 2009, which revoked reinstatement orders. The resolution restores the workers to the legal situation they had been in before such orders were issued. The second appeal resolution also seems to concern two workers. It revokes the sentences issued in 2009 revoking the reinstatement orders of the workers. The third appeal resolution revokes the resolutions issued in 2009 that revoked the reinstatement orders of the workers. It is not clear how many workers the resolution concerns, but it seems to refer to six persons (though according to the United States' argument, it should be four workers).<sup>272</sup> The last two appeal orders direct the court of First Instance to issue new resolutions to substitute for the ones left without effect, under a threat of penalty if the authority failed to do so within the term given. The Constitutional Court decisions each uphold decisions by a labor court dated June 24, 2008 ordering ODIVESA to reinstate workers that it dismissed on May 15, 2008.

358. The Panel must determine whether this evidence establishes that by May of 2011 any orders against ODIVESA dated June 24, 2008 that may have been overturned on appeal either had been directly restored by the Constitutional Court, or were the subject of an order by the Constitutional Court directing that a new order be issued in its place. The dates of dismissal and the dates of the initial orders that were the subjects of Constitutional Court proceedings - May 15, 2008 and June 24, 2008 respectively - are the dates found on the initial orders. The record evidence indicates that there were eight orders issued against ODIVESA on June 24,

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<sup>270</sup> Exhibit GTM-59.

<sup>271</sup> Exhibits USA-237, USA-238, USA-239.

<sup>272</sup> At the hearing the United States mentioned that "US exhibits 237, 238 and 239 ... confirm that the orders for eight of the eleven workers noted in the US initial written submission were affirmed on appeal." US Oral Statement, Panel Hearing Transcription, p. 13.

2008.<sup>273</sup> Guatemala does not suggest that there were more or could have been more. It simply contends that some of the orders were overturned on appeal. The orders of the Constitutional Court are sufficient to establish, in the absence of evidence to the contrary, that as of May 2011 any order issued by a labor court against ODIVESA on June 24, 2008 had by decision of the Constitutional Court either been directly restored or required to be re-issued by the court of First Instance. Therefore, we conclude that as of May, 2011 the two orders identified in the worker statements discussed above, each issued on June 24, 2008, were valid and pending enforcement.

359. Guatemala submits three documents dated between February and December, 2012 concerning three former ODIVESA workers. The first one is a petition whereby a worker desists from his reinstatement claim, stating that he had already been paid the amount due according to law. The second and third documents indicate that the workers did not appear before the Court.

360. The Panel observes that the documents presented by Guatemala were issued on dates falling between about eight and 18 months after the Constitutional Court resolutions contained in the evidence presented by the United States. This would indicate that any reinstatement order to which they pertain remained unenforced for that period of time after it was ultimately upheld by the Constitutional Court.

361. With respect to the second and third documents, as we have already stated, we do not consider the fact that a reinstatement can be a personal procedure relieves the authority of its obligation to continue to seek to execute the orders.

362. With respect to the first document, the Panel has no reason to doubt the authenticity of the worker petition to desist from reinstatement submitted by Guatemala, and the United States does not challenge it. Due to redactions we cannot determine whether this petition refers to one of the two cases with respect to which we have found evidence of failure to enforce labor laws. We therefore cannot determine whether it rebuts in part the *prima facie* conclusion that one of the two orders had not been effectively enforced as of the dates in May, 2014 when the workers made their statements. The United States presented a case based on redacted

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<sup>273</sup> See Exhibits USA-59, USA-161, USA-186 and USA-187.

evidence. This prevents Guatemala from proving that the document pertains to one of the two workers in question. The United States does not deny that it may so pertain. In the circumstances, where the actions of the United States effectively deny Guatemala access to evidence required to prove a correspondence between the withdrawal of claim and the initial order, we are prepared to infer that correspondence from the failure of the United States to deny it or produce evidence disproving it. As a result, we conclude that in the case of one of the two workers the United States has proven no more than that the failure to effectively enforce the court order persisted until the date of the withdrawal of the claim.

363. In any event, this was some 18 months after the date upon which the order became valid and pending enforcement as a result of the order of the Constitutional Court. There is no evidence of effective enforcement action during that period, or of any justification for failing to take such action. Nor is there any evidence of such action or justification for not taking action with respect to the other order, which we find not to have been enforced as of May, 2014. The record evidence therefore supports a conclusion that Guatemala failed to effectively enforce reinstatement orders in respect of two workers dismissed by ODIVESA on May 15, 2008

#### **iv. Fribo**

364. The United States contends that: on April 1, 2009 a labor court found that Fribo illegally dismissed 24 workers for their involvement in the formation of a union; on July 10, 2009, 15 of the 24 workers were reinstated; however, they were not paid back pay or benefits and many were posted to positions with less pay; and that no further action was taken to increase the penalties against the company or to refer the matter to the Public Ministry for criminal sanction despite this continuing non-compliance. The United States also argues that when on August 21, 2009 Fribo paid part of the salaries and benefits owed to the workers, Guatemalan officials urged the workers to accept the reduced payment, and some workers agreed to settle their claims for lesser amounts than they were owed.<sup>274</sup>

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<sup>274</sup> US IWS, paras. 61-65; US RS, para. 94.

365. The United States presents a joint statement by five workers made in 2014, and three sworn declarations made in 2010.<sup>275</sup> Two of the workers that provided those statements presented a second statement, also dated in 2010.<sup>276</sup> The names and identifying information such as the age and position of the worker are redacted from each of these statements.

366. The statements have the same format, their wording is similar and the events narrated make reference to similar events. They contain confidential information that we have considered but not presented here. In the joint statement, five workers affirm that: Fribo dismissed them following an attempt by their union to initiate collective bargaining; after seeking for several months to negotiate their reinstatement with back pay, they filed a claim with the labor court; they received from the court an order for reinstatement with back pay; Fribo, which had by then changed its name to Modas Dae Hang, reinstated 15 of 24 workers seeking reinstatement, but did not compensate any of the workers for back pay amounts owing to them; they presented a claim to the labor court for compensation owing to them; they and their colleagues accepted a payment from Fribo, on the basis of advice received from GLI inspectors, but these payments did not include any money owed by Fribo to them as back pay for the period of their unlawful dismissals.

367. The individual statements are consistent with the joint statement in material respects. In three of the individual statements, each dated March 20, 2010 workers state that as of that date they still had not received the payment due to them pursuant to the court order. In each of the other two statements the worker making the statements indicates that he or she had been reinstated into employment but into a position with less pay, before being dismissed again. The names of the eight persons providing the statements correspond with the names shown on the non-redacted versions of those statements.<sup>277</sup>

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<sup>275</sup> Exhibits USA-11, USA-12, USA-13 and USA-14.

<sup>276</sup> Exhibits USA-184 and USA-185.

<sup>277</sup> Exhibit USA-170, paras. 25-28.

368. The United States also presents a reinstatement order of April 1, 2009 issued by a First Instance Court in Sacatepéquez which concerns 24 workers.<sup>278</sup> The decision cites as its legal basis, among other provisions, Articles 379 and 380 of the GLC. The names of seven of the workers who provided a statement can be found on the unredacted versions of these reinstatement orders.<sup>279</sup> The United States also presents an adjudication document dated July 10, 2009<sup>280</sup> that indicates that 15 workers had been permanently reinstated. That document sets a deadline to pay the workers and to remedy other infractions. Specifically, the deadline for the payment of the reinstated workers was within ten working days of the order, and the deadline to present the payroll for the last six months and documents related to other benefits, such as bonus and payment for social security, was five working days. Seven workers that provided a statement are included in this adjudication order.<sup>281</sup>

369. Finally, the United States presents a sworn declaration made by MSICG representatives dated February 16, 2015 alleging systemic failures by Guatemala to comply with its labor legislation.<sup>282</sup>

370. The statement by five workers is a collective statement, which makes it impossible to assess to what extent it represents the independent recollection of any of its authors. However, the Panel considers that the statement is consistent with the events narrated in the other statements, and along with the rest of the evidence it raises a *prima facie* presumption that a reinstatement order finding labor law violations was issued on April 1, 2009. Seven workers who provided a statement were included in that order and were reinstated on July 10, 2010, along with eight more workers. According to the adjudication document of this last date,

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<sup>278</sup> Exhibit USA-60. This is confirmed as well in Exhibit USA-170, para. 24. The United States also presented a petition made by 25 workers in March 25, 2008 for wrongful dismissal against Fribo alleging that in August 2007 the employer sent them on vacation and were not paid. Later they were sent on vacations once more, which were not paid. Eventually they were dismissed in March 15, 2008. Exhibit USA-191. The Panel cannot confirm the names of the workers due to redactions.

<sup>279</sup> Exhibit USA-170, para. 24.

<sup>280</sup> Exhibit USA-61.

<sup>281</sup> Exhibit USA-170, para. 29.

<sup>282</sup> Exhibit USA-164.

there were a total of 15 workers reinstated at that time, each of whom was to be paid within ten working days after July 10, 2010. These seven workers were also listed in that adjudication document. Four workers who provided the joint statement state they received a payment in August 2009 which did not include the amount owed to them for their dismissal but rather only corresponded to the days that they had worked there since they were reinstated.<sup>283</sup> There is no evidence before the Panel that this payment formed part of a voluntary settlement of the claims. Therefore, the evidence suggests that non-enforcement persisted until 2014 when the workers presented their statement. Three other workers, who were also to be paid according to the adjudication order state that they had not been paid as of the date they provided their statements in March 2010.

371. Regarding these seven cases, the Panel can conclude that a year after the reinstatement order was issued (for three workers) or five years after (for four workers), Guatemalan labor courts were unsuccessful in enforcing that order.

372. The adjudication document of July 10, 2009 confirms that 15 workers were not reinstated until that day. The Panel therefore concludes that the employer did not comply with the reinstatement order of April 1, 2009 in respect of 15 workers for more than three months.

373. Guatemala submits that each of the workers in question accepted a payment from Fribo and that the decision not to impose additional fines or pursue criminal penalties once employees have voluntarily settled their claims is consistent with a policy of prioritizing the allocation of resources under Article 16.2.1(b).<sup>284</sup> It also submits that authorities were justified in discontinuing enforcement following the insolvency of Fribo.<sup>285</sup>

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<sup>283</sup> The Panel cannot determine whether one of the workers that provided a statement was included in the reinstatement order presented or in the adjudication since the evidence presented by the US did not corroborate that. Exhibit USA-170, para. 24 does not include worker labelled as “L”, which provided his statement along with four others as Exhibit USA-11, in Exhibit USA-60 that contains the reinstatement order. Paragraph 29 does not include this worker either in the adjudication presented as Exhibit USA-61.

<sup>284</sup> GTM RS, para. 150.

<sup>285</sup> Guatemala makes the following arguments: “There are also risks involved in the collection of awards. These risks are compounded when, as was the case with Fribo, the company against which the claims must be collected has gone out of business.” GTM RS, para. 155. “Under Article 85 of the Guatemalan Labor Code, employer liabilities may survive bankruptcy or closure... recovery of these [employer] liabilities does not proceed through the labor

374. The insolvency of an employer may justify a discontinuance of enforcement action by the authorities where it is evident that further enforcement action is unlikely to provide any meaningful redress to workers. The Panel lacks sufficient information concerning the financial state of Fribo in August 2009 to draw any conclusions with respect to whether courts exercised reasonable discretion to cease enforcement on this basis. We simply have evidence that Fribo closed operations. It may nonetheless have had sufficient funds as a corporate entity to pay the monies owing to the workers. As discussed above, the onus of proof that authorities exercised a reasonable discretion not to enforce labor laws lies with Guatemala. We therefore cannot conclude that the courts were justified in not enforcing the orders in question on the basis that Fribo had ceased operating.

375. An authority responsible for enforcement of labor laws may also justifiably cease enforcement action where a worker has voluntarily settled his or her claim under no undue influence from either the employer or the enforcement authority. Such a settlement may be mutually advantageous to both the worker and the employer. Enforcement authorities may reasonably exercise discretion not to continue enforcement action following such a settlement, since continued enforcement action might undermine that settlement. Moreover, a policy of continued enforcement in all cases would prevent employers and workers from reaching such agreements. However, a settlement between a worker and an employer cannot retrospectively justify a failure by authorities to enforce an order made prior to the settlement. Delay in enforcement stands to affect settlement negotiations between workers and employers to the disadvantage of workers. In order for settlements to be truly voluntary they must be made free of the influence of undue delay in enforcement. Accordingly, enforcement should generally proceed without delay, and independently of any delays in settlement discussions. In this case the settlements reached on August 21, 2009 cannot justify the failure of the courts to enforce the order issued on April 1, 2009, or the payment that was to be made by the employer within ten working days of the adjudication of July 10, 2009. The evidence demonstrates that three workers

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courts. Rather, as with other creditors of the company, employees must proactively pursue their claims in the bankruptcy proceedings. These proceedings are regulated under Articles 371(b) and 393 of Guatemala's Procedural and Commercial Code. Hence, in such situations, an alleged failure of the employees to recover back wages cannot be attributed to inaction by the labor courts.” GTM Responses, para. 50 and GTM Final, para. 106.

were not paid as provided in that order, and although the other four workers received a payment it is not clear that such payment constituted a voluntary settlement.

376. The Panel therefore concludes that Guatemala failed to effectively enforce its labor laws by failing to secure compliance with court orders against Fribo for reinstatement of 15 workers and back pay orders in respect of seven workers, as described above.

#### **v. RTM**

377. The United States contends that: on August 19, 23, and 25, 2010 a Guatemalan labor court found that RTM had dismissed 12 workers in reprisal for seeking to form a union and initiating a conciliation process to resolve a conflict with RTM; as of May 2014, RTM had not reinstated six of the dismissed stevedores or paid them back wages or benefits; in respect of four of the August 2010 court orders, RTM failed to pay the court-imposed fine; and the court failed to refer the violations for criminal sanctions or to increase the fines in response to non-compliance.<sup>286</sup>

378. In support of its claim, the United States presents six statements made in May of 2014.<sup>287</sup> Names and identifying information such as age and position are redacted from each document. The names of the six persons providing the statements match those on the non-redacted versions.<sup>288</sup> The statements have the same format, their wording is similar and they narrate similar events. In each statement, a worker affirms that he was dismissed from employment by RTM in 2010 for his participation in a union; a judge ordered his reinstatement in 2010; and as of the date of the statement he had not been reinstated to his position at RTM or received the salary or benefits owing to him by RTM. Each statement includes reinstatement

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<sup>286</sup> US IWS, paras. 67-70; US RS, para. 100.

<sup>287</sup> Exhibits USA-7, USA-9, USA-10 and USA-15 - USA-17.

<sup>288</sup> Exhibit USA-170, paras. 12, 14, 15 and 17-19.

orders against RTM dated August 23 or 25, 2010. The legal basis of the decisions includes among other provisions, Articles 379 and 380 of the GLC.

379. The United States also provides, in a separate exhibit, 12 reinstatement orders against RTM dated August 19, 23 or 25, 2010.<sup>289</sup>

380. The United States also provides a report by a legal expert which indicates that there is a valid reinstatement order in respect of four of the proceedings.<sup>290</sup> The cases of four workers that provided a statement are referred to in that report.<sup>291</sup> The report continues on to say that in 2014 the tribunal again ordered reinstatement of the workers, the order was disobeyed, and the court again ordered their reinstatement later in 2014. The report then says that the fines imposed on RTM along with the reinstatement orders had not been collected.

381. Finally, with one of the exhibits, which refers to another company as well, the United States presents a table reporting on the status of proceedings under appeal.<sup>292</sup> It describes nine cases. In three cases the court confirmed the resolution issued by the First Instance Court, the others were described as pending a resolution. The document would seem to complement a document dated August 19, 2010 referring to RTM. However, since the table is undated, has no page numbers and is redacted, the Panel cannot determine whether the cases refer to ODIVESA or RTM.

382. The evidence presented by the United States supports a conclusion that several reinstatement orders that found violations of labor laws by RTM were issued in 2010. The six workers who provided a statement were subjects of such reinstatement orders and had not been reinstated nor paid the amount due to them as of 2014, when they made their statements. This conclusion is reinforced by the fact that the cases of four of those workers are addressed in the legal expert's report dated July 23, 2014. The Panel can conclude that four years after the

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<sup>289</sup> Exhibit USA-62.

<sup>290</sup> Exhibit USA-63.

<sup>291</sup> Exhibit USA-170, paras. 30-31.

<sup>292</sup> Exhibit USA-9.

reinstatement orders had been issued, Guatemalan labor courts were still unsuccessful in enforcing such orders in a manner sufficiently certain to achieve compliance.

383. Guatemala provided no evidence contradicting the evidence submitted by the United States.

384. Guatemala notes however that the report of the legal expert submitted by the United States indicates, by stating that additional fines or a referral for criminal prosecution were “not applicable”, that for each of the four cases the report indicates that the conditions for imposing an additional fine or referring the matter for prosecution had not been met. Guatemala points out that the report goes on to say that because reinstatement had not been validly attempted the employer could not be found to be in a situation of disobedience, and therefore there would have been no basis for the court to take such actions. Guatemala submits that since the labor courts and Public Ministry had no obligation to increase fines or pursue criminal prosecutions, there is no basis for a claim of inaction contrary to Article 16.2.1(a).<sup>293</sup>

385. This argument has no merit. The first and primary form of inaction alleged by the United States is precisely that the labor court had not carried out its responsibility to execute the reinstatement of the workers, and to collect the fines owing. The report indicates that such steps had not been validly attempted. It states, as Guatemala neglects to mention in its submissions, that such steps had not been validly attempted “due to excessive delays by the tribunal of first instance, as well as the de facto suspension of proceedings to execute the reinstatement order.”<sup>294</sup> This clearly constitutes inaction in the face of a legal mandate to enforce the law. If, as the report indicates, failing to take such steps means that preconditions for additional fines or prosecution had not been met, this only compounds the consequences of the court’s inaction.

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<sup>293</sup> GTM RS, para. 158.

<sup>294</sup> Exhibit USA-63, para. 10.

**vi. Alianza**

386. The United States contends that on March 26, 2010 a labor court found that Alianza had wrongfully dismissed 33 workers who had initiated a conciliation procedure to resolve a collective conflict with their employer; Alianza did not reinstate the 33 workers dismissed; 30 signed settlements for less pay than they were owed under the law; and the remaining three workers have not been reinstated nor have they been paid.<sup>295</sup>

387. In support of its claim, the United States presents five statements made in 2014. Four are joint and one is individual.<sup>296</sup>

388. The first joint statement is made by two former workers of the Centro de Derechos Laborales (Labor Rights Center) dated July 2, 2014. They state that they worked for the Center between 2007 and 2013, and state that the Center assisted workers employed by Alianza with collective labor disputes during this period of time. For one particular collective conflict, they state that approximately 33 workers of Alianza were dismissed shortly after commencing the collective conflict. They affirm that approximately 30 of the 33 workers later accepted a settlement from Alianza for a ‘small amount of money.’ While we cannot describe the confidential information contained in their statement, we conclude that it contains information suggesting that the court had ordered the reinstatement of those workers but had not enforced those reinstatement orders as of the date of the statement.<sup>297</sup>

389. The second statement is dated July 2, 2014 and signed by two persons. It appears however to be a declaration by one person. The statement recounts that: Alianza fired the author of the statement along with other workers who had signed a collective conflict petition, and that the labor court judge of first instance ordered their reinstatement. While we cannot describe the confidential information contained in his or her statement, we conclude that it contains information indicating that the court had not enforced his or her reinstatement as of the date of

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<sup>295</sup> US IWS, paras. 74-76; US RS, paras. 105-106.

<sup>296</sup> Exhibits USA-21, USA-22, USA-23, USA-24 and USA-25.

<sup>297</sup> Exhibit USA-21.

the statement.<sup>298</sup> The worker states that he or she accepted a settlement of his or her claim about two years after the court order, for less money than he or she was owed.

390. The third and fourth declarations describe dismissals in February 2010 that do not appear to be related to the events of March 2010. The declarations contain no information concerning any court proceedings.<sup>299</sup>

391. A fifth statement<sup>300</sup> reports events taking place in 2013, after the date of the panel request by the United States. Therefore, for the reasons set out in section III.F, *supra*, we do not consider it for the purpose of determining whether the United States has established a breach of Article 16.2.1(a).

392. The United States also presents a petition to a labor court for a declaration of collective conflict dated March 25, 2010, and a reinstatement order dated March 26, 2010. The legal basis of the order includes Articles 209, 379 and 380 of the GLC.<sup>301</sup> Due to the redactions, it is not clear how many workers were involved, though it is clear enough that it is a large number, perhaps in the range of 30. The name of one worker who provided a statement is shown on the unredacted version of the order.<sup>302</sup>

393. The United States submits a second adjudication document dated March 21, 2013. The redactions make it impossible to confirm whether it refers to cases related to those addressed by the reinstatement order of 2010. There is no evidence that any of the workers who provided a statement are covered by the 2013 adjudication document.<sup>303</sup>

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<sup>298</sup> Exhibit USA-22.

<sup>299</sup> Exhibits USA-23 and USA-24.

<sup>300</sup> Exhibit USA-25.

<sup>301</sup> Exhibits USA-68 and USA-69. According to a statement, the Ministro Ejecutor tried to enforce the reinstatement order once. Exhibit USA-22. According to Exhibit USA-21 the reinstatement was tried once and on another time, reinstatement could not be carried because the address was wrong.

<sup>302</sup> Exhibit USA-170, para. 37.

<sup>303</sup> Exhibit USA-71.

394. The two statements pertaining to the 2010 reinstatement order narrate similar events. The author of the second statement indicates that he or she had not been paid as of 2012 before he or she accepted a payment to terminate his or her case. The name of this worker is shown on the reinstatement order of March 26, 2010. Therefore, the evidence indicates that as of 2012 his or her reinstatement had not taken place. With respect to this case, the Panel can conclude that two years after the reinstatement order had been issued it had not been enforced.

395. The Panel cannot however conclude that the two other workers providing statements were not reinstated after being dismissed, or that they were not paid the full amount due. The statements do not seem to be related to the dismissals that took place in March of 2010, and make no mention of any court proceedings.<sup>304</sup> Neither statement provides a reinstatement order. Nor does either of their names appear on the reinstatement order of March 26, 2010.

396. There is thus no evidence in the record demonstrating that anyone, other than the individual worker who says that he or she was not reinstated following the March 26, 2010 order, was in fact not reinstated.

397. The Panel considered whether the first statement described above<sup>305</sup> could provide a basis upon which it might conclude that the reinstatement order issued on March 26, 2010 has not been enforced in respect of workers other than the worker who gave the second statement. As noted above, the persons submitting the declaration were not Alianza workers but workers from the *Centro de Derechos Laborales* who provided assistance to Alianza workers in a labor dispute. The declarants provide no information explaining how they knew the particular facts of each individual worker's case. They do not describe their relationship to any particular worker, or how they might know whether he or she had been reinstated or not. Their statement does not explain whether they directly witnessed the events described or learned of them through others. The statement provides no evidence with respect to the source of information upon which the authors draw their conclusions. While we have no reason to doubt the honesty or *bona fides* of its

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<sup>304</sup> Exhibits USA-22, USA-23, USA-24 and USA-25. We note that one worker ("T") seems to appear in three of those statements, it could be the legal adviser. However, due to the redactions we cannot be sure.

<sup>305</sup> Exhibit USA-21.

authors, this does not necessarily make their statement an accurate statement. Any conclusion that the statement is more likely than not accurate must be based on evidence. We have no basis upon which to conclude that the perceptions of events of the statement's authors were accurate, or that the information upon which they based their statement was complete. With respect to the crucial question of how long the March 26, 2010 reinstatement order was not enforced in respect of the remaining 32 workers, their statement is vague, and does not explain how the authors know what they say they know.

398. The only other statement in the record that provides evidence that the March 26, 2010 reinstatement order was not enforced is contained in the second statement described above. However, that statement provides no information upon which the Panel could conclude that the court failed to enforce any reinstatement other than that of the statement's author. The statement simply reports the conclusion of its author that the court had taken no action, without specifying in respect of whose reinstatement order or orders it had taken no action, and without reporting any of the information upon which that conclusion was based.

399. The Panel cannot therefore conclude on the basis of the record evidence that the labor court failed to enforce the order of March 26, 2010 in respect of anyone other than the worker providing the second statement described above.<sup>306</sup>

400. Guatemala argues that even if the evidence presented by the United States was accepted as proof of its claims, the settlements admittedly signed by the workers in question would have justified the labor court's not taking further action.<sup>307</sup> As discussed above, we accept that under certain circumstances a settlement of a complaint may justify ceasing enforcement action and therefore provide justification for a failure to enforce under Article 16.2.1(b). The burden of proof of this lies with Guatemala. The evidence with respect to the worker making the second statement is that he or she accepted the settlement two years after his or her dismissal,

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<sup>306</sup> The US presented as Exhibit USA-70 an article entitled *Corruption and Greed: Alianza Fashion Sweatshop in Guatemala*, Institute for Global Labour and Human Rights, (January 2014). However, we note it does not present evidence regarding the dismissals of such workers and contains little information with respect to reinstatement proceedings.

<sup>307</sup> GTM RS, paras. 164-168.

and for less than he or she was owed. A settlement cannot justify taking no enforcement action prior to its being concluded. Guatemala has not provided evidence with respect to when the settlements in question were reached. The evidence proves that regarding one worker the settlement was reached two years after his or her dismissal. Guatemala has not provided evidence that demonstrates that the court did not neglect to compel compliance.

**vii. Avandia**

401. The United States contends that: on November 22, 2006 a labor court found that Avandia unlawfully dismissed nine workers; on August 6, 2007, Avandia reinstated two of the nine workers, but assigned them to lesser paying positions; the court did not address an allegation later presented by the workers about being improperly reinstated; and that the seven workers were never reinstated.<sup>308</sup>

402. In support of its claim the United States presents an undated statement by a legal advisor to workers at Avandia that: on November 14, 2006 Avandia dismissed nine workers who were on the executive committee of a union in formation; on November 22, 2006 a court found the dismissals to be unlawful and ordered their reinstatement; Avandia reinstated two of the workers in question to employment but in lesser positions than they had previously held at Avandia on August 6, 2007; and as of the time of the statement the other workers in question still had not been reinstated.<sup>309</sup>

403. The United States also presents a set of court documents. The first is a petition dated November 13, 2006 by a group of workers to a labor court for a declaration in relation to a collective conflict with their employer. The second is an order by the labor court issued on that same date prohibiting reprisals by either party to the collective conflict.<sup>310</sup> The third is a reinstatement order dated November 22, 2006 directing Avandia to reinstate nine workers. The legal bases for the order are Articles 292-293, 321 to 329, and 374-383 of the GLC.<sup>311</sup> The fourth

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<sup>308</sup> US IWS, paras. 77-79.

<sup>309</sup> Exhibit USA-169.

<sup>310</sup> Exhibit USA-73.

<sup>311</sup> Exhibit USA-74.

is a court order dated July 3, 2007 directing the reinstatement of the same nine individuals who are the subjects of the order dated November 22, 2006.<sup>312</sup> The fifth is a complaint to a labor court dated August 7, 2007 claiming that two workers had been reinstated to positions other than their original ones, contrary to the GLC, and that they had not been paid monies owed to them contrary to the order dated July 3, 2007. The sixth court document is an order dated August 9, 2007 doubling a fine imposed on Avandia and a warning that payment to those two workers had to be made within three days, failing which the case would be certified for criminal prosecution for disobedience.<sup>313</sup>

404. Since the statement by the legal advisor is not dated, the Panel cannot know when it was made. There is nothing in the statement indicating that its author relied upon notes made contemporaneously with the events in question. The answers given by its author are in response to leading questions. However, the Panel considers that the statement is corroborated by the court documents. The order dated July 3, 2007 confirms that as of that date, the nine workers that were to be reinstated under the order issued on November 22, 2006 had not been reinstated. The complaint dated August 7, 2007 and the order dated August 9, 2007 provide further corroboration of the statement. The Panel considers that there is sufficient evidence to presume that a labor court issued an order finding violations of the GLC by Avandia on November 22, 2006. The order concerned nine workers. As of July 3, 2007 that order had not been enforced in respect of any of them. Another order directing the reinstatement of the same individuals was issued on that date. As of August 9, 2007, two workers had not been reinstated into their positions or paid back pay owed to them pursuant to the original order on November 22, 2006.

405. The Panel can conclude that Guatemalan labor courts remained unsuccessful in enforcing the November 22, 2006 orders until July 3, 2007 in respect of nine workers, and until August 9, 2007 in respect of two of those nine workers. This is eight months for nine workers and nine months for two workers. Guatemala does not provide any evidence that contradicts this conclusion. This delay is not consistent with effective enforcement. We therefore conclude that the labour courts failed to effectively enforce labor laws in the cases of these Avandia workers.

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<sup>312</sup> Exhibits USA-75 and USA-170, para. 38.

<sup>313</sup> Exhibit USA-76.

### **viii. Solesa**

406. The United States contends that on November 8, 2010 a labor court found that Solesa wrongfully dismissed 49 workers who had sought to initiate a conciliation process with their employer; on March 8, 2011, an appellate court upheld the orders with respect to 31 workers; on April 8, 2011 the appellate court ordered that the reinstatement orders be effectuated and the workers paid, under the threat of increased fines if the orders were not carried out; as of October 3, 2014, Solesa had not reinstated 21 workers and two more had passed away with unexecuted orders; but the court had not increased the penalty for Solesa, nor had it referred the matter to the Public Ministry for criminal sanction.<sup>314</sup>

407. In support of its argument the United States presented a number of legal petitions and claims alleging that Solesa had unlawfully dismissed workers and that labor courts had failed to enforce orders to remedy the situation.

408. The first is a petition dated July 27, 2012 for protective measures before the Interamerican Commission on Human Rights. The document states among other things, that: in 2010 Solesa sought the dissolution of the *Sindicato de los Trabajadores de la Finca La Soledad* (SITRASOLEDAD) and by September 1, 2010 had dismissed all of those affiliated with the union; that proceedings were initiated in response before the Guatemalan court of first instance; that the court ordered that Solesa reinstate with back pay 49 workers; that 18 of these orders were overturned and 31 upheld by a decision of the Court of Appeal (*Sala Cuarta de la Corte de Apelaciones de Trabajo y Prevision Social*); and that the judicial system had failed to execute the orders despite repeated applications by the workers seeking enforcement, including applications dated May 14, 2011 and July 5, 2011.<sup>315</sup>

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<sup>314</sup> US IWS, paras. 80-83; US RS, paras. 110-113.

<sup>315</sup> Exhibit USA-79.

409. The second and third are requests to a court of first instance for partial liquidation of assets due to non-compliance with reinstatement.<sup>316</sup>

410. The fourth is a reinstatement petition to the court of first instance seeking enforcement of an order against Solesa for reinstatement with back pay upheld by the court of appeal on March 8, 2011 and with respect to which the latter court ordered compliance on April 8, 2011.<sup>317</sup>

411. The fifth and sixth are petitions seeking reinstatement of a Solesa worker. They are accompanied by an order setting a deadline by which Solesa was required to reinstate the worker to his or her position and to pay the amount due to the worker as ordered on November 8, 2010.<sup>318</sup>

412. The seventh is a criminal complaint alleging dereliction of duty by a judge for not executing reinstatement orders against Solesa.<sup>319</sup>

413. The eighth is a further legal petition for an order requiring the court of first instance to take action on reinstatement orders dated November 8, 2010.<sup>320</sup>

414. The United States tendered in addition two statements.

415. The first is a sworn declaration dated October 3, 2014 by an individual indicating that the reinstatement proceedings of the workers dismissed for trying to negotiate a collective agreement remained in the same state as those of a particular worker (whose identity is redacted from the document). This statement implies that the orders for reinstatement with back pay of

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<sup>316</sup> Exhibits USA-86 and USA-194. The former indicates reinstatement of the worker had not been executed even though the order was confirmed on February 7, 2011 by the Appeal Court. This same petition was rejected on October 28, 2011. See Exhibit USA-87 and Exhibit USA-170, para. 39.

<sup>317</sup> Exhibit USA-192.

<sup>318</sup> Exhibits USA-195, USA-196 and USA-197.

<sup>319</sup> Exhibit USA-85.

<sup>320</sup> Exhibit USA-77.

workers listed in the statement (whose identities are redacted such that their number cannot be ascertained by this Panel) remained unenforced as of the date of the statement.<sup>321</sup>

416. The second is an email from an unidentified person that the United States says is “counsel to the union” dated April 4, 2014. The statement indicates that as of that date 23 workers, two of whom had passed away, had not been reinstated in accordance with labor court orders.<sup>322</sup> This statement does not identify the employer of the workers in question, nor does it provide a copy of the judicial orders in question.

417. Finally, the United States tendered two court orders demonstrating that a reinstatement order dated November 8, 2010 had not been complied with several months later. The first is an order by an Appeal Court confirming an order of November 8, 2010 by a labor court of first instance reinstating a worker with back pay and benefits.<sup>323</sup> The second is a subsequent order notifying Solesa to comply with a reinstatement order of November 8, 2010<sup>324</sup> that had been affirmed by an Appeal Court.

418. These two orders each provide *prima facie* proof that as of their date, the courts were required to execute a reinstatement order issued on November 8, 2010 that had not been yet been executed. The Panel considers that the reinstatement petition referred to as the fourth document discussed above is related to this last order, since it refers to an order of that same date whereby the court gave Solesa five days to comply with a resolution dated November 8, 2010.<sup>325</sup>

419. The Panel does not, however, have the original orders issued on November 8, 2010. By letter to the Panel dated June 9, 2015, the United States sought, following the hearing, to tender documents that it said were those orders and other court documents related to them.

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<sup>321</sup> Exhibit USA-20. The United States also provided an email dated April 4, 2014 listing 23 workers (their identifying information is redacted) who had still not been reinstated as of that date. Exhibit USA-84.

<sup>322</sup> Exhibit USA-84.

<sup>323</sup> Exhibit USA-82.

<sup>324</sup> Exhibit USA-83.

<sup>325</sup> Exhibits USA-83 and USA-192.

Guatemala objected to the admissibility of this evidence on timeliness grounds. As noted in the procedural history above, on June 24, 2015 the Panel informed the disputing Parties that it would not admit this evidence into the record, and that its reasons would follow. The Panel agreed with Guatemala that the submission of this evidence was untimely. A disputing Party should ordinarily submit all of the evidence that can be uncovered by the exercise of reasonable diligence and upon which it seeks to rely to prove the arguments advanced in its initial written submission on or before the date of that submission. Where a failure to do so followed by an attempt to introduce such evidence at a later stage would lead to undue delay contrary to the prompt and orderly process of dispute resolution contemplated by the Rules, a Panel can and should refuse to admit it. The evidence in question constitutes part of the foundation of the claim made in the Initial Written Submission of the United States that court orders were issued in respect of Solesa workers and then not enforced. It is thus not evidence rebutting an assertion subsequently made by the other disputing Party. With its Initial Written Submission the United States submitted such orders in relation to each of the other employers discussed above. The Panel has no evidence or argument before it that could establish that the orders in respect of Solesa workers could not have been obtained through the exercise of reasonable diligence and presented to the Panel along with the Initial Written Submission of the United States. Moreover, as Guatemala points out, Guatemala raised in its Initial Written Submission the issue of the failure of the United States to tender such orders in evidence.<sup>326</sup> The United States therefore had notice of the matter to which it sought to respond with evidence tendered after the hearing well in advance of filing its Rebuttal Submission. Without accepting that the evidence in question would have been admissible at the rebuttal stage, the Panel notes that the United States provided no justification for the further delay between the rebuttal stage and June 9, 2015. The Rules contemplate that the evidence constituting the factual record will have been submitted prior to the hearing so that the Parties may present complete arguments with respect to it. Here the United States sought to introduce over 2700 pages of evidence after the close of the hearing, without any justification other than the potential relevance of the evidence, a matter that must have been apparent to it prior to the filing of its Initial Written Submission. Admitting this evidence following the hearing would have necessitated that the Panel afford both disputing

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<sup>326</sup> GTM IWS, para. 263.

Parties opportunities to present extensive additional evidence and argument. This would plainly have been contrary to the orderly process of dispute resolution contemplated by the Rules.

420. Although the Panel does not have the orders in evidence, it does have multiple legal petitions and claims stating that they exist and have not been enforced, and statements to that effect by a union official and a person who may be counsel to union.

421. We are prepared to assume that such claims are not lightly made, and that they are made honestly and in good faith. The sheer number of these claims, the forums in which they are presented, and the seriousness of the allegations lends some credence to what they allege. However, the claims and petitions are simply statements of allegations. They do not state that they report personal knowledge of their authors.

422. Of these legal documents only the petition to the Inter-American Human Rights Commission of July 27, 2012 identifies as 31 the number of workers dismissed or in respect of which valid reinstatement orders remain to be enforced.

423. The only other evidence with respect to the number of workers involved is found in the sworn declaration dated October 3, 2014, and in the statement of the person that the United States says is counsel to the union. As noted above, the former statement is redacted in a way that prevents the Panel from ascertaining the number of workers that the declarant says had not been reinstated as of the date of the statement. While the second statement does list 23 persons, we have only the assertion of the United States that this person was counsel to the union – there is no evidence on the face of the statement of this. Nor, as noted above, is there evidence on the face of the statement that it refers to Solesa workers. Perhaps more importantly, like other statements discussed above, this statement provides no evidence with respect to how its author knows the status of the cases with respect to which he or she offers information.

424. In light of these considerations, the Panel cannot conclude with any certainty how many workers in addition to the two workers with respect to whom court orders are present in the record were dismissed by Solesa, ordered reinstated and then not reinstated despite being the subject of valid reinstatement orders.

425. We conclude that the United States has presented *prima facie* proof that the labor courts failed, beginning April 8, 2011, to effectively enforce two orders directing Solesa to reinstate workers dismissed on November 8, 2010. Guatemala has not presented evidence that rebuts this presumption. We therefore so conclude, and find that the labor courts neglected to compel compliance with two such orders.

### **c. Conclusions**

426. In each instance described above the evidence supports a conclusion that the Guatemalan labor courts failed to effectively enforce the law. The evidence shows that authorities were unsuccessful in enforcing court orders or neglected their enforcement. Courts specifically and directly responsible for initiating enforcement of and securing compliance with their orders directed reinstatement of groups of employees dismissed for union activity and employers failed or refused to comply with the terms of those orders. They also failed to pay the fines imposed by those courts. The subsequent failure by courts to take effective enforcement action in response signaled to the employers in question that they would not be held accountable for their non-compliance with labor laws.

427. We recall that Articles 10, 62(c), 209, 223, 379 and 380 are related to the right of association and the right to organize and bargain collectively. These provisions aim to protect workers from reprisals for exercising their rights, including dismissals for participating in union activities or conciliation processes. We also recall that it is by virtue of Article 16.2.1(a) that the Parties give effect to their commitment to “strive to ensure that [the] labor principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by [each Party’s] law.” In accordance with Article 31.3(c) of the VCLT, the Panel should take into account, together with the context, “any relevant rules of international law applicable in relations between the parties” to the CAFTA-DR in interpreting and applying its provisions.<sup>327</sup> All CAFTA-DR Parties are members of the ILO. By virtue of their membership in that Organization,

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<sup>327</sup> VCLT, United Nations Treaty Series, Vol. 1155, p. 331 (May 23, 1969), Article 31. The Panel agrees with the Appellate Body “that Article 31(3)(c) of the Vienna Convention is considered an expression of the ‘principle of systemic integration’ which, in the words of the ILC, seeks to ensure that ‘international obligations are interpreted by reference to their normative environment’ in a manner that gives ‘coherence and meaningfulness’” (footnote omitted). Appellate Body Report, *European Communities– Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, para. 845 (adopted 1 June 2011).

they are bound by an obligation enunciated in the ILO's Declaration on Fundamental Principles and Rights at Work and grounded in the ILO Constitution to "respect, promote and realize... principles concerning... fundamental rights, namely... (a) freedom of association and the effective recognition of the right to collective bargaining."<sup>328</sup> The interpretation by the relevant committees of the ILO of such principles reflects a clear understanding that retaliatory dismissals are serious violations that can be expected to thwart freedom of association and the rights to organize and bargain collectively. It also recognizes that protecting such internationally recognized rights by law requires prohibition and prompt and effective redress of such dismissals.<sup>329</sup>

428. For all of the above reasons, we conclude that Guatemala has failed to effectively enforce labor laws within the meaning of Article 16.2.1(a) of the CAFTA-DR with respect to 74 workers at the eight worksites described above.

### **3. Sustained or Recurring Course of Action or Inaction**

429. The United States submits that the repeated failures of the Guatemalan labor courts to enforce orders to reinstate and compensate workers unlawfully dismissed for seeking to form a union and bargain collectively constitute a sustained or recurring course of action or inaction within the meaning of Article 16.2.1(a).<sup>330</sup> Guatemala responds that the alleged omissions do not constitute a consistent or repeated series of acts or omissions. It argues that violations of certain articles of the GLC were found with respect to certain companies but not others; violations did not recur at the companies in question; and the number of violations in any

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<sup>328</sup> ILO, *Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, International Labour Conference 86<sup>th</sup> Session (June 1998), p.7.

<sup>329</sup> *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing body of the ILO*, Geneva, International Labour Office, 5<sup>th</sup> (revised) ed (2006), paras. 796-837.

<sup>330</sup> US IWS, paras. 91-95.

given year is not enough to demonstrate a linkage reflecting consistent or repeated conduct or a pattern.<sup>331</sup>

430. The Panel considers this to be a close question. For the reasons of judicial economy, we decline to reach a definitive conclusion on this matter. Rather, we conclude on a provisional basis only that the enforcement failures we found to have been proven<sup>332</sup> constitute a sustained or recurring course of action or inaction. For reasons we discuss later in this report, this conclusion is not dispositive of the U.S. claim, and therefore, we need not revisit our provisional conclusion and reach a definitive conclusion on this question.

431. As discussed above, the evidence establishes that Guatemalan labor courts failed to enforce reinstatement orders in respect of 74 workers at 8 worksites before the date of the U.S. panel request. The failures to enforce were similar to one another in certain key respects. Each time, the court failed to enforce an order or a set of orders to reinstate and compensate a worker or workers unlawfully dismissed while seeking to initiate collective bargaining with their employer. The dismissals were thus found by the court to be contrary to either Article 379 or Article 380 of the GLC, or both. At five of the worksites, the enforcement failure proven by the United States involved multiple workers, ranging from six workers in the RTM case to 25 workers in the case of NEPORSA. On each occasion, the duration of the enforcement failure was prolonged, ranging from about three-and-a-half months with respect to workers eventually reinstated in the Fribo case and with respect to workers not reinstated in the ODIVESA case (a case in which the failure continued after the date of the panel request), to six years without reinstatement in the ITM case.

432. The Panel considers that the enforcement failures proven by the United States constitute either sustained action or inaction or recurring action or inaction, or both. But that is not enough to support a conclusion that Guatemala's conduct breached its obligation under CAFTA-DR Article 16.2.1(a). To reach that conclusion we would have to determine that Guatemala's failure of enforcement was "through a sustained or recurring *course* of action or

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<sup>331</sup> GTM IWS, paras. 275-76.

<sup>332</sup> See Section IV. B.2, *supra*.

inaction.” The question before us, therefore, is whether the individual enforcement failures we have found, taken together, constitute a “course” of action or inaction. We turn to that question now.

433. We recall our conclusion in Part III.C that:

we consider the phrase “*sustained or recurring course of action or inaction*” in Article 16.2.1(a) to mean a line of connected, repeated or prolonged behavior by an enforcement institution or institutions. The connection constituting such a line of behavior is manifest in sufficient similarity of behavior over time or place to indicate that the similarity is not random. A “sustained or recurring course of action or inaction” is thus composed of (i) a repeated behavior which displays sufficient similarity, or (ii) prolonged behavior in which there is sufficient consistency in sustained acts or omissions as to constitute a line of connected behavior by a labor law enforcement institution, rather than isolated or disconnected instances of action or inaction. Whether a Party meets its burden of proving the existence of a sustained or recurring course of action or inaction should be assessed according to the circumstances of a particular case.

With that interpretation in mind, we consider whether the failures to enforce in question display sufficient similarity to one another and sufficient proximity in time or place to one another to be treated as connected behavior, rather than as isolated or disconnected acts or omissions.

434. This determination necessarily involves more than simply counting the number or measuring the duration of failures to effectively enforce and noting the distance in time or space between when and where they occurred. Information as to times, duration and locations of these failures must be interpreted in context and in light of their other characteristics. An apparently large number of failures may remain isolated where they constitute a small fraction of a total number of similar enforcement cases, are relatively minor, and are subject to vagaries beyond the control of even a well-functioning enforcement institution. For example, 30 instances of failure to inspect within several weeks in response to apparently well-founded complaints in a given calendar year may each constitute a failure to effectively enforce labor laws, but may nonetheless

be isolated instances for an inspectorate responding appropriately to 20,000 complaints per year and subject to occasional, varied and unavoidable obstacles to prompt inspection.

435. Conversely, as discussed above, enforcement failures need not be representative of the overall conduct of an enforcement institution in order to constitute a “course” of action or inaction in contravention of Article 16.2.1(a). They need not be system-wide or pervasive. All that is required is that they constitute a line of behavior connected so as to form a course of action or inaction.

436. There is no single test that can be applied to determine whether enforcement failures constitute such a line of behavior rather than disconnected events. This is a question of fact that must be answered based on the particular circumstances of each case. Nonetheless, it is possible to make some observations to help guide the inquiry.

437. First, there are some factors the presence of which would tend to link instances of enforcement failure. For example, if there were evidence of deliberateness underlying enforcement failures or bias against enforcement action involving particular sectors or employers or particular types of labor rights, such evidence might tend to support a finding that the failures constitute a course of action or inaction. Likewise, if there were evidence of institutional direction aimed at securing legitimate institutional aims that unintentionally produced failures to effectively enforce, such evidence might tend to show the existence of a course of action or inaction. Evidence of established customs or practices that routinely result in enforcement failures could help substantiate the existence of a course of action or inaction. Alternatively, a line of recurring or sustained failures to effectively enforce may simply reflect lack of institutional capacity or political will evident in a pattern of significant shortfall between institutional mandate and institutional practice.

438. To be clear, while potentially indicative of a course of action or inaction, none of the above factors must be proven to demonstrate the existence of such a course. We identify the foregoing factors for illustrative purposes only. The factors underlying the failures of institutions to effectively enforce need not lie in deliberate decision making, bias, inadvertent consequences of institutional direction, adherence to custom or routine, or lack of capacity or political will. In

any event, it is not necessary to prove how and why a line of acts or omissions is connected to establish that it is more likely than not that they are connected. Conversely, the presence of such factors will not necessarily lead to the conclusion that enforcement failures constitute a course of action or inaction. The existence of such factors is potentially probative, but their presence or absence is not dispositive of whether there is a course of action or inaction.

439. Second, where multiple actions or inactions taken together make up a line of connected behavior they indicate a direction, so that knowledge of the events that have occurred in the past should give an observer reason to conclude on a balance of probabilities that, absent intervening events, such failures are likely to recur in similar situations in the future with greater frequency than random or isolated failures would. We do not mean to suggest that to demonstrate that enforcement failures constitute a course of action or inaction a claimant must show that future conduct is predictable to any particular degree. Such a requirement would impose a burden on a claimant not supported by the CAFTA-DR text. Nevertheless, for a set of recurring actions or inactions to constitute a course, they should evidence a line of conduct or behavior, and to evidence a line they should relate to one another in a way that ordinarily would enable an observer to perceive direction – that is, to have a reasonable expectation of increased likelihood of failure above a baseline of isolated events.

440. We have not found any evidence of deliberateness, bias, direction, custom, routine, or other such factors that would signal a link between the enforcement failures we have identified. However, we do note a number of similarities among the different enforcement failures, and such similarities could support the finding of a course. In particular, each of the proven instances of failed enforcement amounts to a prolonged failure by the courts to meet specific and ongoing statutory obligations to take immediate action to secure the reinstatement and compensation of workers unlawfully dismissed for seeking to organize a union or bargain collectively. The evidence shows failures to enforce court orders in respect of violations of the rights of 74 workers at eight worksites over the following time periods: November 2006 to August 2007 (Avandia); February 2008 to March 2014 (ITM); June 2008 to May 2014 (NEPORSA); April 2009 to July and August 2009 (Fribo); August 2010 to May 2014 (RTM); March 2010 to July 2014 (Alianza); November 2010 to May 2014 (Solesa); and May 2011 to the

date of the Panel request and thereafter, until August of 2012 in the case of ODIVESA. Failures at five of the eight worksites were in response to multiple violations of the law.

441. This conduct must be viewed in light of the clear and strict requirements of the applicable law. In particular, as discussed in section IV.B.2, *supra*, Articles 379 and 380 of the GLC impose obligations on an employer and, more importantly for present purposes, on a court that take effect from the moment a *pliego de peticiones* is filed. The court's obligations include the obligation to impose penalties for illegal employer reprisals and to ensure that those penalties are paid. Likewise, if an employer dismisses workers in contravention of Article 380, a judge must impose sanctions and order the immediate reinstatement of the dismissed worker. If the employer disobeys the order, the judge is required to increase the sanction. If the employer's disobedience persists, Article 380 requires that the judge order the certification of the matter against the employer committing the infraction for purposes of prosecution, without relieving the employer of the obligation to reinstate the affected employees. Article 380 further stipulates that the judge's reinstatement order must be rendered within 24 hours of the receipt of the employee's complaint by the court, and that in the order the judge must designate an employee of the court as executor of the order to make the reinstatement effective. Article 425 of the GLC makes a judge responsible for executing any order that he or she renders.

442. This legal backdrop – in particular, the precise, mandatory nature of the actions required to be taken – tends to suggest a finding that the failures to effectively enforce constitute a course of action or inaction. Their pattern of significant shortfall between the labor courts' mandate and performance suggests that the failures are not random, but rather more likely than not more than isolated behaviors. This suggestion is reinforced by statistical evidence indicating that during a two-year period beginning not long after the events in question, defendants failed in large numbers and at a high rate to comply with court orders in response to certain enforcement proceedings (payment demands and verifications), often in reinstatement cases.

443. On the other hand, although we do not find that "course" in the context of Article 16.2.1(a) implies a particular frequency of action or inaction, the number of failures – involving 74 workers at eight worksites – strikes members of the Panel as small enough in relation to the five-year period between the beginning of the first instance and the date of the panel request to

make it difficult to discern a line of conduct or behavior indicating a greater likelihood of failure to enforce in the future than would be expected on the basis of a set of isolated events.

444. In the end, we do not need to resolve this question. As will become clear later in this report, this issue is not dispositive of the outcome of the U.S. claim and, therefore, need not be resolved definitively. In order to complete the task before us, we accept on an *arguendo* basis that the instances of failed enforcement in question constitute a sustained or recurring course of action or inaction within the meaning of CAFTA-DR Article 16.2.1(a).

#### **4. In a Manner Affecting Trade Between the Parties**

445. We must therefore consider whether Guatemala's failures to effectively enforce labor laws through a sustained or recurring course of action or inaction were in a manner affecting trade between the Parties.

446. The United States alleges that those failures enabled employers to evade or forego the costs of complying with Articles 10, 62(c), 209, 223, 379 and 380 of the GLC and thus to benefit from inappropriately reduced labor costs.<sup>333</sup> Specifically, it claims that the firms evaded: (1) costs of paying affected workers the wages and benefits owed to them, and associated fines (compensation and sanction costs); and (2) costs associated with workers who are able, with the support of a union, to advocate for better pay and working conditions than non-unionized workers, and who have access, with the support of a union, to the enforcement mechanisms for Guatemala's labor laws (unionization costs).<sup>334</sup> The United States submits that those unionization costs are the costs associated with having a functioning union or a collective labor agreement in the workplace.<sup>335</sup> According to the United States, "[i]t is for this very reason that the employers terminated workers attempting to organize – that is, to avoid the perceived cost of workers negotiating for higher wages or for improved working conditions."<sup>336</sup>

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<sup>333</sup> US IWS, paras. 107, 108 and 110.

<sup>334</sup> US IWS, para. 110.

<sup>335</sup> US Responses, para. 36.

<sup>336</sup> US Responses, para. 36.

447. The United States contends in addition that Guatemalan exporters who are clients of the stevedoring companies also enjoy cost reductions as a result of failures to enforce labor laws against those companies.<sup>337</sup> Finally, it submits that non-compliance of a particular employer can have sectoral spillover effects as “inaction with respect to one company may prompt other companies in the sector to likewise lower their labor costs to be able to compete, which in turn lowers labor costs sector-wide and unfairly modifies the conditions of competition between Guatemalan industry and competing exporters.”<sup>338</sup>

448. On the other hand, Guatemala contends that the United States has failed to identify any trade effects and to establish that such effects are caused by Guatemala’s alleged failure. According to Guatemala the reasoning put forward by the United States is flawed since it contends that allegedly some companies are in a situation of non-compliance with labor laws and then concludes that the whole sector to which these companies pertain would be benefiting from better conditions of competition.<sup>339</sup> Guatemala also responds that the United States has not submitted any evidence that a failure to enforce labor laws had led to a modification of conditions of competition,<sup>340</sup> that the statements about the alleged financial implications for the companies concerned are all speculative and unsubstantiated and that there is no evidence of the cost savings allegedly incurred by the companies concerned.<sup>341</sup> Guatemala characterizes the case of the United States with respect to whether any failures to enforce were in a manner affecting trade as “completely theoretical.”<sup>342</sup>

449. In accordance with our analysis in section III.D we consider here whether (1) at the relevant time the enterprises in question exported to one or more of the CAFTA-DR Parties in a competitive market or competed with imports from one or more of the CAFTA-DR Parties;

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<sup>337</sup> US IWS, para. 108.

<sup>338</sup> US RS, para. 130.

<sup>339</sup> GTM IWS, paras. 462 and 463.

<sup>340</sup> GTM Final, para. 64.

<sup>341</sup> GTM Final, para. 61.

<sup>342</sup> GTM Final, para. 64.

(2) what effects, if any, failures to effectively enforce labor laws had on any of those enterprises, and (3) whether any such effects conferred some competitive advantage on any such enterprise or enterprises.

450. Since the claims of the United States with respect to the shipping companies, the garment manufacturers and the rubber plantation Solesa have different bases, we consider separately whether the failures to effectively enforce labor laws against each employer were in a manner affecting trade.

**a. The Shipping Companies**

451. The United States contends that failures to compel compliance with court orders against the four shipping companies – ITM, NEPORSA, ODIVESA and RTM – allowed them to directly evade or forego the costs of reinstating and compensating groups of workers dismissed for participating in a union and of paying fines sanctioning those dismissals, as well as to avoid unionization costs associated with complying with sections of the GLC protecting freedom of association, the right to organize and the right to bargain collectively.<sup>343</sup>

452. The four shipping companies operate in the Port of Quetzal. According to a Guatemalan government report submitted to the Panel by the United States, shipping companies in the Port provide services under contract to the quasi-governmental Empresa Portuaria Quetzal, which runs the Port. The report also indicates that the Port of Quetzal is the largest Guatemalan port on the Pacific Ocean, responsible for about 20% of all foreign trade by sea for the Central American region in 2012.<sup>344</sup>

453. The United States does not contend that any of these employers, or any other shipping company in the Port of Quetzal, competes for shipping business with enterprises in other ports located in one of the CAFTA-DR Parties. The claim that failures to effectively

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<sup>343</sup> US IWS, paras. 108 and 110.

<sup>344</sup> Exhibit USA-90.

enforce labor laws against the shipping companies breach Article 16.2.1(a) therefore cannot be solely based on the effects of those failures on the shipping companies. It must be about the effects of such failures on the conditions of competition of their clients. Indeed the United States submits that the alleged failures to enforce court orders against the shipping companies affect trade by lowering the costs for shipping companies, which in turn lowers costs for Guatemalan exporters that employ less costly stevedoring services to export their products.<sup>345</sup> Specifically, the United States claims that Guatemala's enforcement failures altered "the fees [the shipping companies] charge for [their] services and thus the conditions of competition for those shipping goods using those services."<sup>346</sup>

454. The merit of claims by the United States that failures to enforce labor laws against the shipping companies were in a manner affecting trade thus depends entirely upon proof of the effects of such failures upon conditions of competition for exporters to whom those shipping companies provided services. Given the claims of the United States, in order to establish such effects, the evidence must enable the Panel to conclude on a balance of probabilities that (1) Guatemalan exporters shipped from the Port of Quetzal to other CAFTA-DR Parties at the relevant times; (2) a shipping company or shipping companies affected by the alleged failure to effectively enforce provided services to such exporters; (3) that the costs of the shipping company or companies in question were reduced by the failure; and (4) that such cost savings were passed on to one or more of the exporters in question to a sufficient extent to constitute a competitive advantage, thus affecting their conditions of competition.

455. We have carefully considered whether we can reach these conclusions by direct observation or inference based upon the record evidence. For the reasons that follow, we conclude that while the record contains some evidence upon which the first three of the above matters might be inferred, the United States has not met its burden to prove that one or more exporter or exporters obtained a competitive advantage from failures to effectively enforce labor laws against the shipping companies, and thus that the failures were in a manner affecting trade.

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<sup>345</sup> US RS, para. 128.

<sup>346</sup> US IWS, para. 108.

456. We begin by considering whether the record establishes that Guatemalan exporters shipped from the Port of Quetzal to other CAFTA-DR Parties at the relevant times. As noted above, the United States provided evidence to show that the Port of Quetzal accounted for 20% of all foreign trade by sea for the Central American region in 2012 and that the United States is a key export market for Guatemala.<sup>347</sup> The United States also submits a report from the United States Customs and Border Protection stating that between July 1, 2006 and December 31, 2014, five Guatemalan garment producers exported goods with a total value of \$44 million to the United States from the Port of Quetzal.<sup>348</sup> We can therefore conclude that Guatemalan exporters shipped from the Port of Quetzal to other CAFTA-DR Parties at the relevant times. Guatemala does not dispute this.

457. We turn next to the question of whether a shipping company or shipping companies affected by the failure to effectively enforce provided services to such exporters. There is no evidence that any of the shipping companies named in the complaint, other than NEPORSa, were involved in loading products for export to CAFTA-DR Parties.<sup>349</sup> Indeed the Panel has no evidence as to the types of products handled by ITM, ODIVESA or RTM, or their destinations. A conclusion that the failures of effective enforcement at the other shipping companies affected Guatemalan exporters could therefore only rest on inference.

458. The Panel considered whether the evidence in the record supports an inference that the other three shipping companies loaded goods for Guatemalan companies exporting to CAFTA-DR parties. The evidence submitted by the United States – a statement by a former worker at ITM and ODIVESA – is that there are 15 stevedoring companies operating in the Port of Quetzal.<sup>350</sup> The United States does not argue or provide any evidence that ITM, ODIVESA or RTM hold a large share of the market for stevedoring services in Port Quetzal. There is therefore no basis in evidence upon which the Panel might conclude that the client base of each of those

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<sup>347</sup> See Exhibit USA-90 and US IWS, para. 105.

<sup>348</sup> Exhibit USA-198.

<sup>349</sup> The United States provides two witness statements that NEPORSa stevedores commonly load bananas for export to the United States. Exhibits USA-4 and USA-183.

<sup>350</sup> Exhibit USA-6.

companies is representative of the client base of the Port of Quetzal as a whole. Therefore, the Panel cannot conclude on the basis of the trade data presented by the United States that CAFTA-DR Party-bound exports were handled by any of those three stevedoring companies.

459. On the other hand, the record evidence might support an inference that the failure to enforce labor laws against the four shipping companies resulted in all or most of the other shipping companies in the Port of Quetzal evading labor costs. If this were the case, the Panel could conclude that a shipping company or shipping companies affected by failures to effectively enforce labor laws must have provided services to enterprises exporting to a CAFTA-DR Party.

460. The Panel finds it difficult to determine whether all or most of the shipping companies in the Port of Quetzal were affected by the proven failures to effectively enforce labor laws. On the one hand, as we discuss below in relation to the garment manufacturers, a failure to enforce labor laws can relieve an employer of unionization costs. Given the scale of the failures to enforce labor laws in the Port of Quetzal, and the fact that they took place relatively close in time to each other, it is possible that failures to enforce against the four shipping companies may have conveyed to the other shipping companies in the Port of Quetzal that they could violate labor laws with impunity, and thus changed their conditions of competition. On the other hand, the record contains little evidence on the state of union organizing in the Port of Quetzal at the relevant time. There is a statement<sup>351</sup> by a union officer that none of the employers in the Port of Quetzal recognizes the particular union that he or she represented. However, the statement offers no explanation for this observation, and provides little contextual information. The reasons for failure to recognize the union could be many, and may bear no relationship to the failures to enforce against the four companies in question. Information on whether any other unions represented workers in the Port would also have assisted the Panel. We also note that a number of worker statements allege that a “blacklist” of union supporters circulated among stevedoring companies in the Port and that those companies referred to the list in refusing to hire such

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<sup>351</sup> Exhibit USA-2.

workers.<sup>352</sup> Again however, there is little specific information in the record concerning this alleged practice.

461. We need not reach a decision on whether all of the stevedoring companies in the Port of Quetzal were affected by the failures to effectively enforce labor laws, in light of the conclusions that we set out immediately below. For reasons of economy, we decline to do so.

462. We turn to the question of whether Guatemalan exporters benefited from a competitive advantage as a result of failures to enforce labor laws against stevedoring companies in the Port of Quetzal. Despite asserting that Guatemala's enforcement failures altered "the fees [the shipping companies] charge for [their] services and thus the conditions of competition for those shipping goods using those services," the United States presents no evidence of any effects on costs of Guatemalan exporters resulting from the failures to enforce labor laws against any shipping companies. Rather it contends that "[c]hanges to conditions of competition for shipping companies would necessarily influence trade between the Parties,"<sup>353</sup> and thus takes the position that a competitive advantage for exporters was a necessary consequence of failures to enforce labor laws against the shipping companies. For the reasons below, the Panel does not agree that those consequences necessarily follow on the basis of the record evidence, at least not to the extent required for the United States to prove that failures to enforce labor laws against the shipping companies were in a manner affecting trade.

463. First, there is no basis in the record evidence upon which the Panel might determine whether any cost savings that might have accrued to Guatemalan exporters as a result of the alleged enforcement failures would have been sufficient to provide a competitive advantage. The Panel received no evidence, even approximate, about the relative importance of stevedoring costs in total costs for the enterprises exporting from the Port of Quetzal to CAFTA-DR Parties, or for exporters shipping from a comparable port elsewhere. As a result, the Panel has an insufficient basis in evidence upon which to conclude that the alleged failures to effectively enforce labor laws conferred a competitive advantage on Guatemalan exporters. A

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<sup>352</sup> See, for example, Exhibits USA-2, USA-3, USA-6 and USA-15.

<sup>353</sup> US RS, para. 128.

dispute settlement Panel need not receive precise evidence of the costs of such inputs to exporters in order to conclude that the exporter would receive a competitive advantage from their reduction. But it does need some basis in evidence upon which to conclude that such costs are sufficient that a reduction in them could make a difference to the conditions of competition of exporters. There is no such evidence in the record.

464. Second, there is insufficient evidence in the record to establish that any cost savings for the shipping companies would have affected conditions of competition for Guatemalan exporters. As noted above, there is no evidence of fee changes in the record. We could infer such effects if we had reason to conclude that shipping companies in the Port of Quetzal compete with each other and therefore pass cost savings on to their clients. This might be the case in a normal competitive market in which several service providers compete for work. However, the evidence indicates that the shipping companies supply stevedoring services through a contractual arrangement with Empresa Portuaria Quetzal, a quasi-governmental entity administering the Port. The presence of such a market intermediary stands to affect the operation of the market for stevedoring services. There is no evidence before the Panel with respect to terms upon which stevedoring services are offered to Guatemalan exporters in the Port of Quetzal. Nor is there any other evidence that might have established that shipping companies in the Port competed with each other at the relevant time. In the absence of such evidence, any conclusion that shipping companies benefitting from a failure to enforce labor laws in the Port of Quetzal would have passed on their costs savings to their customers rather than keeping them as increased net revenue would be based upon conjecture.

465. For all of these reasons, the Panel finds that the United States has not proven that the failures to effectively enforce labor laws against the shipping companies in the Port of Quetzal were in a manner affecting trade.

**b. The Garment Manufacturers**

466. The record evidence establishes that Guatemala failed for significant periods of time to compel compliance with court orders requiring two garment manufacturers—Avandia

and Fribo—to reinstate and compensate groups of workers unlawfully dismissed for participating in a union and to pay fines sanctioning those dismissals. It also establishes that a labor court similarly failed to enforce a court order to reinstate a worker unlawfully dismissed for union activity against a third garment manufacturer, Alianza. We have accepted provisionally in Part IV.B.3 that these instances constitute part of a course of inaction, and on that basis we now consider whether the enforcement failures in question are in a manner affecting trade between the Parties.

467. We must first consider whether the United States has adduced evidence sufficient to prove that Avandia, Fribo and Alianza engaged at the relevant time in CAFTA-DR trade, in that they exported to one or more of the CAFTA-DR Parties in a competitive market or competed with imports from one or more of the CAFTA-DR Parties.

468. The United States provides a report from the United States Customs and Border Protection indicating that each of these companies exported goods worth millions of United States dollars in total during periods of varying lengths falling between July 1, 2006 and December 31, 2014.<sup>354</sup> Each of those periods includes the time during which, according to other evidence presented by the United States, Guatemala failed to enforce a court order or orders against the corresponding employer. The report was authored by Mr. Mark Ziner, Director of the Trade Statistics and Demographics Division, in the Office of International Trade at the U.S. Customs and Border Protection. It is signed and dated March 3, 2015, and takes the form of a declaration made under penalty of perjury under the laws of the United States. Guatemala does not challenge the accuracy of its contents. The evidence indicates that the employers in question were engaged in CAFTA-DR trade at the relevant time. Guatemala offers no evidence to the contrary. We therefore so conclude.

469. The Panel must then consider what effects, if any, the failures to effectively enforce labor laws had on those enterprises, and whether such effects were of sufficient scale and duration to confer a competitive advantage on any of them.

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<sup>354</sup> US Responses, para. 24, summarizing evidence contained in Exhibit USA-198.

470. The United States contends that Guatemala's failures allowed the garment manufacturers to evade costs associated with compliance with Articles 10, 62(c), 209, 223, 379 and 380 of the GLC.<sup>355</sup> Given its more general submissions with respect to the nature of such compliance costs, we consider the evidence with respect to both compensation and sanction costs as well as unionization costs. The Panel also considers whether the evidence supports a finding of spillover effects in the Guatemalan garment sector.

471. The record evidence establishes that each of the three garment manufacturers - Avandia, Fribo and Alianza - avoided costs associated with paying back pay owed to workers not reinstated and with paying fines imposed to sanction unlawful dismissals. There is however no evidence that would enable the Panel to determine the total amounts owed to the workers in question pursuant to the labor court judgments, even approximately. Nor is there any evidence, even approximate, as to the significance of those amounts in relation to the overall labor costs of each firm. The Panel therefore cannot conclude that the failure to ensure the payment of penalties and compensation costs in itself conferred a competitive advantage on the garment manufacturers.

472. We turn next to the question of whether each of these firms avoided unionization costs. The record evidence establishes that courts failed to enforce orders to remedy violations of the GLC, after finding that the employer had dismissed workers in violation of either Article 379 or Article 380 of the GLC, or both. As discussed above, Article 379 protects workers against reprisal by their employer from the moment that a labor court judge receives a *pliego de peticiones* - essentially a list of items that workers seek to bargain collectively with their employer. Article 380 requires that following notification of the General Labor Inspectorate that workers are seeking to organize a union, or following the filing of a *pliego de peticiones* with a labor court, any dismissal of a worker must be authorized by the court before it can take effect. Articles 379 and 380 aim to counter a recognized possibility of reprisals against union leaders and supporters in response to an attempt to initiate collective bargaining.

473. In its Initial Written Submission, the United States stated that:

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<sup>355</sup> US IWS, para. 107.

[d]ue to Guatemala's failure to compel compliance with court orders and ensure that improperly dismissed unionized workers are reinstated and compensated - and that employers are properly fined – the employers evade... the costs associated with workers who are capable, through the support of a union, to advocate for better pay and working conditions than non-unionized workers, and . . . the costs associated with workers who have access, through the support of a union, to the enforcement mechanisms for Guatemala's labor laws. In this respect, Guatemala's failure to effectively enforce the relevant labor laws affected the conditions of competition<sup>356</sup>

474. The U.S. argument about the effects of Guatemala's failures to effectively enforce labor laws thus has two interrelated propositions. The first is that the failures in question deprived workers of the ability to organize a union to advocate for better pay and working conditions and to access labor law enforcement mechanisms. The second is that this relieved employers of labor costs sufficiently to affect conditions of competition.

475. We consider whether the record establishes that failures to effectively enforce labor laws against each of the garment manufacturers had each of these effects, to an extent sufficient to have conferred upon it a competitive advantage.

476. It is obvious that the workers at Avandia, Fribo and Alianza who were unlawfully dismissed for seeking to organize a union and then denied any legal remedy were directly deprived of the ability to join and participate in a union. But the United States submits no evidence with respect to the impact of their dismissals on the ability of other workers to do so, or on the capacity of other workers to organize a union and bargain collectively. There is no statement, for example, by a union organizer or worker describing the effects of the dismissals on the efforts of the union to represent workers at any of the garment manufacturers.

477. Instead the United States notes, in subsequent submissions, that in each case the court found that the employer had terminated employees in response to attempts to organize. It contends that labor costs are associated with a functioning union or a collective labor agreement,

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<sup>356</sup> US IWS, para. 110.

and that this is why the employers terminated employees in response to their attempts to organize.<sup>357</sup> In these respects, the United States seems to suggest that the relevant causal relationships follow inevitably or automatically given the nature of the conduct in question.

478. On the understanding of what it means to “affect conditions of competition” advanced by the United States, this may well have been correct. In its Initial Written Submission, the United States equates evading costs associated with compliance with affecting the conditions of competition.<sup>358</sup> This suggests that any effects on the labor costs of an employer engaged in trade will be sufficient to affect the conditions of competition. In its responses to the Panel’s questions the United States makes this position more explicit, stating that “it is evident from the nature of the labor laws [that are the subject of claims in these proceedings] that not enforcing them would result in an alteration of the conditions of competition because the lack of enforcement reduces marginal costs for Guatemalan enterprises.”<sup>359</sup> This suggests that any failure to enforce a labor law related to rights to bargain collectively, health and safety at work, or acceptable conditions of work would have a sufficient marginal effect on employer labor costs to affect conditions of competition. The implication of this position is that all failures to effectively enforce such laws would be in a manner affecting trade to the extent that they affected employers engaged in trade. The United States appears to recognize and endorse this implication in its responses to Panel questions, stating that:

... the phrase “in a manner affecting trade” serves to delineate the scope of the types of failures that fall within the purview of the effective enforcement obligation. That is, the obligation does not apply to enforcement failures that have no effect on trade between the parties, such as labor enforcement issues relating to government workers or civil servants whose work does not involve the production of goods or the provision of services entering cross-border commerce.<sup>360</sup>

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<sup>357</sup> See US Responses, paras. 28 and 35-36.

<sup>358</sup> US IWS, paras. 107 and 109.

<sup>359</sup> US Responses, para. 28.

<sup>360</sup> US Responses, para. 32.

479. As we explain in section III.D above, the Panel does not agree with this approach to determining whether a failure to effectively enforce labor laws affects conditions of competition. We are of the view that such an interpretation would drain the phrase “affecting trade” of its ordinary meaning, and effectively equate it with the term “trade-related.” We have determined that in order for a failure to enforce to affect trade it must change conditions of competition by conferring a competitive advantage upon an employer engaged in trade.

480. In light of this determination, it does not follow that any failure to enforce labor laws that affects in any way the labor costs of an employer engaged in trade will thereby be in a manner affecting trade. A complainant must demonstrate that labor cost effects reasonably expected in light of the record evidence are sufficient to confer some competitive advantage.

481. Given the lack of any evidence of such effects concerning the garment manufacturers, the Panel could infer their existence only if, in the circumstances in which the failure in question took place, it necessarily substantially impaired the capacity of the employer’s workforce to organize a union or bargain collectively, thus conferring some competitive advantage on the employer. In other words, we would have to conclude as a matter of fact that, in their circumstances, by their very nature or ordinary operation the enforcement failures were in a manner affecting trade.

482. As a general matter, we note that employer dismissals in reprisal for union activity pose a serious threat to the ability of employees to exercise their legal rights to organize and bargain collectively. Employees represented by a union cannot help but take note of the absence of those who sought to represent them or who expressed support for the union following retaliatory dismissals. Retaliatory dismissal of union organizers and supporters tends to send a clear message to employees that they risk serious economic consequences for trying to organize or participate in a union.

483. In view of this tendency, we recognize the possibility that a failure to enforce laws against retaliatory dismissals can place an employer at liberty to use effective intimidation tactics to prevent its employees from exercising their rights to organize and bargain collectively. If an employer enjoys impunity for retaliatory dismissals it will face significantly lower risk on

an ongoing basis that its employees will organize a union or bargain collectively in an effective manner. This in turn will provide such an employer with a competitive advantage by substantially lowering the risk of unionization within its facilities on an ongoing basis. The practically automatic effects of depriving employees of effective access to the right to bargain collectively are to reduce the risk that they will do so, and thus to reduce their bargaining power in relation to the employer. We do not doubt that this chain of consequences *can* flow from a failure to enforce labor laws against retaliatory dismissals and that when it does, there will be an effect on terms of competition and hence on trade.

484. But this does not mean that such consequences necessarily will flow each and every time there is a failure to effectively enforce labor laws in relation to freedom of association and the right to bargain collectively. Whether such a failure substantially impairs the ability of an employer's workforce to exercise such rights is a question of fact to be determined in light of the circumstances of each case. Factual circumstances such as the number of workers dismissed, the timing of their dismissal, whether union leaders were dismissed, and the length of time that failure to enforce legal remedies persists may contribute to the likelihood of the failure to enforce necessarily leading to the hypothesized consequences. Where all of these factors are present, it may be possible to conclude without further evidence that rights to organize of an employer's workforce have been effectively impaired. In other cases it may not be possible to draw such conclusions without evidence of particular effects on union organizing or bargaining activity.

485. In short, many factors may have a bearing on whether a failure to effectively enforce labor laws deprives workers of the ability to organize a union to such a degree as to affect conditions of competition by providing the employer with some competitive advantage. We therefore do not agree with the U.S. position that a failure to effectively enforce labor laws protecting the right to organize or the right to bargain collectively necessarily affects conditions of competition. To prove its case a complainant will generally be required to introduce evidence of the extent and duration of effects of the failure to enforce on the ability of workers to exercise their rights to organize. As noted above, a complainant might do so by producing first-hand evidence from those involved in seeking to organize the union or to bargain collectively. There may nonetheless be circumstances in which the consequences of a failure to remedy serious

violations would be so evident on the face of the failure that further proof would not be necessary, and a Panel could conclude that the failure was in a manner affecting trade.

486. We turn now to consideration of whether the record evidence establishes in each instance that, as the United States contends, Guatemala's failure to effectively enforce its labor laws had the effect of depriving workers at the garment manufacturers of the ability to organize a union and produced a sufficient impact on employer costs to affect conditions of competition.

487. The evidence shows that Avandia dismissed 9 workers on November 14, 2006 following an attempt by workers to initiate collective bargaining. These 9 workers constituted the entire provisional executive committee of a union in formation.<sup>361</sup> A labor court ordered their reinstatement on November 22, 2006. Nine months later, two workers had been reinstated to lesser positions, and seven remained without reinstatement. The reinstatement orders remained valid, and the court enforced none of them, despite a detailed and ongoing legal mandate to carry out such enforcement. While there is no direct evidence of the impacts of these events on workers' attempts to form a union and bargain collectively, we have difficulty seeing how the outcome could have been any different from that claimed by the United States. The employer dismissed the entire union executive committee at the point where the union sought to initiate collective bargaining. The court recognized this, and ordered their reinstatement. The court order was then not enforced for the following nine months. There is no justification in the record for this failure. This sequence of events cannot but have thwarted the workers' attempt to organize and bargain collectively, and sent a message to the employer and its workforce that the employer was free to act again in this manner, without legal consequence. Dismissal of union leaders on this scale in response to an attempt to initiate collective bargaining necessarily sends a message to an employer's workforce that the employer is prepared to inflict significant economic harm on those who seek to bargain collectively with it, and deprives workers seeking to bargain collectively of their leadership. The court failed to take effective enforcement action in response to particularly serious violations of freedom of association despite express and detailed mandates to remedy such violations immediately. In the particular circumstances of this case, we are prepared to conclude even in the absence of additional evidence regarding its impact, that

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<sup>361</sup> Exhibit USA-169.

Guatemala's failure to effectively enforce the law necessarily conferred some competitive advantage on Avandia, by effectively removing the risk that Avandia's employees would organize or bargain collectively for a substantial period of time.

488. We do not consider the record evidence sufficient to prove that the failure to effectively enforce labor laws against Fribo altered conditions of competition for it. The record evidence establishes that on April 1, 2009 a labor court concluded that Fribo had unlawfully dismissed 15 workers following an attempt to initiate collective bargaining, and ordered their reinstatement. Each of the workers who sought reinstatement was a union member, but there is no evidence that any of them were union leaders.<sup>362</sup> The evidence also establishes that those 15 workers were reinstated on July 10, 2009. While seven of them remained without the back pay that they were owed, eight of them received back pay. Fribo ceased operations in August of 2009. The Panel cannot conclude, without more information, that the delay in enforcing reinstatement orders against Fribo and the failure to enforce payment orders in favor of seven workers necessarily substantially impaired the capacity of its workforce to organize and bargain collectively. To so conclude the Panel would need evidence from the workers or the union about how these failures affected their ability to organize. Since the burden of proof lies with the complainant we must find that it has not proven that a failure to enforce labor laws against Fribo conferred some competitive advantage on this employer.

489. We reach the same conclusion with respect to the failure to enforce labor laws against Alianza. The record evidence establishes that on March 24, 2010 a labor court concluded that Alianza had unlawfully dismissed a worker immediately following an attempt to initiate collective bargaining, and ordered his or her reinstatement. The evidence shows that this worker had signed a *pliego de peticiones* seeking to initiate collective bargaining.<sup>363</sup> While the United States alleged that 32 other workers signing the *pliego* were dismissed and ordered to be reinstated on the same dates as this one worker, the record does not contain sufficient evidence to enable the Panel to draw this conclusion. Nor can the Panel conclude, without more information, that a failure to effectively enforce an order to remedy a single unlawful dismissal would

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<sup>362</sup> Exhibit USA-11.

<sup>363</sup> Exhibits USA-21 and USA-22.

necessarily impair the rights to organize and bargain collectively of an employer's workforce sufficiently to confer some competitive advantage upon it.

490. There is no evidence supporting the contention of the United States that failures to enforce labor laws against the three garment manufacturers incentivized others to violate the GLC's protections of rights to organize and bargain collectively. The record contains no evidence upon which the Panel could conclude that an impartial observer would reasonably expect that other employers were aware of the relevant events at any of the garment manufacturers. The Panel therefore cannot conclude that any other employer was incentivized to violate the relevant provisions of the GLC.

491. Thus, we conclude that the failure of Guatemala to effectively enforce court orders against Avandia conferred some competitive advantage upon it.

**c. Solesa**

492. We consider first whether the United States has adduced evidence sufficient to establish that Solesa or other companies allegedly affected by the failure to enforce labor laws against Solesa engaged at the relevant time in CAFTA-DR trade, in that it or they exported to one or more of the CAFTA-DR Parties in a competitive market or competed with imports from one or more of the CAFTA-DR Parties.

493. The United States argues that Solesa is a major exporter of rubber and that Guatemala is the leading exporter of this product in the Americas, as well as a leading exporter in the world.<sup>364</sup> However, the United States provides no evidence that Solesa itself exports to the CAFTA-DR Parties. Rather, it submits evidence—in the form of a single assertion by a worker without detail or supporting information—that Solesa produces rubber for export.<sup>365</sup> This

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<sup>364</sup> US IWS, para. 109.

<sup>365</sup> Exhibit USA-213.

evidence is not sufficient to permit the Panel to infer that Solesa itself is engaged in trade between the CAFTA-DR Parties.

494. The United States also submits data sourced from the U.S. International Trade Commission indicating that the United States imported millions of United States dollars' worth of natural rubber from Guatemala in each year between 2006 and 2014.<sup>366</sup> Guatemala does not offer any evidence to the contrary and we are prepared to accept this evidence as proof of its contents.

495. Because there is no evidence that Solesa itself was engaged in CAFTA-DR trade, and because the only evidence that Guatemalan rubber producers engage in CAFTA-DR trade is at the level of the entire natural rubber production sector, in order to find that a failure to effectively enforce labor laws against Solesa was in a manner affecting trade, the Panel would have to conclude that this failure had widespread effects in the Guatemalan rubber production sector. This is in fact what the United States contends when submitting that "to the extent that Guatemala fails to compel companies like Solesa to comply with Guatemalan labor laws... the impunity of those companies has a spillover effect on the entire Guatemalan sector that participates in exports."<sup>367</sup> However, it provides no evidence of such spillover effects, nor any evidence upon which the Panel could infer the existence of such effects. There is no information on the extent to which the failure of effective enforcement alleged to have occurred at Solesa was known or might reasonably have been expected to be known to other rubber producers in Guatemala.

496. In any event, the record does not establish that the failure to effectively enforce labor laws against Solesa had effects sufficient to confer some competitive advantage on Solesa itself. While the United States alleges differently, the record contains proof only that labor courts failed to enforce reinstatement of two workers unlawfully dismissed for union activity. There is no evidence in the record that would permit the Panel to understand the scale of compensation costs that Solesa thus evaded in absolute terms or relative to Solesa's overall labor costs, though

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<sup>366</sup> Exhibit USA-202

<sup>367</sup> US RS, para. 130.

it is not likely that in the latter respect such costs were large. The failure to enforce proven on the record evidence involved only two individuals. The record does not indicate that they were union leaders or representatives. It is not possible in the absence of further information about the context in which the dismissals took place and their effects on union organizing for the Panel to conclude that the court's failure to enforce its orders enabled Solesa to avoid costs associated with a functioning union or a collective agreement, or risks that employees will organize a union. Therefore, the United States has not met its burden to prove that failures to enforce labor laws against Solesa occurred in a manner affecting trade.

**d. Conclusions**

497. The record evidence demonstrates that Guatemala's failure to effectively enforce its labor laws against one employer – Avandia – conferred some competitive advantage upon it. The evidence does not establish that the other seven failures to effectively enforce labor laws that we have assumed *arguendo* formed a recurring course of inaction prior to the date of the Panel request. This raises a question as to what must be established in order to conclude that a Party has breached its obligation under Article 16.2.1(a). The question concerns how the different elements of Article 16.2.1(a) relate to one another. In particular, where a complaining Party has established that a responding Party failed to effectively enforce its labor laws on multiple occasions and that those failures taken together constitute a sustained or recurring course of action or inaction, but has shown that only one of those failures was in a manner affecting trade, has the complaining Party established a breach of Article 16.2.1(a)? It is to this question that we now turn.

498. For ease of reference, we recall the wording of Article 16.2.1(a):

A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

499. The provision consists of four phrases. The first phrase states the basic obligation: “A Party shall not fail to effectively enforce its labor laws.” Each of the next three phrases qualifies that obligation in a particular way. Thus, a Party’s failure to effectively enforce its labor laws by itself will not necessarily breach its obligation under Article 16.2.1(a). Rather, the failure must be [i] “through a sustained or recurring course of action or inaction,” [ii] “in a manner affecting trade between the Parties,” and [iii] “after the date of entry into force of [the CAFTA-DR].”

500. According to Guatemala, the provisions qualifying the obligation to not fail to effectively enforce labor laws are “cumulative in nature.”<sup>368</sup> While the United States disagrees with Guatemala’s interpretation of each of those qualifying provisions, it does not disagree with Guatemala’s characterization of the provisions as being cumulative in nature.

501. For reasons set out below, we agree with that characterization as consistent with the ordinary meaning of the text of Article 16.2.1(a) in context and in light of the CAFTA-DR’s object and purpose. Thus, for a failure or failures to effectively enforce labor laws to constitute a breach of Article 16.2.1(a), the failure or failures must be through a sustained or recurring course of action or inaction, **and** in a manner affecting trade between the Parties, **and** after the date of entry into force of the CAFTA-DR.

502. There are different ways in which a group of failures to effectively enforce may be **both** through a sustained or recurring course of action or inaction **and** in a manner affecting trade. One possibility is that each such failure is in a manner affecting trade, and the failures taken together relate to one another so as to constitute a sustained or recurring course of action or inaction.<sup>369</sup> Another possibility is that while no individual failure is shown to be in a manner affecting trade (or only some but not all such failures are shown to be in a manner affecting

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<sup>368</sup> GTM IWS, para. 140.

<sup>369</sup> In this case the Panel considered whether each failure was in a manner affecting trade because the evidence presented by the United States, to the extent that it demonstrated consequences of failures to effectively enforce, did so at the workplace level. We note that a Party need not demonstrate that the entire course of action or inaction that it has proven was in a manner affecting trade in order to establish a violation of Article 16.2.1(a). But the failures to effectively enforce labor laws proven to be in a manner affecting trade must themselves constitute a sustained or recurring course of action or inaction in order for there to be a violation. The latter course may be less extensive than the entire course of action or inaction proven by the Party complaining of the violation.

trade), the failures taken together constitute a sustained or recurring course of action or inaction, and the existence of that course has an impact on employers that affects trade, thus causing the failures collectively to be in a manner affecting trade. For example, if the failures making up a course of action or inaction occurred with sufficient frequency and notoriety among employers, they might incentivize employers to violate the law with an expectation of impunity, and the cumulative impact of such violations might be to reduce employers' costs so as to gain a competitive advantage and affect trade. This might be so even if each individual failure on its own had no discernible impact on trade.

503. In this case, although we have found (on an *arguendo* basis) that Guatemala's failures to effectively enforce its labor laws constitute a sustained or recurring course of action or inaction, we have not found any evidence of such course itself having an effect on trade irrespective of the effects of individual failures.

504. Conversely, while we have found one instance of a failure to effectively enforce labor laws to have been in a manner affecting trade (*i.e.*, the Avandia case), that instance alone does not constitute a sustained or recurring course of inaction. It is by definition not recurring. Moreover, there is no evidence in the record to enable the Panel to conclude that, taken on its own, the inaction with respect to enforcement of orders at Avandia was sufficiently consistent over time to indicate institutional behavior constituting a sustained course of inaction. We have insufficient evidence with respect to the sequence of interactions with complainants or other behavior over time by the labor court to draw any conclusions in this regard.

505. In sum, the facts as we have found them fail to establish a breach of Article 16.2.1(a), because whichever way they are viewed, one of the prongs of an Article 16.2.1(a) claim has not been met. When Guatemala's law enforcement failures are looked at collectively, they show (on an *arguendo* basis) a sustained or recurring course of action or inaction, but not conduct in a manner affecting trade. When the one law enforcement failure that we found to be in a manner affecting trade is looked at by itself, there is no sustained or recurring course of action or inaction. Under these circumstances, given the cumulative nature of the elements of Article 16.2.1(a), we are unable to find that provision to have been breached based on the factual matrix before us.

506. To conclude otherwise would amount to separating the requirement that a failure to effectively enforce labor laws be in a manner affecting trade from the requirement that it be “through a sustained or recurring course of action or inaction.” This would be contrary to the cumulative nature of the several elements in Article 16.2.1(a), and it could produce outcomes not consistent with the purposes of that provision. It would not be consistent with the purposes of Chapter 16 - which are centered around ensuring fair conditions of competition within CAFTA-DR trade - to find, on the basis of a single instance of failure to effectively enforce labor laws in a manner affecting trade within a larger course of action otherwise arising in a context not affecting trade, that a Party had failed to conform to its Article 16.2.1(a) obligations.

507. For the foregoing reasons, we conclude that the United States has not established a breach of Article 16.2.1(a) with respect to Guatemala’s failure to enforce its labor law related to court-ordered reinstatement of employees dismissed for engaging in unionization and collective bargaining activities.

**C. The Claim of Failure to Conduct Proper Inspections and Failure to Impose Penalties**

508. We turn now to the second claim of the United States that Guatemala has failed to effectively enforce its labor laws through a sustained or recurring course of action or inaction in a manner affecting trade between the Parties. This claim concerns conduct by inspectors in Guatemala’s GLI. It encompasses two types of alleged action or inaction:

- Inspectors either (a) failing to conduct inspections in response to *bona fide* complaints of employers’ violations of laws related to acceptable conditions of work or (b) not conducting inspections properly (*e.g.*: insisting that workers pay for inspectors’ travel expenses as a condition to doing an inspection; inspectors meeting only with employees selected by the employer), thus making it impossible to discern whether an employer had violated the law; and

- Inspectors failing to impose penalties or otherwise follow up after finding that an employer had violated labor laws.

509. We start by addressing the fundamental question of which allegations we should consider in determining whether the United States has established a breach of Article 16.2.1(a). This question has both a subject-matter dimension and a temporal dimension.

# **1. Subject-Matter of Allegations Covered by The Inspections/Penalties Claim**

510. The U.S. claim of deficient inspections and failure to impose penalties is based on allegations of particular acts or omissions at particular workplaces. It is not based on allegations of system-wide dysfunction. That distinction is important, because at times the United States does rely on reports by international organizations that it characterizes as finding system-wide dysfunction in the administration of Guatemala’s labor law. Although the United States cites such reports, we do not understand it to be asking the Panel to conclude on the basis of those reports, taken independently, that Guatemala has breached its obligations under CAFTA-DR Article 16.2.1(a).

511. Thus, together with its Rebuttal Submission, the United States introduced reports by the United Nations Human Rights Council’s Special Rapporteur on the Right to Food<sup>370</sup>, the ILO’s Committee of Experts on the Application of Conventions and Recommendations<sup>371</sup>, and the United Nations High Commissioner for Human Rights<sup>372</sup>. It cited those reports to counter Guatemala’s assertion (made in the context of discussion of inspections at certain coffee farms) that “labor laws are strictly enforced.”<sup>373</sup> According to the United States, that assertion is contradicted by reports of UN and ILO officials “indicating that companies in the Guatemalan

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<sup>370</sup> Exhibit USA-207.

<sup>371</sup> Exhibit USA-208.

<sup>372</sup> Exhibit USA-209.

<sup>373</sup> See GTM IWS, para. 294.

agricultural sector have consistently violated Guatemala's labor laws subsequent to 2008.”<sup>374</sup> Similarly, in response to one of the Panel's post-hearing questions, the United States contended that “intergovernmental organizations have confirmed that Guatemala's failures such as those documented by the United States are representative of a widespread problem.”<sup>375</sup>

512. Notwithstanding its citation of these reports to bolster its allegations, however, the United States does not ask the Panel to adopt the reports' findings as its own and to conclude that Guatemala has breached its obligations under CAFTA-DR Article 16.2.1(a) as the result of system-wide deficiencies in the enforcement of its labor laws. The United States did not introduce the international organization reports as part of its Initial Written Submission and seek to base its *prima facie* case on them. Even to the extent that it introduced them in rebuttal, it did so, as noted, to counter particular assertions rather than to establish its claims.

513. Guatemala challenges the relevance of the international organization reports based on the age of the data cited and the different context in which they were prepared.<sup>376</sup> Whether those distinctions would have been dispositive if the United States had based its claims on the reports is something we need not decide given the much more limited purpose for which the United States relies on the reports.

514. In sum, while we have reviewed the UN and ILO reports cited by the United States and are aware of the observations they make about Guatemala's enforcement of its labor law in general, we understand the United States claims to be addressed to particular acts and omissions at particular workplaces rather than the system-wide conduct covered by those reports. Accordingly, our findings are addressed to the subject-matter of the U.S. claims as pled in this proceeding.

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<sup>374</sup> US RS, para. 159; see also *ibid*, para. 210 (citing an October 2009 ILO Technical Memorandum as having “observed similar evidence of inaction by the Ministry of Labor with respect to bringing employees who fail to remedy labor violations into compliance”).

<sup>375</sup> US Responses, para. 57.

<sup>376</sup> GTM RS, paras. 226-31.

## **2. Temporal Scope of Allegations Covered by The Inspections/Penalties Claim**

515. We recall that in section III.F *supra*, we concluded that the existence of a breach cannot be established on the basis of events alleged to have occurred after the date of the panel request. The disputing Parties do not disagree.<sup>377</sup> We stated that in considering whether the United States has established a breach of Guatemala's obligation under CAFTA-DR Article 16.2.1(a), we will examine only evidence of conduct on or before the date of the U.S. panel request (August 9, 2011). To the extent we examine evidence of conduct after that date, we will do so only to consider whether breaching conduct in existence on that date continued thereafter.

516. The temporal issue is especially important to the inspections claim since most of the U.S. allegations concern events that did not occur until after August 9, 2011. In particular:

- The allegation concerning Guatemala's failure to impose a sanction or take other punitive action in response to an admission by a representative of Las Delicias coffee farm that the company was not paying workers the minimum wage relates to an admission alleged to have been made on March 25, 2014.<sup>378</sup>
- The allegation concerning four African palm oil plantations pertains to Guatemala's response to a complaint by a group of community organizations submitted to the Ministry of Labor on December 9, 2011.<sup>379</sup>
- The U.S. allegation concerning the apparel manufacturer Alianza is that company representatives failed to comply with a Ministry of Labor summons to attend a conciliatory meeting on March 19, 2013, yet faced no penalty.<sup>380</sup>

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<sup>377</sup> See Panel Hearing Transcription, p. 68 (United States: "the Panel needs to determine whether Guatemala was engaged in the relevant course of an action on the date the United States requested the Panel"), and Panel Hearing Transcription, p.70 (Guatemala: "the conduct that is the subject of the complaint must have been in existence at the time of the Panel request, as long as it occurred [*sic*] after the entry into force of the CAFTA-DR").

<sup>378</sup> US IWS, paras. 143-44.

<sup>379</sup> US IWS, para. 146.

<sup>380</sup> US IWS, para. 162.

- The U.S. allegations concerning the apparel manufacturer Mackditex are that labor inspectors failed to properly investigate claims of labor law violations “beginning in September 2011,”<sup>381</sup> and failed to follow up on a September 16, 2011 finding that workers had been suspended without pay in violation of the Labor Code.<sup>382</sup>
- One of the U.S. allegations concerning the apparel manufacturer Koa Modas relates to the government’s response to a worker complaint filed with the GLI in March 2013, and a separate complaint filed in February 2014.<sup>383</sup>
- The U.S. allegation concerning the Santa Elena coffee plantation (and a sister plantation, known as El Ferrol) relates to the government’s response to a complaint that workers filed on June 5, 2014 concerning health and safety issues arising from changes to the fumigation process used on the farms.<sup>384</sup>
- The U.S. allegation concerning the Serigrafía screen printing factory relates to the government’s response when company representatives failed to attend meetings to resolve complaints of June and July 2012 about reprisals for having organized a union.<sup>385</sup>

517. Since each of the foregoing allegations concern events that did not occur until after the date on which the United States submitted its panel request, we do not consider them for purposes of determining whether the United States has established a breach of CAFTA-DR Article 16.2.1(a) as of August 9, 2011. If we find that the United States has established a breach as of that date, we may consider these allegations in determining whether the breaching conduct

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<sup>381</sup> US RS, para. 171. In its Initial Written Submission, the United States alleged that inspectors at Mackditex met only with employees selected by the employer, but it did not specify when this occurred. US IWS, para. 138. However, from the statement by two employees on which the United States relies (Exhibit USA-18), one can infer that the allegedly deficient inspection must have occurred in or after September 2011, because it apparently took place after a dialogue session that was convened in response to worker petitions filed on November 11, 2010 and September 13, 2011. See Statement of W, X (Exhibit USA-18), para. 3.

<sup>382</sup> US IWS, paras. 164-165.

<sup>383</sup> US IWS, paras. 166 and 171.

<sup>384</sup> US IWS, para. 173.

<sup>385</sup> US IWS, para. 175.

continued after that date. However, for purposes of determining whether the United States has established the existence of such a breach we focus on the following allegations of action or inaction on or before that date:

- The allegation that inspections of coffee farms conducted based on complaints about working conditions starting in 2006 were carried out in a manner contrary to the Labor Code, and that the deficiencies prevented inspectors from acquiring the information needed to identify employer violations.
- The allegation that during the period 2008 to 2009 (and possibly earlier), inspectors who visited the Koa Modas apparel factory in response to complaints about workplace conditions met only with management or employees hand-picked by management and improperly urged workers to drop complaints regarding lack of overtime pay.<sup>386</sup>
- The allegation that although the Ministry of Labor found that certain of the coffee farms identified in the August 12, 2008 complaint by *El Movimiento Sindical, Indígena y Campesino Guatemalteco* (“**MSICG**”)<sup>387</sup> were not paying workers the minimum wage as required by law, it took no further action against the farms.<sup>388</sup>
- The allegation that the Ministry of Labor failed to take any action against the Fribo apparel manufacturer despite the company’s obstruction of inspections related to unpaid wages in September 2007 and despite the inspectors’ finding that in fact the company had failed to comply with a warning to pay unpaid wages.<sup>389</sup>
- The allegation that labor inspectors failed to take follow-up action upon finding in July 2009 that Fribo had failed to pay

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<sup>386</sup> The time period covered by this allegation is somewhat vague. The worker statements supporting the allegation describe events over a period spanning from 2003 to 2014. See Exhibits USA-34, USA-35, USA-36, USA-37, and USA-38. However, it appears that at least some of the allegedly deficient inspections occurred prior to the submission of the U.S. panel request.

<sup>387</sup> Exhibit USA-95.

<sup>388</sup> US IWS, paras. 141-42.

<sup>389</sup> US IWS, paras. 157-59.

wages to reinstated workers and was liable for certain health and safety violations.<sup>390</sup>

518. For each of the latter allegations, we first will determine whether the United States has established a failure by Guatemala to effectively enforce its labor laws. We then will determine whether such enforcement failures as the United States has established constitute a sustained or recurring course of action or inaction.

**3. Has The United States Established That Guatemala Failed to Effectively Enforce Its Labor Laws On or Before the Date of the Panel Request Through Improperly Conducted Inspections or Failures to Impose Penalties?**

519. In making these determinations, we recall our observations in section IV.A, *supra*, regarding the probative value of anonymous declarations. As with its claim of failures to enforce court orders, the U.S. inspections claim relies substantially on written statements by declarants whose identities (as well as other identifying information) have been redacted. In evaluating these statements, we are guided by the principles we articulated previously. In particular, we are mindful of the fact that we lack information about the circumstances in which the statements in question were made, or any motivations of the declarants. This consideration may be important where a statement consists of a declarant's subjective perceptions or interpretation of events and is not verifiable through other evidence or is contradicted by other evidence.

**a. The Coffee Farms**

520. In its Initial Written Submission, the United States contends that “[s]ince 2006, workers from 70 coffee farms jointly filed more than 80 complaints with the Ministry of Labor regarding minimum wage (Article 103), mistreatment (Article 61), or health and safety conditions (Article 197).”<sup>391</sup> The United States claims, first, that despite these complaints

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<sup>390</sup> US IWS, paras. 160-61.

<sup>391</sup> US IWS, para. 132.

“Guatemala failed to inspect the worksites in such a way as to determine whether the employer had violated the relevant laws.”<sup>392</sup> The alleged inspection deficiencies include weeks-long delays between complaints and inspections; inspectors demanding that workers pay for gas as a condition to visiting the worksite; failing to meet with workers or meeting with them only in the presence of management; failing to inspect work areas; and accommodating management’s comments on inspection reports while failing to allow workers to review such reports.<sup>393</sup>

521. Additionally, the United States claims that even though inspectors found, in late 2008 or early 2009, that certain coffee farms were not paying the minimum wage, the Ministry of Labor took “no further actions” to bring about compliance.<sup>394</sup>

522. To support its claim of deficient inspections, the United States relies principally on a collective statement by five individuals identified as RR, SS, TT, UU, and VV,<sup>395</sup> all of whom state that they had worked at Las Delicias coffee farm. The United States designated the contents of this statement as confidential, in their entirety. We discuss the conclusions that can be drawn from this statement below. The United States also cites a statement by an individual identified as QQQ who indicates that he works at El Campamento coffee farm, that when labor inspectors come to the farm to respond to worker complaints they speak only with the employer and not with employees, and that during inspections inspectors do not walk around the farm.<sup>396</sup> The United States cites a statement to similar effect by an individual identified as RRR who states that he works at the El Faro coffee farm.<sup>397</sup>

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<sup>392</sup> *Ibid.*

<sup>393</sup> US IWS, paras. 133-35.

<sup>394</sup> US IWS, para. 142.

<sup>395</sup> Exhibit USA-26.

<sup>396</sup> Exhibit USA-27, p. 3. The quoted statement appears to be a general observation rather than an observation about labor inspectors’ response to a particular complaint.

<sup>397</sup> Exhibit USA-28, p. 3. Like the statement of QQQ, the statement of RRR regarding the conduct of inspections appears to be a general observation rather than an observation about an inspection conducted in response to a particular complaint.

523. Additionally, the United States puts into evidence a complaint to the Ministry of Labor by MSICG (described as “an umbrella organization of farm worker unions and federations”<sup>398</sup>), received by the Ministry on August 12, 2008.<sup>399</sup> The complaint alleges failure to pay the minimum wage and other labor law violations at 61 different workplaces<sup>400</sup> and demands, among other things, that inspections be conducted to verify these allegations.

524. The United States also submits evidence of how the Ministry of Labor responded to the August 2008 complaint by MSICG. This includes a second complaint by MSICG to the Ministry of Labor (dated September 30, 2008) alleging that contrary to an agreement with MSICG, the Minister of Labor announced, in a press conference, that inspections were to be conducted, indicating the zones where the inspections would be done which, according to MSICG, alerted the farms to the inspections prior to their occurrence.<sup>401</sup> MSICG also complained that despite a prior agreement to coordinate inspections with the claimants, a schedule was established by the Ministry without any such coordination.<sup>402</sup>

525. Similar statements are made in declarations by declarants who state that they are familiar with how the Ministry of Labor responded to the August 2008 complaint. These include a declaration by an individual identified as ZZZ.<sup>403</sup> ZZZ describes participating in a meeting between MSICG and the Minister of Labor for the purpose of developing a plan to address the claims in the August 2008 complaint. His statement indicates that despite an understanding that the plan to conduct inspections would be kept confidential so as to avoid giving employers

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<sup>398</sup> US IWS, para. 141.

<sup>399</sup> Exhibit USA-95.

<sup>400</sup> In its Rebuttal Submission, the United States explained that two of the 61 workplaces identified in the original complaint are municipalities rather than farms, bringing the total number of farms to 59, and that the complaint later was extended to add 11 more farms, bringing the total to 70. US RS, para. 154.

<sup>401</sup> Exhibit USA-204, p. 2.

<sup>402</sup> *Ibid.*

<sup>403</sup> Exhibit USA-39.

advance warning, the Minister of Labor made a statement to the press that enabled employers to cover up alleged violations before inspections occurred.<sup>404</sup>

526. In response, Guatemala argues that because of their anonymity, the worker statements are not reliable, and it points out that the MSICG complaint is just that – a complaint – and does not constitute evidence of what was or was not done in response to the complaint.<sup>405</sup> For these reasons, Guatemala contends that the United States has failed to make a *prima facie* case of a failure to effectively enforce labor laws. Nevertheless, to show that it responded appropriately to the MSICG complaint, Guatemala submits a report summarizing certain inspections<sup>406</sup> and two inspectors’ reports<sup>407</sup> that Guatemala argued were examples of inspections conducted in response to the MSICG complaint. Further, to refute the allegation that inspectors demanded that workers pay their fuel costs as a condition for the inspectors to travel to worksites for inspections, Guatemala submits book entries from its General Comptroller’s Office purporting to evidence payment of inspectors’ fuel costs.<sup>408</sup> Guatemala also cites evidence of labor inspections taking place at Las Delicias from 2012 to 2014.<sup>409</sup>

527. In reply, the United States argues that the worker statements are reliable, because details contained therein are corroborated by the MSICG complaint.<sup>410</sup> It adds that the summary of inspections in Exhibit GTM-5 is insufficient to rebut the U.S. claim because it shows only that certain employers were in “compliance with the law on one particular day.”<sup>411</sup> Further, the United States offers evidence (additional anonymous statements by trade union representatives and a second complaint filed by MSICG in September 2008) that contrary to promises by the

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<sup>404</sup> Exhibit USA-39, pp. 1-2.

<sup>405</sup> GTM IWS, paras. 291-92.

<sup>406</sup> Exhibit GTM-5.

<sup>407</sup> Exhibit GTM-6.

<sup>408</sup> Exhibit GTM-7.

<sup>409</sup> GTM IWS, para. 299 (citing Exhibit GTM-36).

<sup>410</sup> US RS, para. 155.

<sup>411</sup> US RS, para. 157.

Ministry following the MSICG complaint, inspections were conducted without coordinating with MSICG, and employers were improperly given advance warning of inspections.<sup>412</sup> Other declarants state that inspections did not happen at all at certain farms. For example, a witness identified as FFFF, states that he works at another farm and indicates that as of March 22, 2010 (the date of his declaration) there had not been a government response to the August 2008 MSICG complaint.<sup>413</sup>

528. Similar statements appear in declarations by two persons identified as HHHH and GGG, who state that they are union representatives affiliated with MSICG, as well as a declaration by a person (identified as HH) claiming to work CUSG.<sup>414</sup> Each of these witnesses attests to an absence of inspection in responses to MSICG's August 2008 complaint.

529. The United States also contends that Guatemala's arguments about labor inspections in the agricultural sector are contradicted by findings of international organizations identifying deficiencies.<sup>415</sup>

530. Regarding Guatemala's evidence of inspections at Las Delicias between 2012 and 2014, the United States submits anonymous worker statements in which workers state that labor law violations continued despite those inspections.<sup>416</sup>

531. In its rebuttal, Guatemala continues to argue that the anonymous statements on which the United States relies are unpersuasive, noting that in one of those statements the declarant apparently was reporting events of which he had no personal knowledge.<sup>417</sup> It further

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<sup>412</sup> *Ibid.*

<sup>413</sup> Exhibit USA-162, p.2. It appears that FFFF does not work on one of the coffee farms covered by the MSICG August 2008 complaint, but is affiliated with a union that has received reports from six of the farms in question.

<sup>414</sup> Exhibits USA-177, USA-178, and USA-179.

<sup>415</sup> US RS, para. 159. Although the U.S. claim concerns inspections at coffee farms, it occasionally broadens its allegations to encompass the agricultural sector in general. Despite such occasional expansions of its allegations, we understand its claim to be limited to inspections at coffee farms and alleged failures to impose penalties on such farms.

<sup>416</sup> US RS, para. 160 (citing Exhibits USA-27, USA-28, USA-29, and USA-33).

<sup>417</sup> GTM RS, para. 209 (discussing the statement of FFFF contained in Exhibit USA-162).

argues that the U.S. attempt to dismiss the summary of coffee farm labor inspections contained in Exhibit GTM-5 is unavailing. Guatemala notes that its labor law did not require it to coordinate inspections with the unions, and that advising the farms of the upcoming inspections also was not improper.<sup>418</sup> As for the U.S. reliance on reports by international organizations, Guatemala states that these are outdated and irrelevant, as they do not relate to the specific claims made by the United States.<sup>419</sup>

532. We have reviewed all of the evidence submitted by the disputing Parties regarding the coffee farms. The questions we must decide are whether the United States has established a failure to effectively enforce labor laws at Las Delicias or any of the other coffee farms either (i) by failing to conduct inspections in a proper manner so as to enable the inspectors to determine whether an employer has violated Guatemalan labor law, or (ii) by failing to impose penalties upon finding labor law violations to have occurred. We consider these claims to pertain only to the particular coffee farms for which the United States has submitted evidence. In other words, although the MSICG complaint as amended purports to cover as many as 70 coffee farms, the United States has not submitted evidence of whether and how inspections were conducted at each and every one of those farms. Rather, its evidence relates to Las Delicias farm, as well as a few other identified farms.

533. Although the U.S. submissions deal with claims related to the coffee farms collectively, we find it useful to separate (i) claims related to Las Delicias and other individual farms from (ii) claims related to the August 2008 MSICG complaint, and we make that distinction in the discussion that follows.

**i. Las Delicias and other individual farms**

534. If inspections at Las Delicias and the other farms in fact were carried out in the manner the United States contends (or not carried out at all), that could well amount to a failure

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<sup>418</sup> GTM RS, paras. 221-25.

<sup>419</sup> GTM RS, paras. 226-31.

to effectively enforce labor laws. The United States correctly points out that delays, insistence on workers paying inspectors' travel costs, inspectors meeting only with management or with employees hand-selected by management, as well as other deficiencies could make it impossible for inspectors to get an accurate picture of practices at a worksite and therefore to determine whether there are labor violations.

535. The difficulty for us is that based on the evidence the United States has put forward in the form of anonymous declarations, we are unable to determine with a reasonable degree of confidence how the inspections at Las Delicias and other farms were conducted. As we observed previously, we cannot know anything about the motivations the declarants may have had to make their statements. Further, we do not know how the declarations in question were created and therefore we do not know whether they record the spontaneous recollections of the declarants or, instead, record accounts that were suggested to and then modified by the declarants. Most importantly, the statements provide little contextual information or detailed recollection of events that would allow us to determine whether the declarant's version of events is complete or only partial, and there is little corroborating evidence in the record that might help us to assess the statement's reliability.

536. The evidence on which the United States principally relies with respect to Las Delicias is the collective statement of RR, SS, TT, UU, and VV.<sup>420</sup> Apart from the anonymity of the declarants, the fact that this is a collective statement makes it difficult to assess because, by definition, it represents a summary of what five individuals understand or believe, rather than a statement of events of which each one claims to have personal knowledge. This aspect of the statement is evident from the way in which events are described.

537. The workers allege that the Ministry inspectors refused to come to the farm unless the workers paid for gas, and that they paid for the inspectors' gas on at least ten occasions. The workers further allege that when the inspectors did come, they would speak to the workers only in the presence of the employer, if at all.<sup>421</sup>

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<sup>420</sup> Exhibit USA-26.

<sup>421</sup> *Ibid*, pp. 3-4.

538. The Panel carefully considered the contents of the statement. It cannot report those considerations here because the United States designated the statement as confidential in its entirety. We can only report the conclusions that we have drawn on the basis of those considerations. If an inspector conducted an inspection in the manner described in the statement, that could well constitute a deficiency amounting to a failure to effectively enforce labor laws. But the nature of the evidence, including the anonymity of the declarants, the collective nature of their statement, the vagueness with respect to dates and other details prevents us from making a finding to that effect based only on the collective statement. We observe that, rather than discussing the ways in which a particular inspection or inspections were conducted, the declarants give a generic description of what happens after a complaint is filed.<sup>422</sup> Relevant detail that might have been provided, but was not, would have included the nature of the alleged health and safety violations, approximate dates (at least the month and year) of the complaints, and a description of the action or inaction of the inspector on each occasion by a declarant who explained how he or she was able to observe the conduct of the inspector. The description of the inspector's conduct could have identified the person or persons who filed the complaint, and specifically addressed whether the inspector spoke with such person(s). (Identifying information could then have been redacted, if necessary, as discussed above.) The United States has not produced any of the complaints referenced in the statement.

539. The statement of RR, SS, TT, UU, and VV includes one allegation that is a bit more specific and concrete than the others. The evidence constituting this allegation is confidential. Once again, we cannot present it here, but can only report our conclusions. We observe that the workers simply report a statement made by an inspector and provide no information on whether the inspector took any action or not to enforce the laws in question against the employer. The Panel concluded that in the absence of any detail giving context to the alleged conduct by the inspector, it was not prepared to find that the declarants' allegation in and of itself is sufficient to establish an instance of failure to effectively enforce the labor law.

540. While the United States asserts that information that would corroborate or contradict the assertions of the workers is with Guatemala, we again note that Rule 65 places the

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<sup>422</sup> Exhibit USA-26, p. 3.

burden of proof on the complainant. As the Party complaining, the United States must submit evidence upon which we can conclude that the inspector in question failed to enforce the relevant labor laws. The United States argues that details of the statement by the Las Delicias witnesses “are corroborated by documents created contemporaneously with the events described,” by which it means the original MSICG complaint and the later expansion of that complaint.<sup>423</sup> Although the United States does not elaborate, the details to which it is referring appear to be “dates, work schedules, and wage rates.”<sup>424</sup> However, even if those details were corroborated, the core allegations regarding the conduct of inspections remain uncorroborated. The MSICG complaint provides no detail with respect to these matters.

541. This essential problem with the declaration of the Las Delicias workers as the basis for a finding of deficient inspections amounting to a failure to effectively enforce labor laws characterizes the other anonymous declarations as well. Thus, for example, the witness identified as QQQ, a worker at El Campamento farm, attests that when labor inspectors came to the farm to respond to complaints of labor law violations, the inspectors spoke only with the employer and did not survey the farm or speak to employees in a manner that would allow the inspectors to determine whether the alleged violations were occurring.<sup>425</sup> The contents of this statement are confidential and therefore we cannot report our detailed consideration of them here. We observe that the statement of QQQ contains no context about the circumstances that the witness describes, including when the inspectors visited and what prompted their visit. Moreover, it gives no basis for the witness’s understanding that the inspectors’ visits were limited in the way he describes. How, for example, does QQQ know that inspectors did not interview workers at a time or place when QQQ was not present? If he or she could not know this because he or she could only report what he or she saw, and he or she did not observe the full conduct of the inspection, then his or her statement would have provided better evidence had it said so. Had this statement and others provided detailed and appropriately qualified observations of inspector conduct, the Panel might have been able to infer that it was more likely

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<sup>423</sup> US RS, para. 155.

<sup>424</sup> *Ibid.*

<sup>425</sup> Exhibit USA-27, p. 3.

than not that the inspections described by QQQ had been conducted in a deficient manner. But the statement of QQQ stands on its own as the only statement from a worker at El Campamento farm. The statement of RRR concerning inspections at El Faro farm is similarly short on detail that would enable us to determine whether RRR's allegations of inspectors drinking with the farm administrator rather than carrying out proper inspections is a sufficiently complete and accurate picture of how particular inspections actually were conducted to enable the Panel to conclude that they were conducted in a deficient manner.<sup>426</sup>

**ii. Claims related to the 2008 MSICG complaint**

542. In addition to the declarations proffered in support of its *prima facie* case, the United States submits three declarations of union representatives with knowledge of the government's response to MSICG's August 2008 complaint.<sup>427</sup> The United States contends that this evidence rebuts Guatemala's evidence (Exhibit GTM-5) demonstrating that inspections were carried out in response to the MSICG complaint. In particular, the union representatives contend that such inspections were flawed, because the government failed to coordinate with MSICG and gave the farms advance notice of the inspections. Moreover, the United States contends that violations of the minimum wage law and other laws concerning conditions of work continued after the inspections.

543. The union leader statements are consistent with one another in several respects. Each of them describes a meeting with the Minister of Labor in August or September 2008 concerning the August 12, 2008 complaint by MSICG regarding working conditions at coffee farms. Each of them contends that a plan of action was agreed that would entail labor inspectors coordinating their inspections with MSICG representatives. Each of them states that it was agreed that the plan would not be publicly announced prior to the inspections. Finally, each of them states that the Government broke this agreement by not coordinating with MSICG and by publicly announcing (at a press conference by the Minister of Labor) that inspections would be

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<sup>426</sup> See Exhibit USA-28, p. 3.

<sup>427</sup> Exhibits USA-177, USA-178, and USA-179.

conducted in response to complaints about failures to pay the minimum wage and other practices at coffee farms.<sup>428</sup> Moreover, statements to similar effect also appear in the September 30, 2008 communication from MSICG to the Minister of Labor seeking to expand the scope of the complaint to include 11 additional coffee farms.<sup>429</sup> We also note that Guatemala does not dispute the U.S. allegations concerning the events of August and September, 2008.<sup>430</sup>

544. Given the consistency among the statements in question and the absence of any contrary evidence submitted by Guatemala, we accept as fact the events described in the immediately preceding paragraph. The question is whether these facts establish a failure to carry out proper inspections as required by Guatemalan law and, therefore, a failure to effectively enforce the law. We find that they do not.

545. Notwithstanding the apparent breakdown in the August/September 2008 understanding between the Government and MSICG, Guatemala contends that it undertook inspections of coffee farms in response to the MSICG complaint, and it provides evidence of the outcome of certain of those inspections in the form of a table included with a Report of the Operational Plan of Visits Carried Out to Agricultural Companies in the Departments of San Marcos, Suchitepéquez and Chimaltenango.<sup>431</sup> Guatemala also submits two labor inspector reports from this group of inspections.<sup>432</sup>

546. The United States does not dispute that the inspections occurred. Rather, it complains about the manner in which the MSICG complaint was handled. First, the United States submits that the employers had advance notice of the inspections. It tenders a statement by

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<sup>428</sup> See Exhibits USA-177, USA-178, and USA-179.

<sup>429</sup> Exhibit USA-204.

<sup>430</sup> See GTM RS, paras. 221-25.

<sup>431</sup> Exhibit GTM-5.

<sup>432</sup> Exhibit GTM-6.

a union official indicating the Ministry released a copy of the inspection schedule.<sup>433</sup> Guatemala does not deny this allegation.

547. An inspectorate might justifiably announce an inspection campaign in advance with a view to inducing proactive compliance by employers within a particular economic sector or region. But this would be different from informing a particular employer in advance of when it will be inspected. The latter conduct enables an employer to temporarily bring itself into compliance or remove evidence of non-compliance without requiring it to change its practices over any significant period of time. We find the evidence indicating that the inspection schedule was released in advance to be troubling. While perhaps not per se a failure to effectively enforce labor laws, where such advance warning of inspections is associated with continued non-compliance it will likely constitute one.

548. The United States contends that in fact very few inspections were conducted, that following the inspections employers remained in non-compliance, and that when inspectors uncovered non-compliance they failed to take effective action to bring employers into compliance.<sup>434</sup>

549. First, the United States asserts that workers at the coffee farms covered by the MSICG complaint “complained of labor violations subsequent to the date of the inspections.”<sup>435</sup> As evidence, it cites the statements of the union representatives referenced previously. The statement of HHHH provides the only specific information in this regard. That information is confidential. Having carefully reviewed it, we have concluded that the statement contains no information enabling the Panel to determine even in general terms the extent of any non-compliance following the inspections. Nor does it provide any way to link cases of non-compliance at a particular employer with any action or inaction by the inspectorate in relation to that employer. We therefore have no basis upon which to determine whether this non-compliance reflects a failure to effectively enforce labor laws by the inspectorate.

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<sup>433</sup> Exhibit USA-178.

<sup>434</sup> US RS, paras. 156-8; US IWS, para. 142.

<sup>435</sup> US RS, para. 158.

550. The United States tenders another statement by a union official who says that local unions monitored whether inspectors showed up to inspect in accordance with the schedule released by the Ministry of Labor.<sup>436</sup> The statement does not however indicate at how many plantations this monitoring was done, or for how long. Further, it appears to be at least partially contradicted by the information reported in the other statement discussed immediately above.

551. The Panel cannot conclude on the basis of these two statements either that inspectors failed to carry out inspections to any particular or significant extent, or that employers were non-compliant following inspections to any particular or significant extent. The information before the Panel simply lacks the basic level of precision and detail necessary to draw such conclusions, even in general terms. Further, as discussed above, the Panel requires sufficient detail to indicate the reliability of evidence before it can draw such conclusions.

552. Finally, in support of the allegation that when labor inspectors did find violations at the coffee farms they failed to take follow-up action<sup>437</sup> the United States cites the statement of ZZZ.<sup>438</sup> However, while that statement references a statement by the Minister of Labor from 2008 or 2009 confirming the existence of labor law violations at certain farms, it offers no basis in evidence for the U.S. allegation that “no further actions were taken” other than an assertion, without elaboration, that the claims of the union continued at the majority of farms.<sup>439</sup>

553. In response, Guatemala contends that “[a] few farms were required to make adjustments, which they did.”<sup>440</sup> Its evidence in support of that statement is not entirely clear, but Guatemala appears to be relying on Exhibit GTM-5, which indicates in certain instances that the inspected company “complies with the cautionary measures” or “complies with preventive measures” (as opposed to “complies with the law”).

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<sup>436</sup> Exhibit USA-178, p. 1.

<sup>437</sup> US IWS, para. 142.

<sup>438</sup> Exhibit USA-39.

<sup>439</sup> US IWS, para. 142.

<sup>440</sup> GTM IWS, para. 294.

554. Given the lack of any detail supporting the U.S. contention that no action was taken upon finding coffee farms to be out of compliance, it is difficult to attach any probative weight to it. We appreciate the difficulty of proving a negative. But here, the United States has not even identified which farms remained out of compliance following the 2008 inspections or how they remained out of compliance.<sup>441</sup>

555. In sum, with respect to the coffee farms, we find that the United States has not established a *prima facie* case that Guatemala failed to conduct proper inspections or failed to follow up on labor law violations discovered during inspections and therefore failed to effectively enforce its labor laws.

**b. Koa Modas**

556. The U.S. claim with respect to the Koa Modas apparel manufacturer is that when labor inspections were conducted, the inspectors met only with management or with employees hand-picked by management and not with the employees who had initiated the underlying complaints. The United States also alleges other deficiencies, including one instance of an inspector sleeping during an inspection and another of a worker being instructed to prepare a gift for the inspector. The United States further alleges that when workers complained about not being paid overtime, rather than conduct an inspection, the inspector simply told the workers that there was nothing he could do, because the company lacked the necessary funds.<sup>442</sup>

557. In support of its claim, the United States relies principally on declarations of three individuals identified as DD, EE, and FF, who claim to work at Koa Modas.<sup>443</sup> The United States

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<sup>441</sup> In this regard, the allegations regarding the coffee farms are different from the allegations regarding Fribo, discussed below. In the latter case, the company concerned and the violations found were clearly identified such that, if remedial action had been taken, it should have been a relatively easy matter for Guatemala to identify that action.

<sup>442</sup> US IWS, paras. 136-37.

<sup>443</sup> Exhibits USA-34, USA-35, and USA-36.

also cites a collective statement by four individuals who are members of the Koa Modas workers union.<sup>444</sup>

558. Guatemala argues that the anonymous declarations on which the United States relies are inherently unreliable and that, accordingly, the United States has failed to establish a *prima facie* case.<sup>445</sup> Guatemala also observes that Koa Modas workers were assisted by counsel at certain inspections, and that the signatures of the workers and their counsel on inspection reports evidence an absence of contemporaneous objection to the contents of the reports, thus calling into question the veracity of the objections being asserted now.<sup>446</sup> This observation appears to pertain to inspections conducted in 2013. Indeed, the witness who states that he is an employment lawyer for the Koa Modas workers attests that he first became involved with the workers when he was invited to attend a roundtable discussion at the Ministry of Labor in January 2013.<sup>447</sup> As noted above, the U.S. allegation concerning the government's response to the Koa Modas workers' March 2013 complaint pertains to events that post-date the U.S. panel request, and we do not consider it for purposes of determining whether the United States established a breach as of the date of its panel request.

559. The question for us is whether the evidence submitted by the United States, in particular the statements of DD, EE, and FF, as well as the collective statement of members of the Koa Modas workers' union, establishes a *prima facie* case of labor inspections conducted contrary to Guatemalan law as of the date of the U.S. panel request. In answering this question, we recall our previous observations about the difficulty in assessing the probative value of statements made by unidentified witnesses. The way in which this testimony has been presented makes it difficult for us to discern circumstances including context and the motivation of the witness.

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<sup>444</sup> Exhibit USA-38. A separate part of the U.S. complaint concerns certain events in 2013 and 2014, for which the United States relies on a statement by an individual (GG) claiming to be an employment attorney representing the Koa Modas workers (Exhibit USA-37). However, because this part of the complaint concerns events that post-date the U.S. panel request, it is not relevant to the present discussion.

<sup>445</sup> GTM IWS, para. 305.

<sup>446</sup> GTM IWS, paras. 306-08.

<sup>447</sup> Exhibit USA-37 (Statement of GG), p. 1.

560. The statements of DD, EE and FF were designated as confidential in their entirety by the United States. The non-confidential summary of those statements contains only the following information concerning labor inspections: “Worker DD further attests that the Ministry of Labor typically only met with management when it came to inspect complaints, and that it only spoke to workers chosen by management rather than the complainants”.<sup>448</sup> The summary makes public relatively little of the content of the relevant exhibits. We therefore cannot discuss in this report the details of the evidence upon which we have based our conclusions with respect to inspections conducted at Koa Modas. We can only report those conclusions.

561. Key paragraphs in the statements of DD, EE, and FF are identical to one another. The almost *verbatim* identity of these three statements raises important questions about how they were prepared and therefore whether they are reliable. One reasonably can infer from the similarities that the statements are not entirely the product of spontaneous declarations by the witnesses. But because we do not know how the statements were created, we do not know the precise explanation for the common text.

562. Individually and taken together, the statements of DD, EE and FF are imprecise with respect to the number of complaints, and provide no information with respect to what they alleged or what information or evidence the workers provided in support of them. The statements thus do not contain detail that might reassure the Panel as to the accuracy of the workers’ recollection some seven years after the alleged events, when they were made. Further, even if the statements in fact report events accurately, they do not necessarily prove a failure to enforce labor laws. If they had included enough information for the Panel to determine that the worker in question had complained about a matter that is at least arguably addressed by Guatemalan labor law, the Panel could have concluded on a *prima facie* basis that the complaint or complaints would have merited investigation, provided of course that the statement appeared otherwise reliable. The complete absence of any detail regarding the nature of the complaints makes it impossible for the Panel to find that the statements prove a failure to effectively enforce labor laws.

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<sup>448</sup> Non-confidential summary of Exhibit USA-34.

563. The collective statement by members of the Koa Modas workers' union describes an incident in or around 2009 in which workers were forced to work overtime, ostensibly to make up for time when they had been paid without working due to lack of business. The four witnesses state that they reported unpaid overtime to the Ministry of Labor, following which an inspector came to the company and told them that they could not do anything for them because the company did not have enough money to pay them more.<sup>449</sup> But again, the statement is without any detail, context, or corroborating evidence. We therefore cannot give much probative weight to it.

564. In sum, we find that the United States has not established a *prima facie* case of deficient inspections at the Koa Modas factory amounting to a failure to effectively enforce Guatemala's labor laws as of the date of the U.S. panel request.

**c. Fribo**

565. The U.S. claim regarding the Fribo apparel manufacturer<sup>450</sup> has two parts. First, the United States contends that in September 2007, labor inspectors made several attempts to conduct an inspection at Fribo in response to worker complaints about unpaid leave allegedly constituting unlawful reprisal for union activity. The United States claims that the company obstructed each of these attempts and that, finally, the labor inspectors informed the company that it was in violation of its duty to cooperate as well as its duty to comply with an earlier warning to pay wages. Notwithstanding these findings, and notwithstanding their advice to the company that they would seek sanctions, the labor inspectors took no further action, according to the United States.<sup>451</sup>

566. Second, the United States contends that on July 10, 2009, labor inspectors found Fribo liable for health and safety violations and for obligations to pay wages to reinstated

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<sup>449</sup> Statement of NN, OO, PP, QQ (Exhibit USA-38), p. 2.

<sup>450</sup> At some point between 2007 and 2009, Fribo's name was changed to Modas Dae Hang, S.A., and it is sometimes referred to as such in the evidence. For simplicity, however, and consistently with the disputing Parties' practice in their pleadings, we refer to the company throughout this section as "Fribo."

<sup>451</sup> US IWS, paras. 157-59.

workers. Despite these findings, the United States argues, the inspectors failed to verify and compel Fribo's compliance at follow-up inspections on July 22 and 27.<sup>452</sup>

567. These two parts to the Fribo claim appear to be connected, in that the requirement to compensate reinstated workers for back pay that inspectors identified in July 2009 stemmed from the actions at issue in the September 2007 inspections. According to a statement by five individuals claiming to have worked at Fribo during the relevant period, in July and August 2007, they and others had complained about working conditions, including health and safety conditions, non-payment of benefits, and non-payment of overtime. They also had begun discussing formation of a union, following which the company sent them on a month of unpaid "vacation."<sup>453</sup> The workers considered the company's actions to amount to a suspension without pay, which prompted them to file a complaint with the Ministry of Labor.<sup>454</sup> That complaint led to the aforementioned September 2007 attempted inspections. However, when the workers came to the conclusion that they were not going to get relief through administrative channels, they brought a court action, which led to an order of reinstatement with back pay on April 1, 2009.<sup>455</sup> Among other issues, compliance with that order appears to have been one of the matters covered in the July 2009 inspections.

568. Although the two parts of the Fribo claim are interrelated, we will address them one at a time, which is how the disputing Parties have dealt with them.

569. As concerns the September 2007 inspections, in addition to the statement of the five Fribo workers, the United States refers to reports by the labor inspectors documenting their unsuccessful attempts to conduct inspections at Fribo over the course of the month.<sup>456</sup> The reports record the various instances of non-cooperation that the inspectors encountered and the

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<sup>452</sup> US IWS, paras. 160-61; US RS, paras. 191-192.

<sup>453</sup> Statement of K, L, M, N, O. Exhibit USA-11, p. 1-2.

<sup>454</sup> *Ibid*, p. 2.

<sup>455</sup> *Ibid*, p. 2.

<sup>456</sup> Exhibits USA-111 and USA-112.

warnings they issued to the company.<sup>457</sup> Separately, the United States submits a September 24, 2007 determination by the labor inspectors stating that the inspector was unable to enter the location in order to conduct the inspection, and directing Fribo to pay wrongfully dismissed workers their wages and benefits for the period of their dismissal.<sup>458</sup>

570. The U.S. complaint is that despite these clear findings of labor law violations, the Labor Ministry took no further action after the inspectors filed their September 24, 2007 report.<sup>459</sup>

571. Guatemala does not dispute the evidence of the labor inspector reports. However, it contends that the reports “cannot serve the purpose of demonstrating the lack of any action for the imposition of sanctions.”<sup>460</sup> The United States replies that the reports are not evidence of the lack of imposition of sanctions; rather they are evidence of findings that warranted the imposition of sanctions. When coupled with testimony that sanctions were never pursued, the United States maintains, the reports support a finding of failure to enforce the law.<sup>461</sup> In its rebuttal, Guatemala repeats the point that “the reports cannot serve the purpose of demonstrating the lack of any action for the *imposition of sanctions*.”<sup>462</sup>

572. We have reviewed the labor inspector reports on which the United States relies, which make clear that Fribo representatives obstructed inspections in September 2007. Guatemala does not dispute that fact. The question, then, is whether the Ministry of Labor took any follow-up action in light of the inspector’s determinations. The United States asserts that it

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<sup>457</sup> See Exhibit USA-111 at source page 10 of 14.

<sup>458</sup> Exhibit USA-112.

<sup>459</sup> US IWS, para. 159.

<sup>460</sup> GTM IWS, para. 361.

<sup>461</sup> US RS, para. 189.

<sup>462</sup> GTM RS, para. 304.

did not.<sup>463</sup> Guatemala does not assert that it did, but argues that the inspectors' reports are not evidence of inaction.

573. Guatemala misses the point. The United States does not contend that the inspectors' reports in and of themselves are evidence of inaction. It contends that the reports are evidence that action should have been taken to sanction Fribo, and that the absence of any action is significant precisely because of what the inspector had found. In this circumstance, if the United States is correct that no follow-up action was taken, we would not expect there to be any evidence of the absence of follow-up action. Conversely, if follow-up action was taken, we would expect it to be relatively easy for Guatemala to identify such action. Although the documents in support of the Fribo allegations contain redactions, there is no doubt as to the identity of the company or the dates of the events in question. Therefore, unlike certain other allegations in this dispute, we do not see the redaction of evidence as being an impediment to Guatemala's locating evidence to contradict the U.S. claim if such evidence existed.<sup>464</sup>

574. For the foregoing reasons, we find that the United States has established that the Ministry of Labor failed to follow up on the labor law violations its inspector identified during his attempts to conduct inspections at Fribo in September 2007. This is an instance of Guatemala failing to effectively enforce its labor laws.

575. We turn now to the second part of the Fribo claims, concerning the inspections conducted in July 2009. As noted above, following the September 2007 inspections, the suspended workers pursued claims in court and secured orders of reinstatement with back pay in April 2009.<sup>465</sup> The United States claims that on July 10, 2009, an inspection was conducted at Fribo, and in addition to identifying various health and safety violations, the inspector ordered the company to pay wages to the reinstated workers. However, according to the United States, despite conducting two follow-up inspections, the inspectors never verified and compelled the

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<sup>463</sup> US IWS, para. 159.

<sup>464</sup> This is in contrast to the coffee farms allegations, discussed above, where generalized allegations of lack of follow-up after the discovery of unspecified non-compliance at unspecified workplaces could make it difficult or impossible to identify evidence contradicting such allegations.

<sup>465</sup> Statement of K, L, M, N, O (Exhibit USA-11), p. 2.

company's correction of these violations (either the health and safety violations or the non-payment of wages).<sup>466</sup>

576. Guatemala replies that the follow-up inspections were conducted prior to the deadline for correction of the health and safety violations, which explains why compliance was not verified during those inspections. As for the payment of wages, Guatemala contends that the workers themselves asked that verification be postponed until the end (in the event, August 21, 2009) so that all matters covered by the July 10 inspection could be addressed at once.<sup>467</sup>

577. The disagreement between the disputing Parties is in part about how to interpret the labor inspector reports. The United States considers that during the first inspection the inspectors identified violations, issued warnings, and committed to follow up, but then did not secure compliance, whereas Guatemala considers that the inspectors were in the process of following up, and that the follow-up inspections occurred before the operative deadlines.

578. We have reviewed all three inspection reports and do not consider them to evidence a lack of follow-through by the inspectors upon finding labor law violations at Fribo. The United States has designated the contents of these reports in their entirety as confidential. The publicly available non-confidential summaries of those reports contain little of the pertinent detail. Therefore in presenting the conclusions that we draw from those reports we can present only briefly the detailed analysis that supports those conclusions.

579. The reports indicate that three inspections took place. During the first, inspectors identified health and safety violations. The report concerning that inspection also states that 15 workers reinstated by the court reinstatement order had not been paid the back pay or benefits mandated by that order. The inspectors gave the company 10 days to pay the wages owed to the reinstated workers and 30 days to remedy the remaining violations.<sup>468</sup>

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<sup>466</sup> US IWS, para. 160; US RS, paras. 191-192.

<sup>467</sup> GTM IWS, paras. 363-66.

<sup>468</sup> Exhibit USA-61.

580. The next inspection report notes that the inspection found that one worker was not assigned to his original position following the above-described reinstatement, but had been reassigned to a position with a lower wage. The report indicates that the inspector notified the company that legal action would be taken against the company for failure to comply with labor laws.<sup>469</sup>

581. The third report records that workers stated that after being reinstated, two workers were not paid benefits, that the workers were subject to very high production goals, that they were insulted by their supervisors, and that one of the workers was not reinstated in his original position but was paid a lower salary. The inspector reports that Fribo is in violation of Guatemalan labor laws. The inspector orders Fribo to pay the worker's benefits and reinstate another worker to his original position with his original salary.<sup>470</sup>

582. It is undisputed that two follow-on inspections occurred prior to the deadline for Fribo to comply with the warnings related to its health and safety violations. Therefore, the United States is incorrect in asserting, based on the follow-on inspection reports, that the Ministry of Labor "chose not to verify Fribo's compliance with its occupational safety and health-related violations."<sup>471</sup>

583. As for the warning related to back pay, the follow-up inspection did occur one business day after the deadline to comply with that warning. The report of that inspection does not discuss the payment of back pay *per se*. However, it does indicate that the inspectors interviewed the reinstated workers; identified instances of retaliation, including one worker who was demoted and whose pay was reduced; and issued new warnings related to the retaliation, with a verification to take place soon thereafter. The report also indicates that the previous warnings remained in force and warns the company that legal action will be taken against it

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<sup>469</sup> Exhibit USA-113, p. 2. There is no evidence as to whether a legal proceeding in fact was initiated. However, the collective statement by former Fribo workers indicates that on August 21, Modas Dae Hang closed its operations. Exhibit USA-11, p. 3.

<sup>470</sup> Exhibit USA-114, p. 1.

<sup>471</sup> US IWS, para. 160.

should it fail to comply with them.<sup>472</sup> We do not interpret this to mean that the labor inspectors had abandoned the enforcement of their warning on back pay, as the United States suggests. Although the follow-up report does not discuss back pay expressly, neither does it suggest that enforcement of the previously issued warning had been abandoned. In fact, it affirms that the previously issued warnings remained in force. We do not consider the absence of an express determination about the back pay warning one business day after the deadline to comply with that warning had expired to be evidence of the inspectors' failure to effectively enforce the law.

584. In short, the inspectors followed up in a reasonably timely fashion to verify the employer's compliance with their warnings.

585. The United States maintains in addition that the Panel should conclude that the GLI failed to effectively enforce labor laws against Fribo because the record does not show that the employer was brought into compliance once the deadlines for compliance set by the inspectors had elapsed. We do not think that the record evidence warrants such a conclusion. The record contains no evidence of action or inaction by the inspectors after July 27, 2009. In order to accept the argument of the United States, the Panel would have to find that failure to bring the employer into compliance with non-retaliation and pay and benefits provisions of the GLC within 11 working days of issuing an order constitutes a failure to effectively enforce labor laws, despite the GLI having inspected and issued a compliance order, conducted follow-up verifications within 17 calendar days, and stated to the employer it would institute court proceedings in connection with its breach of the non-retaliation provisions of the GLC. Had the record shown that court proceedings were not promptly initiated, or that they had not secured compliance within a reasonable time, our conclusion likely would have been different. But the record simply does not speak to events after July 27, 2009. We therefore have no basis upon which to conclude that the GLI failed to effectively enforce labor laws in response to Fribo's 2009 violations of the GLC.

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<sup>472</sup> Exhibit USA-114, p. 2.

586. Accordingly, we find that the U.S. claim that the July 2009 inspections of Fribo were conducted in a way that evidences a failure to effectively enforce Guatemalan labor law is not well-founded.

#### **d. Summary of Findings**

587. In this section, we have reviewed each of the U.S. allegations of failure to effectively enforce Guatemala's labor laws on or before the date of the U.S. panel request (August 9, 2011) through failure to conduct proper inspections or failure to impose penalties upon finding labor law violations. Those allegations concerned (a) inspections of Las Delicias and other coffee farms, (b) the response to a Ministry of Labor determination that certain coffee farms were not paying the minimum wage, (c) inspections of the Koa Modas apparel manufacturer, (d) the response to findings of violations during the September 2007 inspections of the Fribo apparel manufacturer, and (e) the response to findings of violations during the July 2009 inspections of the Fribo apparel manufacturer.

588. Of these allegations, the only one as to which the United States has established a failure to effectively enforce the labor laws is the allegation concerning the September 2007 inspections of the Fribo apparel manufacturer. In that case, the evidence shows that the company had obstructed inspections, in violation of the Labor Code. The United States notes the absence of any evidence of imposition of sanctions or other follow-up action – which absence is unsurprising if, in fact, no such action was taken – and Guatemala identifies no evidence of any such action having been taken. In each of the other cases, we determined that the evidence did not support a finding of failure to effectively enforce labor laws.

589. We turn now to the “sustained or recurring course of action or inaction” prong of our analysis.

#### **4. Sustained or Recurring Course of Action or Inaction**

590. As we concluded in section III.C, *supra*, for conduct to constitute a sustained or recurring course of action or inaction it must be characterized by repeated behavior or prolonged behavior by enforcement institutions displaying sufficient similarity or consistency across instances or over time – and where it involves multiple instances, sufficient proximity in time or place – that it can be treated as related institutional behavior rather than isolated or disconnected instances of action or inaction. Here, we have found a single instance of a failure to effectively enforce through improper inspection or a failure to impose penalties – in particular, a failure to impose sanctions or take other follow-up action when the Fribo apparel manufacturer obstructed inspections in September 2007.

591. In theory, a single instance of failure to effectively enforce labor laws could constitute a sustained course of action or inaction. That might be the case if, for example, the failure was characterized by consistent conduct by law enforcement authorities over a prolonged period of time. That is not how we see the September 2007 failure to penalize Fribo, however. Rather, this appears to us to have been a discrete instance of failure to effectively enforce the law.

#### **5. Conclusion**

592. For the foregoing reasons, we conclude that, with respect to its inspections claim, the United States has not established a failure to effectively enforce Guatemala's labor laws through a sustained or recurring course of action or inaction as of the date of the U.S. panel request.

593. Given our conclusion that, with respect to its inspections claim, the United States has not established that Guatemala failed to effectively enforce its labor laws through a sustained or recurring course of action or inaction as of the date of the panel request, we do not consider

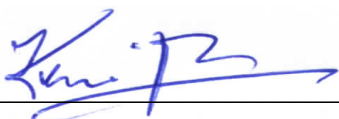
the evidence of conduct post-dating the panel request. As we stated previously,<sup>473</sup> such evidence may be relevant only to establish that breaching conduct in existence as of the date of the panel request is continuing. Since the United States has not established the existence of breaching conduct as of the date of the panel request, evidence of events post-dating the request is not relevant for our determination.

#### **D. Conclusions**

594. The United States has proven that at eight worksites and with respect to 74 workers Guatemala failed to effectively enforce its labor laws by failing to secure compliance with court orders, but not that these instances constitute a course of inaction that was in a manner affecting trade. The United States has not proven sufficient failures to adequately conduct labor inspections to constitute a course of action or inaction. The Panel has no jurisdiction over the other claims advanced by the United States in these proceedings, as they were not included in the panel request. We therefore conclude that the United States has not proven that Guatemala failed to conform to its obligations under Article 16.2.1(a) of the CAFTA-DR.

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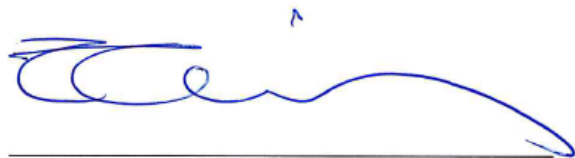
<sup>473</sup> See section III. F, *supra*.



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Kevin Banks

Signed in Ottawa, this 14<sup>th</sup> day of June, 2017



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Ricardo Ramírez Hernández

Signed in Geneva, this 14<sup>th</sup> day of June, 2017



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Theodore R. Posner

Signed in Washington, DC, this 14<sup>th</sup> day of June, 2017

**Annex 1: Ruling on the Procedure for Addressing Guatemala's Request for a Preliminary Ruling**

English

DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES FREE TRADE  
AGREEMENT

ARBITRAL PANEL ESTABLISHED PURSUANT TO CHAPTER TWENTY

**IN THE MATTER OF**

**GUATEMALA – ISSUES RELATING TO THE OBLIGATIONS UNDER ARTICLE 16.2.1(a)**

Ruling on the Procedure for Addressing Guatemala's Request for a Preliminary Ruling

November 20, 2014

Panel Members  
Professor Kevin Banks (Chair)  
Mr. Theodore R. Posner  
Mr. Mario Fuentes Destarac

## **Opinion of the Panel Majority**

### **I. Introduction**

1. This decision concerns one matter only: how the panel should address, as a matter of procedure, a request by Guatemala for a preliminary ruling. The panel does not address at this time the substance of Guatemala's request.

2. Guatemala seeks a preliminary ruling that "this dispute is not properly presented before [the panel], as the US panel request[] does not meet the minimum requirements to present the problem clearly."<sup>1</sup> Guatemala asks the panel to find "that it does not have the authority to proceed with the analysis of the merits of the dispute."<sup>2</sup> Guatemala requested that, in order to address this request for a preliminary ruling, the panel suspend a timetable for proceedings previously established to address the dispute, and adopt procedures for a separate preliminary phase of the proceedings. In that regard, Guatemala proposed that the disputing Parties each have the opportunity to file initial and rebuttal submissions with respect to preliminary issues, after which the panel could convene a hearing if it considered it necessary. The disputing Parties would then have the opportunity to present supplementary written submissions and responses to questions from the panel, and then finally an opportunity to make comments on an initial report by the panel prior to issuance of a final report on the preliminary ruling request.

3. The United States of America opposed this request, taking the position that the panel does not have the authority to suspend the timetable for proceedings, and that Guatemala's request for a preliminary ruling can and must be addressed within the sequence of submissions and proceedings laid out in that timetable.

4. On October 30, 2014 the panel issued the following written determination:

The panel has considered the question of how, as a matter of procedure, it should address Guatemala's October 10, 2014 request for a preliminary ruling. The conclusion and the disposition of the panel are set out below. The reasons of the panel will follow.

Subject to the following paragraphs, the panel finds that it must, as a matter of procedure, address Guatemala's preliminary ruling request without altering the procedures and timetable for proceedings established in the October 10, 2014 letter from the disputing Parties to the Responsible Office.

Guatemala informed the Responsible Office yesterday that on October 28, 2014 the President of the Republic of Guatemala declared that Guatemalan government offices, including the Responsible Office Guatemala, would be closed on October 31, 2014. As a consequence, under Rules 6 and 11 of the Model Rules of Procedure the United States of America may not

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<sup>1</sup> Request by Guatemala for a Preliminary Procedural Ruling, para. 126 (Oct. 10, 2014).

<sup>2</sup> *Id.*

deliver a submission on that date. This will require adjustments to the timetable so that the United States of America delivers its initial written submission the next day upon which the Responsible Office has normal business hours.

Accordingly, the panel hereby adopts the timetable set out below and invites the disputing Parties to address Guatemala's request for a ruling on preliminary matters in the written and oral submissions provided for in that timetable.

Without prejudice to any of the other submissions provided for in the timetable:

- The submission of the United States of America in response to Guatemala's request for a preliminary ruling will be due as part of its initial written submission no later than November 3, 2014.
- Any reply by Guatemala to that submission will be due no later than December 1, 2014 as part of its initial submission.
- Any rejoinder by the United States to that reply will be due no later than January 9, 2015, as part of its rebuttal submission.
- The disputing Parties may present arguments with respect to the issues raised in Guatemala's request for a preliminary ruling at the hearing, and those issues may be the subject of written questions from the panel following the hearing.

In the event that, upon receipt of the initial written submission of the United States of America, Guatemala considers that it requires as a matter of due process additional time to prepare its initial written submission, the panel invites it to confer with the United States of America on an appropriate extension and thereafter, but in any event by no later than November 10, 2014, make a request for such an extension to the panel. If Guatemala makes such a request, and if the United States of America opposes that request, the United States of America should submit its views to the panel by no later than November 17, 2014. The panel would endeavor to issue a decision on any such request by November 20, 2014.

5. The reasons of the panel majority are set out immediately below.

## **II. Factual and Legal Background**

### **1. Rules Governing Arbitral Panel Procedures**

6. Article 20.10.1 of the Dominican Republic – Central America – United States of America Free Trade Agreement (hereinafter referred to as the “CAFTA-DR” or the “Agreement”) requires the Parties to the Agreement to establish Model Rules of Procedure (hereinafter referred to as the “Rules”). They did so by decision of the Free Trade Commission dated February 3, 2011.

7. Article 20.10.2 of the Agreement in turn requires arbitral panels established under Chapter Twenty to conduct their proceedings in accordance with the Rules unless the disputing Parties otherwise agree.

8. The Rules relevant to the matter at hand are the following:

1. These model rules, including the appendices thereto, are established pursuant to Article 20.10 (Rules of Procedure) of the Dominican Republic – Central America – United State Free Trade Agreement and shall apply to the dispute settlement proceedings under Chapter Twenty unless the disputing Parties agree otherwise.

7. Each complaining Party shall submit its initial written submission to the panel no later than seven days after the date of the constitution of the panel.

8. Within 14 days of the delivery to the Parties of the request for establishment of a panel, each participating Party shall deliver to the responsible office a list of public holidays on which the Party's office is closed. No later than seven days after the date of the constitution of the panel, the panel shall issue a timetable for the proceedings that provides for:

- (a) submission of the initial written submission of the Party complained against no later than 35 days after the date of the constitution of the panel;
- (b) submission of the written submission of any third Party no later than seven days after the delivery of the initial written submission of the Party complained against;
- (c) submission of any rebuttal submission of any complaining Party no later than 21 days after the submission of the rebuttal submission of the Party complained against;
- (d) submission of any rebuttal submission of the Party complained against no later than 21 days after the submission of the rebuttal submission of the complaining Party or Parties;
- (e) a hearing within 14 days of the date for submission of the rebuttal submission of the Party complained against;
- (f) delivery to the participating Parties of any written questions from the panel within 3 days of the date of the hearing;
- (g) submission of a Party's supplementary written submission responding to any matter that arise during the hearing, along with responses to any written questions from the panel within 14 days of the date of the hearing;
- (h) submission of a Party's comments on the supplementary written submissions of other participating parties and any responses to written questions from the panel within 14 days of the submission of those responses.

In establishing the dates for submission or for the hearing, the panel shall comply with Rule 12 and consult with the responsible office to provide additional time if translation of documents will be necessary under Rule 81.

12. If the date for submission of a document by a Party falls on a public holiday of that Party, or on a date on which the Party's office is closed by force majeure, the date for the submission of the document will be the next business day of that Party.

27. Where a procedural question arises that is not covered by these rules, a panel may adopt an appropriate procedure that is not inconsistent with the Agreement or these rules.

34. A panel may, after consulting the participating Parties, modify any time period applicable in the panel proceeding and make such other procedural or administrative adjustments as may be required in the proceeding, such as where a panelist is replaced.

81. Where the responsible office is required to arrange for the translation of a document, any period of time the calculation of which is dependent on the submission of that document shall be adjusted to allow a reasonable time for preparation of the translation. If the preparation of a translation takes longer than the estimate provided to the panel under rule 80, the panel shall make a corresponding adjustment to the timetable issued under rule 8.

## **2. Proceedings**

9. On August 9, 2011 the United States of the America requested the establishment of an arbitral panel under Article 20.6.1 of the CAFTA-DR to consider whether the government of Guatemala is conforming to its obligations under Article 16.2.1(a) of the Agreement.

10. The panel was constituted in November 2012, but suspended its work for 60 days at the joint request of the disputing Parties on November 30, 2012.

11. On January 29, 2013 the disputing Parties informed the panel of their agreement pursuant to Rule 1 to modify the timetable for proceedings otherwise required by Rules 7 and 8 as follows:

- Notwithstanding Rule 7, the United States will submit its initial written submission to the panel no later than 28 days after the date the panel resumes its work.
- Notwithstanding Rule 8(a), Guatemala will submit its initial written submission to the panel no later than 56 days after the panel resumes its work.

12. That same day, the disputing Parties requested that the panel suspend its work for a further ten days.

13. The panel again suspended its work in accordance with a further joint request by the disputing Parties on February 25, 2013. The panel resumed its work on March 8, 2013. The panel subsequently suspended its work, in response to a series of joint requests by the disputing Parties, from April 5, 2013 to September 18, 2014. On September 18, 2014, the United States of America requested that the panel resume its work.

14. On September 26, 2014 the panel proposed to the disputing Parties a timetable for proceedings in accordance with Articles 7 and 8 of the Rules and the joint letter of the disputing Parties dated January 29, 2013.

15. By joint letter dated October 10, 2014 the disputing Parties requested that the Panel adopt a set of modifications to that timetable. Their letter read in relevant part as follows:

The Parties request the Panel to adopt the following modifications to the dates of the timetable:

- The United States of America will submit its initial written submission to the panel no later than October 31, 2014.
- Guatemala will submit its initial written submission to the panel no later than November 28, 2014.
- Any third Party will submit its written submission to the panel no later than December 5, 2014.
- Any request by a non-governmental entity to submit written views will be due by December 5, 2014, or within seven days of the delivery of the non-confidential version of the written submission of Guatemala if that submission contains confidential information.
- The Panel will decide whether to grant leave to submit written views in response to any such request within seven days of receipt of that request.
- The rebuttal submission of the United States of America will be due on January 9, 2015.
- The rebuttal submission of Guatemala will be due on February 13, 2015.
- Any written views submitted by a non-governmental entity will be due no later than February 13, 2015.
- Any response by a Party to a written submission of a non-governmental entity will be due no later than February 27, 2015.
- The hearing would take place no later than March 13, 2015. In the absence of further communications from the Parties or the Responsible Office regarding the matter, the Panel would therefore convene a single day of hearing on March 13, 2015.
- Any written questions from the Panel to the Parties would be due March 16, 2015.
- Any supplementary written submissions and answers to questions from the Panel would be due by March 27, 2015.
- Any decision by the Panel to seek technical advice must be rendered by March 27, 2015. In the event that the Panel decides to seek such advice it will issue a further timetable in accordance with Rules 73 to 77 of the Model Rules of Procedure.
- Any comments by the Parties on supplementary written submissions and responses to questions from the Panel would be due by April 10, 2015.

Recognizing that Article 20.13 of the Dominican Republic-Central America-United States Free Trade Agreement provides a maximum time period for the Panel's presentation of a initial report, unless the Parties otherwise agree, the Parties agree to extend this maximum time period to June 10, 2015.

16. Also on October 10, 2014, after transmittal of the aforementioned joint communication, Guatemala sent a separate communication in which it requested that the panel suspend the timetable for proceedings and adopt an alternative preliminary procedure, as described above.<sup>3</sup>

17. In its submissions seeking a preliminary ruling Guatemala argues that the request for a panel by the United States of America dated August 9, 2011 was drafted in such broad and vague terms

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<sup>3</sup> In fact, Guatemala's October 10, 2014 letter asked the panel "to suspend the timetable provided to the Parties on 26 September 2014." It did not reference the timetable set forth in the disputing Parties' joint communication from earlier in the day on October 10.

that it fails to present clearly the problem that the panel would consider. As a result, Guatemala contends, the panel request fails to comply with the provisions of the CAFTA-DR through which the panel obtains jurisdiction or authority to consider the merits of the issues that the panel request raises. Guatemala also submits that the breadth and vagueness of the panel request “prejudices the preparation of Guatemala’s defence and violates Guatemala’s right to due process in these proceedings.”<sup>4</sup> Without limiting the foregoing, Guatemala also contends that the 28-day period between the due date for the initial written submission of the United States and the due date for that of Guatemala, a period established in the timetable proposed by the panel in its September 26, 2014 letter to the Parties, is insufficient to enable Guatemala to prepare its defense.

18. The disputing Parties differ with respect to whether Guatemala notified the United States that it intended to seek a preliminary ruling and to request a suspension of the timetable for proceedings in advance of doing so. In any event, there is no evidence that the disputing Parties discussed Guatemala’s intention to request a preliminary ruling when they set out the modified timetable contained in their October 10, 2014 letter.

19. In a letter dated October 21, 2014 to the Chair of the panel, Guatemala affirms that it agreed in good faith upon the timetable set out in the October 10, 2014 joint letter.

### **III. Summary of the Positions of the Disputing Parties with Respect to How, as a Matter of Procedure, the Panel Should Address Guatemala’s Request for a Preliminary Ruling**

#### **1. Position of Guatemala**

20. In its October 10, 2014 submission Guatemala takes the position that the panel has the authority under Rule 27 to suspend the timetable for proceedings and to establish a separate expedited process to consider its request for a preliminary ruling.

21. Specifically, Guatemala contends that its request for a preliminary ruling is a “procedural question” that is not covered by the Rules. It notes that the lack of special rules to deal with preliminary issues is not uncommon in different jurisdictions. It submits that the panel can have recourse to principles of due process to fill a gap in the coverage of the Rules.

22. Guatemala also contends that its request for expedited preliminary procedures is not inconsistent with the CAFTA-DR or the Rules.

23. Finally, Guatemala submits that its request for a preliminary ruling relates to extremely important matters, namely, the panel’s jurisdiction and Guatemala’s right to due process, and that the issues raised in this request are so fundamental that the panel needs first to determine whether it has the authority to proceed with the merits of this case.

#### **2. Position of the United States of America**

24. In its October 15, 2014 letter to the panel Chair, the United States responds with three sets of arguments.

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<sup>4</sup> Request by Guatemala for a Preliminary Procedural Ruling, para. 4 (Oct. 10, 2014).

### *Scope of Panel Authority to Adopt Procedures under Rule 27*

25. First, the United States argues that neither the CAFTA-DR nor the Rules permit the panel to accede to Guatemala's request for altered procedures. It submits that, unlike the rules governing the settlement of disputes before the World Trade Organization Dispute Settlement Body, the Rules govern these proceedings unless the Parties otherwise agree. It contends that Guatemala's proposed procedures would be a departure from the Rules to which the United States has not agreed. It argues that Rules 7 and 8 provide for a sequence of submissions according to a timetable, that therefore the Rules cover the sequencing and timing of submissions, and that a departure from such timetable without the agreement of both parties would be inconsistent with the Rules. The United States submits that the panel therefore does not have discretion under Rule 27 to grant Guatemala the procedural ruling that it seeks.

### *Appropriateness of Procedures*

26. Second, the United States contends in addition that Guatemala's proposed procedures are not appropriate because any examination of the issues raised in Guatemala's request for a preliminary ruling would require discussion of the issues that the United States will present as part of its initial written submission on the merits of its complaint. As a result, the United States argues, addressing such issues separately from the timetable for proceedings on the merits of the complaint would require it to present part of its first written submission out of context, in a disjointed and piecemeal fashion.

27. Further, the United States insists that Guatemala's proposed procedures would result in undue delay. It contends that the Rules contemplate a process in which the Party complained against has a maximum of 42 days to prepare its defense and first written submission from the time of the request for a panel. By contrast, argues the United States, under Guatemala's proposed procedures there would be eight or more substantive submissions and a hearing before the United States files its first written submission on the merits of its complaint. As a result, the United States contends, Guatemala's first written submission would be filed on a date far exceeding the 42 days provided in the Rules. Further, says the United States, Guatemala's proposed procedures would effectively reverse the order of submissions provided in the Rules. For these reasons, the United States argues that such procedures would not be consistent with the Rules.

### *Due process*

28. Finally, the United States submits that Guatemala's due process concerns can be addressed through the procedures for submissions, questions from the panel, and written responses established in the October 10 timetable for proceedings.

## **3. Reply of Guatemala**

29. In a letter to the panel Chair dated October 21, 2014 Guatemala replies to each of these arguments.

### *Scope of Panel Authority to Adopt Procedures under Rule 27*

30. Guatemala submits that, with the exception of Rule 27, the Rules provide for proceedings to address the merits of disputes and not procedural issues. Thus, Guatemala contends, the Rules do not

cover the timing and sequence of submissions in a preliminary matter limited to a due process question of sufficiency and clarity of the panel request. The sufficiency and clarity of a panel request is, in Guatemala's submission, a procedural question that relates to due process and the panel's jurisdiction. It follows, in Guatemala's submissions, that Rule 27 authorizes the panel to adopt appropriate procedures to deal with such questions without needing the agreement of the disputing Parties. Guatemala adds that in its view it is incorrect to characterize its proposal as reversing the sequence of submissions, since the Rules address only the sequence of submissions on the merits of a case and not in preliminary procedural matters.

#### *Appropriateness of Procedures*

31. Guatemala insists that time invested by the panel in addressing due process and whether a dispute had been correctly submitted to the panel cannot and should not be understood as undue delay.

32. Guatemala rejects the claim that its proposed procedures would require the United States to present its case to the panel in a disjointed and piecemeal fashion, arguing that the sufficiency and clarity of the panel request can be decided solely on the basis of the text of that request, without entering into the merits of the case.

33. Finally, Guatemala notes that the panel "is free within its authority to decide the best way to approach [Guatemala's] request," while reiterating its request that the disputing Parties have ample opportunities to comment on each other's positions.<sup>5</sup>

#### *Due process*

34. Guatemala argues that acceding to the US request to address its request for a preliminary ruling after the initial submission of the United States would be a violation of Guatemala's right to due process and prejudice the preparation of Guatemala's defense. Guatemala contends that the panel request serves an important due process role of notifying the respondent and third Parties of the nature of the complainant's case, and that non-compliance with requirements for that request cannot be subsequently cured.

35. Moreover, Guatemala submits that, taking into account the suspensions of proceedings in this matter, the United States has had five years to prepare its case, while Guatemala has had no explicit indication of the case that it must to respond to.

36. Finally, Guatemala states that it is seriously concerned that accepting the US proposition that 42 days is sufficient time to prepare a defense would open the door to the tactical use of broad and vague panel requests by complaining Parties to prejudice the right of defense of defending Parties.

#### **4. Rejoinder of the United States of America**

37. In a letter to the panel Chair dated October 27, 2014 the United States submits by way of rejoinder that due process does not require that the United States respond to Guatemala's request for a preliminary ruling prior to filing its first written submission. It contends

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<sup>5</sup> Letter from Guatemala to Panel Chair at 4 (Oct. 21, 2014).

that it is common in working procedures of World Trade Organization dispute settlement panels to provide that if the party complained against makes a request for a preliminary ruling it should do so no later than its first written submission, and the panel would then set a date for response after that first written submission. The United States cites this approach as demonstrating that “others do not share Guatemala’s view that there is a general ‘due process’ ‘right’ to the type of schedule that Guatemala proposes here.”<sup>6</sup>

#### **IV. Decision**

38. Guatemala submits that Rule 27 provides the panel with authority to suspend the previously established timetable for proceedings – whether as set forth in the September 26, 2014 communication from the Panel to the disputing Parties or as set forth in the disputing Parties’ October 10, 2014 joint communication to the panel – and to adopt separate procedures to address the preliminary issues raised in its October 10, 2014 submission. We must therefore first consider the scope of discretion that Rule 27 confers on the panel.

##### *Scope of Panel Authority to Adopt Procedures under Rule 27*

39. We recall that Rule 27 provides as follows:

Where a procedural question arises that is not covered by these rules, a panel may adopt an appropriate procedure that is not inconsistent with the Agreement or these rules.

Rule 27 thus authorizes the panel to adopt “an appropriate procedure” in specified circumstances, subject to specified constraints. It applies only where “a procedural question arises that is not covered by the[] [R]ules.” If that condition is met, then any procedure that the panel may adopt must be not only “appropriate,” but also “not inconsistent with the Agreement or the[] [R]ules”.

40. Guatemala takes the position that its request to the panel to “make a preliminary procedural ruling to find that this dispute was not properly presented before it”, and find that “it does not have the authority to proceed with the analysis of the merits of the dispute” is a “procedural question” that is “not covered by the Rules”.<sup>7</sup> We do not agree that this is a procedural question. By “procedural question” we understand Rule 27 to refer to questions of how the panel should operate procedurally, and not to questions the answers to which may dispose of a complaint. The functions of the Rules are to stipulate how panels are established and operate.<sup>8</sup> Within such Rules the term “procedural question” should logically refer precisely to such matters. Rule 27 is contained within a part of the Rules entitled “Operation of Panels”. In addition to the matters addressed by Rule 27, that part of the

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<sup>6</sup> Letter from the United States to the Panel Chair at 1 (Oct. 27, 2014).

<sup>7</sup> Request by Guatemala for a Preliminary Procedural Ruling, paragraphs 5 and 23 (October 10, 2014).

<sup>8</sup> The functions of the Rules include stipulating how panel terms of reference are to be delivered, how timetables for submissions and other proceedings should be structured and established, which documents submitted to or issued by the panel are to be released to the public, procedures for the identification of and treatment of confidential information, how panels should conduct hearings, what notifications the panel should issue, how the panel may secure information and technical advice, who is responsible to rendering which translations, how time periods and to be computed, and similar issues.

Rules deals with matters such as the means of communication by which the panel may conduct its business, who may take part in panel deliberations, how to confirm the willingness of panelists to serve, replacement of panelists, suspensions of the panel's work, and what issues the panel must or must not consider. By contrast, Guatemala's October 10, 2014 submission with respect to the clarity and sufficiency of the request for a panel raises questions the answers to which may effectively dispose of the complaint. They require the panel to consider whether or not the panel request was sufficiently clear and met the requirements of the Agreement, and if not, what implications this has for the panel's authority and jurisdiction to proceed with an analysis of the merits of the complaint.

41. Nonetheless, taken together, the positions and arguments of the disputing Parties do in fact raise a procedural question within the meaning of Rule 27: the question of how, as a matter of procedure, the panel should consider Guatemala's request for a preliminary ruling. We must therefore determine whether this procedural question is covered by the Rules.

42. In our view it is. By determining in detail both the sequencing and timing of proceedings, and the reasons for which a panel may adjust them within the time limits placed on panel proceedings by the CAFTA-DR, the Rules cover the question of how preliminary issues such as those raised by Guatemala must be addressed.

43. Rules 7 and 8 establish a detailed sequence and timetable for proceedings. Rule 7 provides that after a panel has been constituted, the first written submissions to be filed shall be the written submissions of each complaining Party. It does not provide for a circumstance in which the first written submission to be filed may be a jurisdictional objection (or other preliminary objection) by the Party complained against. This is in contrast to the CAFTA-DR's provisions for investment dispute settlement, for example, which expressly contemplate a respondent submitting certain objections "as a preliminary question" "as soon as possible after the tribunal is constituted," whereupon "the tribunal shall suspend any proceedings on the merits."<sup>9</sup> However, in dispute settlement under Chapter 20 of the CAFTA-DR and the applicable Rules, the initial written submission of each complaining Party must be filed within 7 days of the constitution of the panel. Rule 8 mandates that the panel issue a timetable for proceedings providing for delivery of the remaining initial written submissions and reply submissions, the holding of a hearing, and for post-hearing procedures, all in accordance with specified maximum timeframes. The timeframes are brief, indicating an intent that proceedings be expeditious. The timetable does not expressly contemplate other submissions or procedures.

44. Neither Rule 7 or 8, nor the disputing Parties' October 10, 2014 joint letter, purport to limit the issues that may be addressed in the disputing Parties' initial written submissions or any subsequent submissions. In particular, neither the Rules nor the disputing Parties' agreed-upon modification of the Rules for purposes of this proceeding require the disputing Parties to address only merits issues in their initial submissions and not jurisdictional issues.

45. Nor is it necessary to restrict the scope of issues covered by Rules 7 and 8 in this manner to give a coherent and reasonable interpretation to the Rules or the agreement of the disputing Parties modifying the application of the Rules. As a matter of practice in WTO and other dispute settlement proceedings, jurisdictional and other preliminary issues can be and often are raised and argued together with merits issues in the same submissions and proceedings. It is true that a panel may find

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<sup>9</sup> CAFTA-DR, art. 10.20.4.

itself in the position of having to disregard evidence and arguments going to the merits of a dispute if it finds itself to be without jurisdiction or otherwise unable to proceed with an analysis of the merits of the complaint. But this is neither unworkable nor beyond the reasonable contemplation of Parties establishing rules for trade dispute resolution. Nor, as we discuss below, does it present due process problems.

46. In fact, in order for panel proceedings to operate consistently with the CAFTA-DR, Rules 7 and 8 must be interpreted as requiring preliminary issues and merits issues to be addressed in the same submissions and proceedings – as opposed to allowing for a bifurcation of the proceeding, with preliminary issues dealt within in a first phase and merits issues dealt with in a second phase (assuming they survive the first phase). Article 20.13.3 of the Agreement requires the panel to present an initial report, including a determination as to whether a disputing Party has conformed with its obligations under the Agreement or any other determination requested in the terms of reference, within 120 days after the last panelist is selected, unless the disputing Parties otherwise agree. The shortness of this timeframe indicates that the Parties have placed a high priority on expeditious process.<sup>10</sup> It also clearly indicates that the Parties did not anticipate separate proceedings to hear and decide preliminary issues. In fact, if a timetable established under Rule 8 accords to each Party at each step in the required sequence the maximum length of time available under that Rule, completing the timetable would take 119 days. In the absence of agreement between the parties to extend the due date for the panel's initial report, the CAFTA-DR therefore appears to contemplate that Parties will not even be given the maximum time allowed at each step in the sequence of proceedings under Rules 7 and 8. It is therefore clear that, except by agreement of the disputing Parties, the Agreement does not contemplate a separate set of procedures to address preliminary issues prior to addressing the merits of a complaint.

47. Finally, we note that the Rules stipulate in some detail the reasons for which a panel can modify the timetable for proceedings. Rule 8 requires the panel to provide additional time if necessary for translation of documents under Rule 81, and to comply with Rule 12 dealing with public holidays and force majeure. Under Rule 34 a panel may, after consulting the participating Parties, modify any time period applicable in the panel proceeding and make such other procedural or administrative adjustments as may be required in the proceeding, such as where a panelist is replaced.

48. The Rules therefore require that issues between the parties be addressed according to an expeditious and predetermined sequence of procedures and timetable, unless the disputing Parties otherwise agree, or the panel decides that adjustments are necessary to meet translation or other requirements. By specifying both a sequence and timetable for proceedings and reasons for which a timetable may be adjusted within the time limits on the panel's work established by the Agreement, the Rules thus cover the question of how, as a matter of procedure, panels should address requests for preliminary rulings.

49. The modifications agreed to by the disputing Parties in their joint letter of October 10, 2014 do not alter but rather are consistent with the application of Rules 7 and 8 to preliminary issues. Rule 1 stipulates that the Rules shall apply to dispute settlement proceedings under Chapter 20 unless the

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<sup>10</sup> Indeed, even in agreeing to extend the maximum time period for the Panel to present its initial report, the disputing Parties established a deadline – June 10, 2015 – that is only two months after filing of the last written submissions. See Letter from Guatemala and the United States to the Responsible Office at 2 (Oct. 10, 2014).

Parties otherwise agree. In this case, in their joint letter of October 10, 2014, the disputing Parties recorded their agreement to modify the timetable for, but not the sequence of, written and oral submissions. The sequence of proceedings set out in that letter mirrors that set out in the Rules. The wording of the letter offers no indication that the disputing Parties sought to address or alter the scope of application of the Rules in connection with preliminary matters. Nor is there any evidence that the disputing Parties discussed doing so. Guatemala subsequently affirmed that this was an agreement made in good faith. Following this agreement, the Rules therefore continue to apply, subject only to the changes that the disputing Parties' agreement introduces to the timetable for proceedings.

50. Since the procedural question at hand is covered by the Rules, it would be inconsistent with the Rules and the CAFTA-DR for the panel to alter under Rule 27 the sequence and timetable of proceedings established in the joint letter of the disputing Parties of October 10, 2014.

### Due process

51. Guatemala raises two due process concerns that relate to the question of how, as a matter of procedure, the panel should address Guatemala's request for a preliminary ruling.

52. First, as noted above, Guatemala submits that addressing its request for a preliminary ruling after the initial submission of the United States would be a violation of Guatemala's right to due process and prejudice the preparation of its defense.

53. We see no reason why the panel's receiving submissions and evidence on both preliminary issues and the merits of a complaint over the course of a single proceeding (as opposed to two separate proceedings, one for preliminary issues and another for the merits) would violate due process or prejudice the right of a Party complained against to prepare its defense. If such a Party successfully raises a preliminary issue going to the jurisdiction of the panel or the admissibility of particular claims, a panel having heard submissions and evidence on the merits of the dispute may, and indeed must, simply disregard those submissions and evidence and conclude that it is without a mandate to consider them. The Party raising such a preliminary issue is therefore perfectly able to vindicate its rights. In this case, Guatemala argues that the United States has not complied with legal requirements for a panel request, and that non-compliance with those requirements cannot be subsequently cured. It is of course for the panel to decide whether these arguments are correct and therefore, in the absence of legal reasons why it may not or should not do so, the panel must proceed to consider them. If the panel were to agree with Guatemala's arguments, it would make no difference to Guatemala's ability to vindicate its claims whether the panel so decided before or after having heard submissions and received evidence on the merits. In either case, the panel would simply decline to consider such submissions and evidence.

54. In reaching the foregoing conclusion, we are mindful of the practice of panels in WTO dispute settlement proceedings. Although such practice has evolved under different international agreements, not the CAFTA-DR, both disputing Parties have referred to WTO dispute settlement practice in their written submissions. Since both disputing Parties see such practice as relevant here, it is not inappropriate for us to consider how WTO dispute settlement panels have dealt with preliminary ruling requests and how they have taken account of due process in doing so. In fact, several WTO dispute settlement panels have had occasion to consider preliminary ruling requests related to the sufficiency of the complainant's panel request and the related procedural question of when in the course of the proceeding to address such a request. One such panel was the panel in the

*Colombia -- Ports of Entry* dispute (DS366). In its report, that panel found that

... there is no established jurisprudence nor is there any established practice on whether panels need to rule on the scope of their mandate on a preliminary basis, i.e. before the issuance of its Interim Report to the parties. Numerous panels have reserved ruling on preliminary issues until issuing a Final Report.<sup>11</sup>

55. In light of the foregoing considerations, the panel will address due process arguments going to its authority and jurisdiction to consider the complaint by following the timetable and sequence of submissions and proceedings established in the disputing Parties' joint letter of October 10, 2014, subject to the adjustments set out in paragraph 4 of these reasons and any other adjustments that new circumstances may require.

56. This does not however address Guatemala's concern that the 28-day period between the due date for the initial written submission of the United States and the due date for that of Guatemala - a period which remains in place under the timetable established in the disputing Parties joint letter of October 10, 2014 - is insufficient to enable Guatemala to properly prepare its defense.

57. As noted above, Rule 34 provides that "[a] panel may, after consulting the participating Parties, modify any time period applicable in the panel proceeding and make such other procedural or administrative adjustments as may be required in the proceeding, such as when a panelist is replaced." Given the framework of Rules discussed above, we consider that Rule 34 provides the panel with discretion to make such adjustments where necessary to meet legal or practical requirements.

58. It may be the case that in certain circumstances, the Panel can make adjustments to a timetable for proceedings that it considers necessary to meet due process requirements. On the other hand, the panel generally should not presume that there are due process problems prior to their having been demonstrated through evidence and argument. This is particularly the case where, as here, the disputing Parties expressly have agreed to a tailor-made process (rather than the default process prescribed by the Rules) well after the establishment of the panel and immediately prior to due process issues being raised.

59. Guatemala might therefore consider, in light of the initial written submission of the United States, whether for due process reasons it requires more time for the preparation of its initial written submission than the time provided for in the October 10, 2014 joint letter. We suggest that if it so considers, it confer with the United States with a view to agreeing on an appropriate extension of time. In the absence of agreement between the disputing Parties, Guatemala may request an extension of time from the panel. If Guatemala makes such a request, the panel will consider whether it has the authority under the Rules to grant such request and whether it should grant it in the circumstances of the present case. In our disposition we establish a timetable for dealing with any such request.

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<sup>11</sup> Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, para. 7.14 & n. 145 (adopted 20 May 2009) (citing examples of other panels that have reserved ruling on preliminary issues until issuing final report); *see also* Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, para. 9.15 & n.505 (adopted, together with AB Report, 20 Aug. 1999).

### **Dissenting Opinion of the Panel Minority**

I do not agree that the request of Guatemala, for a preliminary procedural ruling dated October 10, 2014, should be addressed together with the main matter at issue, for the following technical-legal reasons.

1. The request of Guatemala for a preliminary procedural ruling, dated October 10, 2014, lodges a complaint about the infringement of articles 16.2.1(a) and 20.6.1(a) DR-CAFTA in the request of an arbitral panel dated August 9, 2011 submitted by the United States, challenges the authority (jurisdiction and mandate) of the arbitral panel, and raises questions of due process (rights to procedural equality and to a defense).

Therefore, the request of Guatemala for a preliminary procedural ruling dated October 10, 2014, does not address the main matter at issue, but rather a preliminary issue (through which the jurisdiction and mandate of the arbitral panel and the due process will be questioned), for special and prior determination, since the arbitral proceeding cannot be initiated (initial submission, reply, rejoinder, hearing, evidence, final report) if this issue has not been resolved, under the principle of consistency, which governs the dispute settlement proceeding (Chapter 20 DR-CAFTA).

2. Hypothetically and without prejudging, if the arbitral panel, after analyzing the issue, were to determine that the request of an arbitral panel submitted by the United States on August 9, 2011 fails to meet the requirements specified in articles 16.2.1(a), y 20.6.1(a) DR-CAFTA, the process would inexorably have to go back to that prior stage, and, therefore, it is not reasonable to initiate the arbitral proceeding without the arbitral panel having analyzed and resolved the aforementioned preliminary issue.

3. The request of Guatemala for a preliminary procedural ruling dated October 10, 2014 entails a clear expression of its will to modify the schedule agreed upon with the United States, and, therefore, it should be understood that there is no longer an agreement of the Parties in this regard, as well as on the fact that the arbitral panel is the one that should resolve the matter. In fact, Article 27 of the Rules of Procedure (Chapter 20 DR-CAFTA) provides: "Where a procedural question arises that is not covered by these rules, a panel may adopt an appropriate procedure that is not inconsistent with the Agreement or these rules."

4. Considering that 38 months have elapsed since the request for an arbitral panel was submitted by the United States on August 9, 2011, and taking into account that the work of the arbitral panel was suspended several times, for up to 6 months, it is not reasonable that the arbitral panel, despite accepting that the preliminary issue raised should be analyzed and be resolved, does not take the time to discuss the objections to its authority (jurisdiction and mandate) and to due process, before the United States presents its initial written submission..

5. On the grounds of simple procedural economy, it is not reasonable that the questioning or objection of Guatemala, with respect to the authority (jurisdiction and mandate) of the arbitral panel and to due process, to the request for an arbitral panel dated August 9, 2011 submitted by the United States should be resolved together with the main matter at issue and not earlier.

Spanish

TRATADO DE LIBRE COMERCIO ENTRE REPÚBLICA DOMINICANA –  
CENTROAMÉRICA – ESTADOS UNIDOS

GRUPO ARBITRAL ESTABLECIDO CONFORME  
A LO DISPUESTO EN EL CAPÍTULO VEINTE

**EN EL CASO DE**  
**GUATEMALA – CUESTIONES RELATIVAS A LAS OBLIGACIONES DERIVADAS**  
**DEL ARTÍCULO 16.2.1(a)**

Decisión sobre el procedimiento para atender la solicitud de una decisión preliminar presentada  
por Guatemala

20 de noviembre de 2014

Miembros del grupo arbitral  
Profesor Kevin Banks (Presidente)  
Sr. Theodore R. Posner  
Sr. Mario Fuentes Destarac

## **Opinión de la mayoría del grupo arbitral**

### **I. Introducción**

1. Esta decisión concierne solamente a una cuestión: la forma en la que el grupo especial debe atender, como cuestión procesal, una solicitud de una decisión preliminar presentada por Guatemala. En este momento el grupo arbitral no atiende los méritos de la solicitud de Guatemala.

2. Guatemala solicita una decisión preliminar que indique que “esta controversia no está presentada adecuadamente ante [el grupo arbitral], ya que la solicitud de establecimiento del grupo arbitral, presentada por Estados Unidos no cumple con los requerimientos mínimos para presentar el problema con claridad.”<sup>1</sup> Guatemala solicita al grupo arbitral que encuentre “que no tiene la autoridad para proceder con el análisis de los méritos de la controversia.”<sup>2</sup> Guatemala solicitó que, para atender esta solicitud de una decisión preliminar, el grupo arbitral suspenda el calendario para los procedimientos previamente establecido para resolver la controversia y adopte procedimientos para una fase preliminar independiente de los procedimientos. En este sentido, Guatemala propuso que las Partes contendientes tengan cada una la oportunidad de presentar alegatos escritos iniciales y de réplica con respecto a los asuntos preliminares, después de lo cual el grupo arbitral podría convocar a una audiencia si lo considerara necesario. Las partes contendientes tendrían entonces la oportunidad de presentar alegatos escritos complementarios y respuestas a preguntas del grupo arbitral, y luego, finalmente una oportunidad para hacer comentarios sobre un informe inicial del grupo arbitral antes de la emisión de un informe final sobre la solicitud de una decisión preliminar.

3. Los Estados Unidos de América se opuso a esta solicitud, adoptando la posición que el grupo arbitral no tiene la autoridad para suspender el calendario de los procedimientos y que la solicitud de una decisión preliminar, presentada por Guatemala, puede y debe ser atendida dentro de la secuencia de los alegatos y procedimientos dispuestos en dicho calendario.

4. El 30 de octubre de 2014 el grupo arbitral emitió la siguiente determinación por escrito:

El grupo arbitral ha examinado el asunto de la manera, como cuestión de procedimiento, se debe abordar la solicitud de Guatemala del 10 de octubre 2014 de decisión prejudicial. La conclusión y la disposición del grupo arbitral se exponen a continuación. Las razones del grupo arbitral seguirán.

Con sujeción a los siguientes párrafos, el grupo arbitral constata que debe, desde un punto de visto procesal, abordar la solicitud de decisión prejudicial de Guatemala sin alterar los procedimientos y el calendario establecidos en el 10 de octubre 2014 carta de las Partes contendientes a la Oficina Responsable.

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<sup>1</sup> Solicitud de una Decisión Procesal Preliminar presentada por Guatemala, párrafo 126 (10 de octubre de 2014).

<sup>2</sup> *Ibidem*

Guatemala informó a la Oficina Responsable ayer que el 28 de octubre de 2014, el Presidente de la República de Guatemala declaró que las oficinas del gobierno de Guatemala, entre ellos la Oficina Responsable de Guatemala, se cerraron el 31 de octubre de 2014. Como consecuencia, en virtud de los artículos 6 y 11 de la Reglas Modelas de Procedimiento, los Estados Unidos de América no pueden presentar un alegato escrito en esa fecha. Esto requerirá ajustes al calendario para que los Estados Unidos de América presenta su alegato escrito inicial el día siguiente en que la Oficina Responsable tiene horas normales de trabajo.

En consecuencia, el grupo arbitral adopta por este medio el calendario establecido a continuación, y invita a las Partes contendientes a abordar la solicitud de Guatemala de decisión prejudicial en los alegatos escritos y orales previstos en dicho calendario.

Sin perjuicio de cualquier de los otros alegatos previstos en el calendario:

- El alegato escrito de los Estados Unidos de América respondiendo a la petición de Guatemala de decisión prejudicial se deberá, como parte de su alegato escrito inicial, a más tardar el 3 de noviembre 2014.
- Cualquier réplica de Guatemala a este alegato se deberá a más tardar el 1 de diciembre 2014, como parte del alegato escrito inicial de Guatemala.
- Cualquier réplica de los Estados Unidos a esta réplica se deberá a más tardar el 9 de enero 2015, como parte de su escrito de réplica.
- Las Partes contendientes pueden presentar argumentos con respecto a las cuestiones planteadas en la solicitud de decisión prejudicial de Guatemala en la audiencia, y esas cuestiones pueden ser objeto de preguntas escritas del grupo arbitral después de la audiencia.

En el caso de que, tras la recepción del alegato escrito inicial de los Estados Unidos de América, Guatemala considera que se requiere como una cuestión de debido proceso más tiempo para preparar su alegato escrito inicial, el panel le invita a conferir con los Estados Unidos de América sobre una extensión adecuada y después de eso, pero en todo caso no más tarde que el 10 de noviembre de 2014, presentar una solicitud de dicha prórroga al grupo arbitral. Si Guatemala presenta una tal solicitud, y si los Estados Unidos de América se opone a dicha solicitud, los Estados Unidos de América debe presentar sus opiniones al grupo arbitral a más tardar el 17 de noviembre 2014. El grupo arbitral trataría de emitir una decisión sobre dicha solicitud a mas tardar el 20 de noviembre 2014.

5. Las razones de la mayoría del grupo arbitral se exponen inmediatamente a continuación.

## **II. Antecedentes de hecho y de derecho**

### **1. Reglamentos que rigen los procedimientos del grupo arbitral**

6. El Artículo 20.10.1 del Tratado de Libre Comercio entre República Dominicana– Centroamérica – Estados Unidos de América (en lo sucesivo denominado “CAFTA-RD” o el “Tratado”) exige a las Partes del Tratado que establezcan Reglas Modelo de Procedimiento (en lo sucesivo denominadas las “Reglas”). Esto lo hicieron por decisión de la Comisión de Libre Comercio, con fecha del 3 de febrero de 2011.
7. El Artículo 20.10.2 del Tratado, a su vez, requiere que los grupos arbitrales establecidos bajo el Capítulo Veinte lleven a cabo sus procedimientos de acuerdo con las Reglas, a menos que las Partes contendientes acuerden otra alternativa.
8. Las Reglas relevantes al asunto en cuestión son las siguientes:
  1. Estas reglas modelo, incluyendo sus apéndices, se establecen de conformidad con el Artículo 20.10 (Reglas de Procedimiento) del Tratado de Libre Comercio entre República Dominicana – Centroamérica – Estados Unidos y aplicarán a los procedimientos de solución bajo el Capítulo Veinte, salvo que las Partes contendientes acuerden otra cosa.
  7. Cada Parte reclamante presentará su alegato inicial por escrito al grupo arbitral a mas tardar siete días después de la fecha de constitución del grupo arbitral.
  8. Dentro de los 14 días siguientes a la entrega de la solicitud para el establecimiento de un grupo arbitral, cada Parte entregará a la oficina responsable una lista de días inhábiles en los que la oficina de esa Parte está cerrada. A más tardar siete días después de la fecha de constitución del grupo arbitral, el grupo arbitral deberá emitir un calendario de los procedimientos que estipule:
    - (i) La presentación del alegato inicial por escrito de la Parte demandada a más tardar 35 días después de la fecha de la constitución del grupo arbitral ;
    - (j) La pesentación del alegato escrito de cualquier tercera parte a más tardar siete días después de la entrega del alegato inicial por escrito de la Parte demandada;
    - (k) La presentación de un escrito de réplica de cualquier Parte reclamante a más tardar 21 días después de la presentación del alegato inicial por escrito de la Parte demandada;
    - (l) La presentación de un escrito de dúplica de la Parte demandada a más tardar 21 días después de la presentación del escrito de réplica de la (s) Parte(s) reclamante(s);
    - (m) Una audiencia dentro de los 14 días siguientes a la fecha de presentación del escrito de dúplica de la Parte demandada;
    - (n) Entrega a las Partes participantes de cualesquiera preguntas por escrito formuladas por el grupo arbitral dentro de los tres días siguientes a la fecha de la audiencia;
    - (o) La presentación de los comentarios de las Partes a los escritos complementarios de alegatos de las otras Partes participantes y cualesquiera respuestas a las

preguntas formuladas por escrito por el grupo arbitral dentro de los 14 días siguientes a la presentación de dichas respuestas.

- (p) La presentación de los comentarios de las Partes a los escritos complementarios de alegatos de las otras Partes participantes y cualesquiera respuestas a las preguntas formuladas por escrito del grupo arbitral dentro de los 14 días siguientes a la presentación de dichas respuestas.

Al establecer las fechas para las presentaciones de escritos o para la audiencia, el grupo arbitral cumplirá con la Regla 12 y consultará con la oficina responsable para proporcionar tiempo adicional si la traducción de documentos fuera necesaria conforme a la Regla 81.

12. Si la fecha de presentación de un documento por una Parte cae en un día inhábil de esa Parte, o en una fecha en la que la oficina de la Parte esté cerrada por razones de fuerza mayor, la fecha para la presentación del documento se trasladará para el siguiente día hábil de esa Parte.

27. Cuando surja una cuestión procesal que no esté cubierta por estas reglas, un grupo arbitral puede adoptar un procedimiento apropiado que no sea inconsistente con el Tratado ni con estas reglas.

34. Un grupo arbitral puede, tras haber consultado con las Partes participantes, modificar cualquier plazo aplicable al procedimiento del grupo arbitral y realizar aquellos otros ajustes administrativos o procesales que se requieran en el procedimiento, tales como cuando un árbitro es sustituido.

81. Cuando la oficina responsable requiera encargarse de la traducción de un documento, el cálculo de cualquier plazo cuyo computo dependa de la presentación de ese documento se ajustará para permitir un tiempo razonable para la preparación de la traducción. Si la preparación de una traducción toma más tiempo del estimado proporcionado al grupo arbitral conforme a la regla 80, el grupo arbitral hará un ajuste correspondiente al calendario emitido conforme a la regla 8.

## **2. Procedimientos**

9. El 9 de agosto de 2011, los Estados Unidos de América solicitó el establecimiento de un grupo arbitral en virtud del Artículo 20.6.1 del CAFTA-RD para considerar si el gobierno de Guatemala está cumpliendo con sus obligaciones en virtud del Artículo 16.2.1(a) del Tratado.

10. El grupo arbitral fue conformado en noviembre de 2012, pero suspendió su trabajo por 60 días ante la solicitud conjunta de las Partes contendientes el 30 de noviembre de 2012.

11. El 29 de enero de 2013 las Partes contendientes informaron al grupo arbitral sobre su acuerdo, en virtud de la Regla 1, de modificar el calendario para los procesos requeridos por las Reglas 7 y 8 de la siguiente manera:

- No obstante lo dispuesto en la Regla 7, los Estados Unidos presentará su alegato inicial por escrito al grupo arbitral en un plazo no mayor de 28 días después de la fecha en la que el grupo arbitral reanude sus labores.
- No obstante lo dispuesto en la Regla 8(a), Guatemala presentará su alegato inicial por escrito al grupo arbitral en un plazo no mayor de 56 días después de la fecha en la que el grupo arbitral reanude sus labores.

12. Ese mismo día, las Partes contendientes solicitaron al grupo arbitral que suspendiera su trabajo por otros diez días.

13. El grupo arbitral suspendió de nuevo su trabajo de acuerdo con una nueva solicitud conjunta por parte de las Partes contendientes el 25 de febrero de 2013. El grupo arbitral reanudó su trabajo el 8 de marzo de 2013. El grupo arbitral suspendió posteriormente su trabajo, como respuesta a una serie de solicitudes conjuntas por parte de las Partes contendientes, del 5 de abril de 2013 al 18 de septiembre de 2014. El 18 de septiembre de 2014, los Estados Unidos de América solicitó que el grupo arbitral reanudara su trabajo.

14. El 26 de septiembre de 2014 el grupo arbitral propuso a las Partes contendientes un calendario para los procedimientos de acuerdo con los Artículos 7 y 8 de las Reglas y la carta conjunta de las Partes contendientes con fecha del 29 de enero de 2013.

15. Por medio de una carta conjunta con fecha del 10 de octubre de 2014 las Partes contendientes solicitaron que el Grupo Arbitral adopte una serie de modificaciones a dicho calendario. Su carta lee, en su parte relevante, de la siguiente manera:

Las partes solicitan conjuntamente al Panel adoptar las siguientes modificaciones a las fechas del calendario:

- Los Estados Unidos de América presentará su alegato inicial por escrito al Panel a más tardar el 31 de octubre de 2014.
- Guatemala presentará su alegato inicial por escrito al Panel a más tardar el 28 de noviembre de 2014.
- Culaquier tercera parte presentará su comunicación escrita al Panel a más tardar el 5 de diciembre de 2014.
- Culaquier solicitud por una entidad no gubernamental a presentar sus opiniones por escrito será, a mas tardar, el 5 de diciembre de 2014, o dentro de los siete días de entrega de la versión no confidencial de la comunicación escrita de Guatemala si esta comunicación contiene información confidencial.
- El Panel decidirá si concede autorización a presentar tales opiniones por escrito dentro de los siete días siguiente de su recepción de dicha solicitud.
- La comunicación de réplica de los Estados Unidos de América se deberá presentar, a más tardar, el 9 de enero de 2015.
- La comunicación de réplica de Guatemala se deberá presentar, a mas tardar, el 13 de febrero de 2015.
- Cualquier opinion presentada por una entidad no gubernamental se deberá presentar, a más tardar, el 13 de febrero de 2015.
- Cualquier respuesta por una Parte a una opinion presentada por escrito de una entidad no gubernamental se deberá presentar, a más tardar, el 27 de febrero de 2015.

- La audiencia se llevaría a cabo a más tardar el 13 de marzo de 2015. En ausencia de más comunicaciones de las Partes o de la Oficina Responsable sobre la materia, el Panel, por tanto convocará solamente un día, una audiencia el 13 de marzo de 2015.
- Cualquier pregunta escrita del Panel a las Partes sería presentada, a más tardar, el 16 de marzo de 2015.
- Cualquier presentación de escritos complementarios y respuestas a preguntas del Panel se deben enviar antes del 27 de marzo de 2015.
- Cualquier decisión del Panel para procurarse un asesoramiento técnico debe presentarse antes del 27 de marzo de 2015. En el caso de que el Panel decida buscar una asesoría, emitirá un calendario adicional de acuerdo con las Reglas de Procedimiento 73 a 77.
- Cualquier comentario de las Partes sobre escritos complementarios y respuestas de preguntas del Panel se deben enviar antes del 10 de abril de 2015.

595.

Reconociendo que el Artículo 20.13 del Tratado de Libre Comercio entre República Dominicana, Centroamérica, y Estados Unidos estipula un máximo plazo para la presentación de un informe inicial, salvo que las Partes acuerden otra cosa, las Partes acuerdan extender este máximo plazo al 10 de junio del 2015.

16. También el 10 de octubre de 2014, después de transmitir la comunicación conjunta antes indicada, Guatemala envió una comunicación separada en la que solicitaba que el grupo arbitral suspendiera el calendario para los procesos y adoptara un procedimiento preliminar alterno, tal y como se describió anteriormente.<sup>3</sup>

17. En sus alegatos en busca de una decisión preliminar, Guatemala sostiene que la solicitud de un grupo arbitral por parte de los Estados Unidos de América, con fecha del 9 de agosto de 2011, se redactó en términos tan amplios y vagos, que no logran presentar claramente el problema que el grupo arbitral considerará. Como resultado, Guatemala sostiene que, la solicitud de grupo arbitral no cumple con las estipulaciones del CAFTA-RD a través de las cuales el grupo arbitral obtiene jurisdicción o autoridad para considerar los méritos de las cuestiones que la solicitud de grupo arbitral plantea. Guatemala también afirma que la amplitud y vaguedad de la solicitud de grupo arbitral “perjudica la preparación de la defensa de Guatemala y viola el derecho de Guatemala al debido proceso en este procedimiento.”<sup>4</sup> Sin perjuicio de lo anterior, Guatemala también sostiene que el período de 28 días entre la fecha límite para el alegato inicial por escrito de Estados Unidos y la fecha límite para el de Guatemala, un período establecido en el calendario propuesto por el grupo arbitral en su carta del 26 de septiembre de 2014 a las Partes, no es suficiente para permitirle a Guatemala que prepare su defensa.

18. Las Partes contendientes difieren en respecto de que Guatemala mando o no la notificación a los Estados Unidos de su intención de buscar una decisión preliminar y solicitar una suspensión del calendario para el procedimiento, antes de hacerlo. En cualquier caso, no existe evidencia de que las Partes contendientes abordaran la intención de Guatemala para

<sup>3</sup> De hecho, la carta de Guatemala con fecha del 10 de octubre de 2014 solicitó al grupo arbitral que “suspenda el calendario provisto a las Partes el 26 de septiembre de 2014.” No hizo referencia al calendario establecido en la comunicación conjunta de las Partes contendientes de comienzos del día 10 de octubre.

<sup>4</sup> Solicitud de una Decisión Procesal Preliminar presentada por Guatemala, párrafo 4 (10 de octubre de 2014).

solicitar una decisión preliminar cuando establecieron el calendario modificado incluido en su carta del 10 de octubre de 2014.

19. En una carta con fecha del 21 de octubre de 2014 al Presidente del grupo arbitral, Guatemala afirma que acordó de buena fe el calendario establecido en la carta conjunta del 10 de octubre de 2014.

### **III. Resumen de las posiciones de las Partes contendientes con respecto a la forma en la que, como cuestión procesal, el grupo arbitral deberá atender la solicitud de una decisión preliminar presentada por Guatemala**

#### **1. Posición de Guatemala**

20. En su alegato del 10 de octubre de 2014, Guatemala toma la posición que el grupo arbitral tiene la autoridad, en virtud de la Regla 27, de suspender el calendario de los procedimientos y establecer un proceso acelerado y separado para considerar su solicitud de una decisión preliminar.

21. Específicamente, Guatemala sostiene que su solicitud de una decisión preliminar es una “cuestión procesal” que no está cubierta por las Reglas. Advierte que la falta de reglas especiales para atender cuestiones preliminares no es algo inusual en diferentes jurisdicciones. Afirma que el grupo arbitral puede recurrir a los principios de debido proceso para llenar un vacío en el alcance de las Reglas.

22. Guatemala también sostiene que su solicitud para procedimientos preliminares acelerados no es inconsistente con el CAFTA-RD o con las Reglas.

23. Finalmente, Guatemala afirma que su solicitud de una decisión preliminar se relaciona con asuntos de extrema importancia, a saber, la jurisdicción del grupo arbitral y el derecho que Guatemala tiene a debido proceso, y que las cuestiones planteadas en esta solicitud son tan fundamentales que el grupo arbitral debe, primero, determinar si tiene la autoridad para proceder con los méritos de este caso.

#### **2. Posición de los Estados Unidos de América**

24. En su carta del 15 de octubre de 2014 al Presidente del grupo arbitral, los Estados Unidos responde con tres argumentos.

##### *Alcance de la autoridad del grupo arbitral para adoptar los procedimientos en virtud de la Regla 27*

25. En primer lugar, los Estados Unidos argumenta que ni el CAFTA-RD ni las Reglas le permiten al grupo arbitral acceder a la solicitud de alteración de procedimientos presentada por Guatemala. Sostiene que, a diferencia de las reglas que rigen la resolución de controversias ante el Órgano de solución de diferencias de la Organización mundial del comercio, las Reglas rigen estos procedimientos a menos que las Partes acuerden lo contrario. Los Estados Unidos también

sostiene que los procedimientos propuestos por Guatemala serán un alejamiento de las Reglas, a lo cual Estados Unidos no ha acordado. Considera que las Reglas 7 y 8 estipulan una secuencia de alegatos de acuerdo a un calendario, que, por lo cual, las Reglas cubren la secuencia y sincronización de las presentaciones y que un alejamiento de dicho calendario sin el acuerdo de ambas partes sería inconsistente con las Reglas. Los Estados Unidos afirma que el grupo arbitral, por ende, no posee poder discrecional en virtud de la Regla 27 para otorgar a Guatemala la decisión procesal que busca.

#### *Adecuación de los procedimientos*

26. En segundo lugar, los Estados Unidos también sostiene que los procedimientos propuestos por Guatemala no son los apropiados, ya que el análisis de las cuestiones planteadas en la solicitud de una decisión preliminar, presentada por Guatemala, requerirá abordar las cuestiones que los Estados Unidos planea presentar como parte de su alegato inicial por escrito en los méritos de su demanda. Los Estados Unidos considera que, como resultado de esto, abordar dichas cuestiones de forma separada del calendario de los procedimientos en los méritos de la demanda requerirá la presentación de la primera parte de su alegato por escrito fuera de contexto, de una manera desarticulada y poco sistemática.

27. Además, los Estados Unidos insiste que los procedimientos propuestos por Guatemala darían como resultado un retraso injustificado. Afirma que las Reglas contemplan un proceso en el que la Parte demandada tiene un máximo de 42 días para preparar su defensa y el primer alegato por escrito a partir del momento de la solicitud de un grupo arbitral. Por el contrario, afirma que los Estados Unidos, bajo los procedimientos propuestos por Guatemala, que habría ocho o más alegatos sustantivos y una audiencia antes de que Estados Unidos presente su primer alegato por escrito en los méritos de esta demanda. Como resultado de esto, Estados Unidos sostiene que el primer alegato por escrito de Guatemala se presentaría en una fecha que excedería los 42 días estipulados en las Reglas. Así mismo, los Estados Unidos sostiene que los procedimientos propuestos por Guatemala cambiaría completamente el orden de las presentaciones estipulado en las Reglas. Por estas razones, los Estados Unidos argumenta que dichos procedimientos no son consistentes con las Reglas.

#### *Debido proceso*

28. Finalmente, los Estados Unidos considera que las inquietudes de Guatemala con respecto al debido proceso pueden ser atendidas a través de los procedimientos de los alegatos, preguntas del grupo arbitral y respuestas por escrito establecidas en el calendario de los procedimientos con fecha del 10 de octubre.

### **3. Respuesta de Guatemala**

29. En una carta al Presidente del grupo arbitral, con fecha del 21 de octubre de 2014, Guatemala responde a cada uno de estos argumentos.

#### *Alcance de la autoridad del grupo arbitral para adoptar los procedimientos en virtud de la Regla 27*

30. Guatemala afirma que, a excepción de la Regla 27, las Reglas estipulan los procedimientos para abordar los méritos de las controversias y no cuestiones procesales. Por lo tanto, Guatemala sostiene que las Reglas no cubren el tiempo y secuencia de los alegatos en un asunto preliminar limitado a una cuestión de debido proceso sobre la suficiencia o claridad de la solicitud de un grupo arbitral. La suficiencia y claridad de una solicitud de grupo arbitral es, en el alegato de Guatemala, una cuestión procesal que se relaciona al debido proceso y a la jurisdicción del grupo arbitral. De los alegatos de Guatemala se deduce que la Regla 27 autoriza al grupo arbitral adoptar procedimientos apropiados para abordar dichas cuestiones sin la necesidad del acuerdo de las Partes contendientes. Guatemala agrega que desde su punto de vista, es incorrecto caracterizar que su propuesta esté cambiando por completo la secuencia de los alegatos, ya que las Reglas atañen solamente la secuencia de alegatos en los méritos de un caso y no en cuestiones procesales preliminares.

#### *Adecuación de los procedimientos*

31. Guatemala insiste que el tiempo invertido por el grupo arbitral en atender el debido proceso y la cuestión de si una controversia se haya presentado correctamente al grupo arbitral no puede y no debe comprenderse como un retraso injustificado.

32. Guatemala rechaza la reclamación de que sus procedimientos propuestos requerirán que los Estados Unidos presente su caso al grupo arbitral de forma desarticulada y poco sistemática, argumentando que la suficiencia y claridad de la solicitud del grupo arbitral puede decidirse únicamente con base en el texto de dicha solicitud, sin entrar en los méritos del caso.

33. Finalmente, Guatemala advierte que el grupo arbitral “es libre, bajo su autoridad, de decidir la mejor forma de resolver [] [la] solicitud [de Guatemala],” mientras que reitera su solicitud de que las Partes contendientes tienen amplias oportunidades para hacer comentarios sobre sus posiciones respectivos.<sup>5</sup>

#### *Debido proceso*

34. Guatemala argumenta que acceder a la solicitud de Estados Unidos de atender su solicitud para una decisión preliminar luego del alegato inicial de Estados Unidos sería una violación al derecho que Guatemala tiene a debido proceso y perjudicaría la preparación de la defensa de Guatemala. Guatemala asegura que el grupo arbitral desempeña un papel importante de debido proceso al notificar al demandado y a terceras Partes sobre la naturaleza del caso del demandante y que el incumplimiento de los requisitos para dicha solicitud no puede subsanarse posteriormente.

35. Además, Guatemala sostiene que, tomando en cuenta las suspensiones de los procedimientos en este asunto, los Estados Unidos ha tenido cinco años para preparar su caso, mientras que Guatemala no ha tenido indicación explícita del caso al que debe responder.

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<sup>5</sup> Letter from Guatemala to Panel Chair at 4 (Oct. 21, 2014).

36. Finalmente, Guatemala indica que le preocupa seriamente que el hecho de aceptar la propuesta de los Estados Unidos de que los 42 días son tiempo suficiente para preparar una defensa, abra la puerta al uso táctico de solicitudes amplias y vagas al grupo arbitral por parte de las Partes demandantes, para perjudicar el derecho de defensa de las Partes demandadas.

#### **4. Réplica de los Estados Unidos de América**

37. En una carta al Presidente del grupo arbitral con fecha del 27 de octubre de 2014, los Estados Unidos presenta con una réplica que el debido proceso no requiere que los Estados Unidos responda a la solicitud de decisión preliminar, presentada por Guatemala, antes de presentar su primer alegato por escrito. Sostiene que es común en los procedimientos de trabajo del Órgano de solución de diferencias de la Organización mundial del comercio estipular que si la parte demandada presenta una solicitud para una decisión preliminar lo debe hacer a más tardar en su primer alegato por escrito y que el grupo arbitral entonces debe establecer una fecha para la respuesta, después de dicho primer alegato por escrito. Los Estados Unidos cita que este enfoque demuestra que “otros no comparten el punto de vista de Guatemala de que existe un ‘derecho’ general de ‘debido proceso’ para el tipo de cronograma que Guatemala propone en este caso.”<sup>6</sup>

#### **IV. Decisión**

38. Guatemala sostiene que la Regla 27 le otorga al grupo arbitral autoridad para suspender el calendario para los procedimientos previamente establecido – ya sea conforme a la comunicación del 26 de septiembre de 2014 del grupo arbitral a las Partes contendientes, o conforme a la comunicación conjunta enviada por las Partes contendientes al grupo arbitral el 10 de octubre de 2014 – y para adoptar procedimientos independientes para la atención de las cuestiones preliminares planteadas en su alegato del 10 de octubre de 2014. Por lo tanto, debemos considerar el alcance discrecional que la Regla 27 confiere al grupo arbitral.

#### *Alcance de la autoridad del grupo arbitral para adoptar los procedimientos en virtud de la Regla 27*

39. Recordamos que la Regla 27 estipula lo siguiente:

Cuando surja una cuestión procesal que no esté cubierta por estas reglas, el grupo arbitral puede adoptar un procedimiento apropiado que no sea inconsistente con el Tratado ni con estas reglas.

La Regla 27, por ende, autoriza al grupo arbitral adoptar “un procedimiento apropiado” en circunstancias específicas, sujeto a restricciones específicas. Esto aplica solamente cuando “surja una cuestión procesal que no esté cubierta por estas [] [R]eglas”. Si dicha condición se cumple, entonces cualquier procedimiento que el grupo arbitral pueda adoptar no sólo tendrá que ser “apropiado”, sino que también tendrá que cumplir con el requerimiento que “no será inconsistente con el Tratado ni con estas [] [R]eglas”.

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<sup>6</sup> Carta de Estados Unidos al Presidente del Grupo Arbitral en 1[sic] (27 de octubre de 2014).

40. Guatemala opina que su solicitud al grupo arbitral de tomar una “Resolución Anticipada de Proceso que considere que esta disputa no fue presentada de forma apropiada ante el mismo” y que encuentre que “no tiene la autoridad para proceder con el análisis de los méritos de esta disputa” es una “cuestión procesal” que “no está cubierta por las Reglas”.<sup>7</sup> No estamos de acuerdo que esta sea una cuestión procesal. Por “cuestión procesal” entendemos que la Regla 27 se refiere a cuestiones de la forma en la que el grupo arbitral debe operar procesalmente y no a cuestiones que pueden resolver la demanda. Las funciones de las Reglas son estipular la forma en la que los grupos arbitrales son establecidos y operan.<sup>8</sup> Dentro de dichas Reglas el término “cuestión procesal” lógicamente debe referirse precisamente a dichos asuntos. La Regla 27 está incluida dentro de una Parte de las Reglas titulada “Operación de los grupos arbitrales”. Además de los asuntos cubiertos por la Regla 27, la parte de las Reglas que trata con asuntos como los medios de comunicación por medio de los cuales el grupo arbitral puede realizar sus funciones, quién puede tomar parte en las deliberaciones del grupo arbitral, cómo confirmar el deseo de los miembros del grupo para prestar sus servicios, el reemplazo de miembros del grupo, suspensiones del trabajo del grupo arbitral y los temas del grupo arbitral que deben o no considerarse. Por el contrario, el alegato de Guatemala con fecha 10 de octubre de 2014 con respecto a la claridad y suficiencia de la solicitud de un grupo arbitral plantea preguntas, cuyas respuestas pueden efectivamente resolver la demanda. Ellos requieren que el grupo arbitral considere si la solicitud de grupo arbitral fue o no suficientemente clara y cumple con los requerimientos del Tratado y, de no ser éste el caso, cuáles implicaciones tiene esto con respecto a la autoridad y jurisdicción del grupo arbitral para proceder con un análisis de los méritos de la demanda.

41. No obstante, considerados en conjunto, las posturas y los argumentos de las Partes contendientes en efecto plantean una cuestión procesal dentro del significado de la Regla 27: la cuestión de la forma en la que, como cuestión procesal, el grupo arbitral debería considerar la solicitud de una decisión preliminar presentada por Guatemala. Por lo tanto, debemos determinar si esta cuestión procesal está cubierta por las Reglas.

42. A nuestro juicio si está. Al determinar en detalle tanto la secuencia y tiempo de los procedimientos y las razones por las que un grupo arbitral puede ajustarlos dentro de los límites de tiempo establecidos en los procedimientos del grupo arbitral por el CAFTA-RD, las Reglas cubren la materia de la forma en la que las cuestiones preliminares, como las planteadas por Guatemala, deben considerarse.

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<sup>7</sup> Solicitud de una Decisión Procesal Preliminar presentada por Guatemala, párrafos 5 y 23 (10 de octubre de 2014).

<sup>8</sup> Las funciones de las Reglas incluyen estipular cómo el mandato de los grupos arbitrales deben entregarse, cómo deben estructurarse y establecerse los calendarios para alegatos y otros procedimientos, cuáles documentos presentados o emitidos por el grupo arbitral deben divulgarse al público, los procedimientos para la identificación y el trato de la información confidencial, cómo deben realizar los grupos arbitrales las audiencias, cuáles son las notificaciones que el grupo arbitral debe emitir, la forma en la que el grupo arbitral puede asegurar la información y la asesoría técnica, quién es responsable de elaborar cuáles traducciones, cómo estimar los plazos y cuestiones similares.

43. Las Reglas 7 y 8 establecen una secuencia detallada y un calendario para los procedimientos. La Regla 7 estipula que después de que se haya constituido un grupo arbitral, los primeros alegatos por escrito que deben presentarse deben ser las comunicaciones por escrito de cada Parte demandante. Las reglas 7 y 8 no determinan una circunstancia en la que el primer alegato por escrito a presentarse pueda ser una objeción jurisdiccional (u otra objeción preliminar) por la Parte demandada. Esto está en contraposición con las estipulaciones de CAFTA-RD para la resolución de controversias de inversión, por ejemplo, que expresamente contempla a un demandado presentando ciertas objeciones “como cuestión preliminar” “tan pronto después el tribunal se ha constituido”, después de lo cual “el tribunal deberá suspender todo procedimiento en los méritos.”<sup>9</sup> Sin embargo, en la resolución de controversias en virtud del Capítulo 20 de CAFTA-RD y de las Reglas aplicables, el alegato inicial por escrito de cada Parte demandante debe presentarse en un lapso de 7 días después de constituirse el grupo arbitral. La Regla 8 exige que el grupo arbitral emita un calendario para los procedimientos estipulando la entrega de los restantes alegatos iniciales por escrito y alegatos de réplica, la celebración de una audiencia, así como los procedimientos posteriores a la audiencia, todo ello de acuerdo con los plazos máximos especificados. Los plazos son breves, indicando un intento por que los procesos sean rápidos. El calendario no contempla expresamente otros alegatos o procedimientos.

44. La Regla 7 ni la 8, así como tampoco la carta conjunta de las Partes contendientes de fecha 10 de octubre de 2014, pretenden limitar las cuestiones que pueden abordarse en los alegatos iniciales por escrito de las Partes contendientes o cualquier otro alegato posterior. En particular, ni las Reglas ni la modificación de las Reglas acordada por las Partes contendientes requieren que las Partes contendientes atiendan solamente cuestiones de mérito en sus alegatos iniciales y no cuestiones jurisdiccionales.

45. Tampoco es necesario restringir el alcance de las cuestiones cubiertas por las Reglas 7 y 8 en este asunto para tener una interpretación coherente y razonable a las Reglas o el acuerdo de las Partes contendientes modificando la aplicación de reglas. En la práctica de la OMC y de otros procedimientos de resolución de controversias, las cuestiones jurisdiccionales y otras cuestiones preliminares se pueden y a menudo se plantean y argumentan junto con cuestiones de mérito en los mismos alegatos y procedimientos. Es verdad que un grupo arbitral puede encontrarse en la postura de tener que hacer caso omiso a evidencia y argumentos que van con los méritos de una controversia si se halla sin jurisdicción o de otra forma incapaz de proceder con un análisis de los méritos del demandante. Pero esto no es ni inviable ni está fuera de la contemplación razonable de las Partes que establecen reglas para la resolución de controversias de comercio. Tampoco, como discutiremos más adelante, presenta problemas de debido proceso.

46. De hecho, para que los procedimientos del grupo arbitral operen consistentemente con el CAFTA-RD, las Reglas 7 y 8 deben interpretarse de tal forma que requieren que cuestiones preliminares y cuestiones de mérito sean atendidas en los mismos alegatos y procedimientos – contrario a permitir una bifurcación del procedimiento, con cuestiones preliminares abordadas dentro de una primera fase y las cuestiones de mérito abordadas en una segunda fase (asumiendo que sobrevivan la primera fase). El Artículo 20.13.3 del Tratado requiere que el grupo arbitral

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<sup>9</sup> CAFTA-RD, artículo 10.20.4.

presente un informe inicial, incluyendo la determinación de que si una Parte contendiente ha cumplido con sus obligaciones bajo el Tratado u otra determinación solicitada en el mandato, dentro de los 120 días después de haberse seleccionado al último miembro del grupo arbitral, a menos que las Partes contendientes dispongan lo contrario. La brevedad de este plazo indica que las Partes han dado alta prioridad al proceso expedito.<sup>10</sup> Esto también indica claramente que las Partes no previeron procesos separados para la audiencia y decisión de cuestiones preliminares. En efecto, si el calendario establecido bajo la Regla 8 concede a cada Parte, en cada paso de la secuencia requerida el plazo máximo disponible bajo dicha Regla, el calendario tomaría 119 días en completar. En la ausencia de un acuerdo entre las partes para prorrogar la fecha límite de el informe inicial del grupo arbitral, el CAFTA-RD, por ende, contempla que las Partes ni siquiera recibirán el tiempo máximo permitido en cada paso en la secuencia de procedimientos bajo las Reglas 7 y 8. Por lo tanto, es claro que, excepto por el acuerdo de las Partes contendientes, el Tratado no contempla una serie separada de procedimientos para abordar cuestiones preliminares antes de abordar los méritos de una demanda.

47. Finalmente, advertimos que las Reglas estipulan en cierto detalle las razones por las que un grupo arbitral puede modificar el calendario de los procedimientos. La Regla 8 requiere que el grupo arbitral proporcione tiempo adicional, en caso necesario, para la traducción de los documentos en virtud de la Regla 81, y cumplir con la Regla 12 que trata sobre días festivos y fuerza mayor. En virtud de la Regla 34, un grupo arbitral puede, después de consultar con las Partes involucradas, modificar cualquier período de tiempo aplicable en el procedimiento del grupo arbitral y hacer cualquier otro ajuste procesal o administrativo que pueda requerirse en el procedimiento, así como cuando un miembro del grupo es reemplazado.

48. Por lo tanto, las Reglas requieren que las cuestiones entre las partes se atiendan de acuerdo con una secuencia de procedimientos y un calendario expedito y predeterminado, a menos que las Partes contendientes acuerden lo contrario, o que el grupo arbitral decida que los ajustes son necesarios para cumplir con la traducción u otros requerimientos. Al especificar tanto la secuencia y el calendario de procesos y las razones por las que un calendario puede ser ajustado dentro de los límites de tiempo en el trabajo del grupo arbitral establecido por el Tratado, las Reglas cubren la cuestión de la forma en la que, como cuestión de procedimiento, los grupos arbitrales deben atender las solicitudes de decisiones preliminares.

49. Las modificaciones acordadas por las Partes contendientes en su carta conjunta con fecha del 10 de octubre de 2014 no alteran, y de hecho son consistentes con la aplicación de las Reglas 7 y 8 a cuestiones preliminares. La Regla 1 estipula que las Reglas deberán ser aplicadas a procedimientos de resolución de controversias en virtud del Capítulo 20, a menos que las Partes acuerden lo contrario. En este caso, en su carta conjunta con fecha del 10 de octubre de 2014, las Partes contendientes registraron su acuerdo para modificar el calendario, pero no la secuencia de los alegatos escritos y orales. La secuencia de los procedimientos establecidos en dicha carta refleja los establecidos en las Reglas. La redacción de la carta no ofrece indicación alguna de que

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<sup>10</sup> En efecto, incluso al acordar prorrogar el plazo máximo para que el Grupo Arbitral presente su informe inicial, las Partes contendientes establecieron una fecha límite – el 10 de junio de 2015 – que es solamente dos meses después de presentar los últimos alegatos por escrito. *Vea* la carta de Guatemala y Estados Unidos a la Oficina Responsable (10 de octubre de 2014).

las Partes contendientes buscaran abordar o alterar el alcance de la aplicación de las Reglas en conexión con las cuestiones preliminares. Tampoco existe ninguna evidencia de que las Partes contendientes plantearan hacerlo. Guatemala posteriormente afirmó que este fue un acuerdo hecho de buena fe. Luego de este acuerdo, las Reglas, por ende, siguieron aplicando sujetas solamente a los cambios que el acuerdo de las Partes contendientes introducen al calendario para los procedimientos.

50. Dado que el asunto procesal en cuestión está cubierto por las Reglas, estaría inconsistente con las Reglas y el CAFTA-RD que el grupo arbitral, en virtud de la Regla 27, alterara la secuencia y el calendario de los procedimientos establecidos en la carta conjunta de las Partes contendientes de fecha 10 de octubre de 2014.

### Debido Proceso

51. Guatemala plantea dos inquietudes sobre debido proceso que se relacionan a la forma en la que, como cuestión de procedimiento, el grupo arbitral debe abordar la solicitud de una decisión preliminar, presentada por Guatemala.

52. En primer lugar, como se advirtió anteriormente, Guatemala sostiene que abordar su solicitud de una decisión preliminar después del alegato inicial de Estados Unidos sería una violación al derecho que Guatemala tiene a debido proceso y perjudicaría la preparación de su defensa.

53. No vemos razón alguna por la que el hecho de que el grupo arbitral reciba alegatos y evidencia tanto en cuestiones preliminares y en los méritos de una demanda durante el transcurso de un solo procedimiento (contrario a dos procedimientos separados, uno para cuestiones preliminares y otro para los méritos) violaría el debido proceso o perjudicaría el derecho de una Parte demandada a preparar su defensa. Si dicha Parte plantea exitosamente una cuestión preliminar en cuanto a la jurisdicción del grupo arbitral o la admisibilidad de reclamaciones en particular, un grupo arbitral que haya escuchado los alegatos y evidencia de mérito de la controversia puede, y, en efecto, debe, simplemente hacer caso omiso de dichos alegatos y evidencia, y concluir que no tiene mandato para considerarlos. La Parte que plantea dicha cuestión preliminar es, por lo tanto, perfectamente capaz de hacer valer sus derechos. En este caso, Guatemala argumenta que los Estados Unidos no ha cumplido con los requerimientos legales para una solicitud de grupo arbitral y que el incumplimiento con dichos requerimientos no puede subsanarse posteriormente. Ciertamente, el grupo arbitral es el que decidirá si estos argumentos son correctos y, por lo tanto, en ausencia de razones legales por qué no puede o no debe hacerlo, tiene que proceder a considerarlos. Si el grupo arbitral estuviera de acuerdo con los argumentos de Guatemala, no haría ninguna diferencia en cuanto a la capacidad de Guatemala de hacer valer sus reclamaciones sobre si el grupo arbitral lo decidirá antes o después de haber escuchado los alegatos y la evidencia recibida en los méritos. En cualquier caso, el grupo arbitral simplemente se negaría a considerar dichos alegatos y evidencia.

54. Para llegar a la conclusión anterior, hemos tenido en cuenta la práctica de los grupos arbitrales en los procedimientos de solución de diferencias de la OMC. Aunque dicha práctica ha evolucionado bajo diferentes tratados internacionales, que no son el CAFTA-RD, ambas Partes

contendientes se han referido a la práctica de solución de diferencias de la OMC en sus comunicaciones escritas. Dado que ambas Partes contendientes ven dicha práctica como relevante en este caso, no es inapropiado que nosotros consideremos la forma en la que los grupos arbitrales de solución de diferencias de la OMC han abordado las solicitudes de decisión preliminar y la forma en la que han tomado en cuenta el debido proceso al hacerlo. De hecho, varios grupos arbitrales de solución de diferencias de la OMC han tenido la ocasión de considerar solicitudes de decisión preliminar relacionadas con la suficiencia de la solicitud de grupo arbitral del demandante y la cuestión procesal relacionada de cuándo, en el transcurso del procedimiento, abordar dicha solicitud. Uno de estos grupos arbitrales fue el de la controversia de *Colombia – Puertos de entrada* (DS366). En su informe, dicho grupo arbitral encontró que

... no existe jurisprudencia establecida ni existe una práctica establecida sobre si los grupos arbitrales deben decidir sobre el alcance de su mandato de manera preliminar, es decir, antes de emitir su Informe Provisional a las partes. Varios grupos arbitrales se han reservado la decisión sobre cuestiones preliminares hasta emitir un Informe Final.<sup>11</sup>

55. En vista de las consideraciones anteriores, el grupo arbitral abordará los argumentos de debido proceso que atañen su autoridad y jurisdicción para considerar la demanda siguiendo el cronograma y la secuencia de alegatos y procedimientos establecidos en la carta conjunta de las Partes contendientes de fecha 10 de octubre de 2014, sujeto a los ajustes estipulados en el párrafo 4 de estas razones y cualquier otro ajuste que pueda requerirse por nuevas circunstancias.

56. Sin embargo, esto no afronta la inquietud de Guatemala de que el período de 28 días entre la fecha límite para el alegato inicial por escrito de Estados Unidos y la fecha límite para el de Guatemala – un período que permanece fijo bajo el calendario establecido en la carta conjunta de las Partes contendiente con fecha del 10 de octubre de 2014 - sea insuficiente para permitirle a Guatemala preparar adecuadamente su defensa.

57. Como se advirtió anteriormente, la Regla 34 estipula que “[un] grupo arbitral puede, después de consultar con las Partes involucradas, modificar cualquier período de tiempo aplicable en el procedimiento del grupo arbitral y realizar cualquier otro ajuste procesal o administrativo que pueda requerirse en el procedimiento, como cuando se reemplaza a un miembro del grupo arbitral.” Dado el marco de las Reglas tratadas anteriormente, consideramos que la Regla 34 le brinda al grupo arbitral la discreción de realizar dichos ajustes cuando es necesario para cumplir con los requerimientos legales o prácticos.

58. Puede ser el caso que en ciertas circunstancias, el grupo arbitral pueda hacer ajustes al calendario de los procedimientos que considere necesarios para cumplir los requerimientos de debido proceso. Por otro lado, el grupo arbitral generalmente no debería suponer que existen problemas de debido proceso antes de haber sido demostrados mediante evidencia y argumento. Éste es, en particular, el caso en el que, como aquí, las Partes contendientes expresamente han

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<sup>11</sup> Informe del Grupo Arbitral, *Colombia – Precios Indicativos y Restricciones de los Puertos de Entrada*, WT/DS366/R, párrafo 7.14 & n. 145 (adoptado el 20 de mayo de 2009) (citando ejemplos de otros grupos arbitrales que se han reservado la decisión en cuestiones preliminares hasta emitir el informe final); *vea también* Informe del Grupo Arbitral, *Canadá – Medidas que afectan la exportación de aeronaves civiles*, WT/DS70/R, párrafo 9.15 & n.505 (adoptado, junto con el Informe AB, 20 de agosto de 1999).

acordado un proceso ‘hecho a la medida’ (en lugar del proceso preestablecido, prescrito por las Reglas) mucho después del establecimiento del grupo arbitral e inmediatamente antes de plantear las cuestiones de debido proceso.

59. Por lo tanto, Guatemala podría considerar, en vista del alegato inicial por escrito de Estados Unidos, si, por razones de debido proceso, requiere más tiempo para la preparación de su alegato inicial por escrito que el tiempo estipulado en la carta conjunta del 10 de octubre de 2014. Sugerimos que, si así lo considera, consulte con Estados Unidos a fin de acordar en una prórroga apropiada del plazo. En caso de no existir un acuerdo entre las Partes contendiente, Guatemala puede solicitar una prórroga del plazo al grupo arbitral. Si Guatemala realizara dicha solicitud, el grupo arbitral consideraría si tiene la autoridad, en virtud de las Reglas, para otorgar dicha solicitud y si debería otorgarla en las circunstancias del presente caso. En nuestra resolución establecemos un calendario para encargarnos de tal solicitud.

### **Opinión disidente de la minoría del grupo arbitral**

No estoy de acuerdo con que la Solicitud de Guatemala para una Decisión Procesal Preliminar de fecha 10 de octubre de 2014 sea tramitada junto con el asunto principal, por las siguientes razones técnico-jurídicas:

1) La Solicitud de Guatemala para una Decisión Procesal Preliminar de fecha 10 de octubre de 2014 denuncia la infracción de los artículos 16.2.1(a) y 20.6.1(a) DR-CAFTA en la Solicitud de Establecimiento de un Grupo Arbitral de fecha 9 de agosto de 2011, presentada por los EE.UU., y cuestiona la autoridad (jurisdicción y mandato) del Grupo Arbitral y el debido proceso (derechos de igualdad procesal y de defensa).

Por tanto, la Solicitud de Guatemala para una Decisión Procesal Preliminar de fecha 10 de octubre de 2014 no se refiere al asunto principal (fondo), sino que a una cuestión preliminar (mediante la cual se cuestiona la jurisdicción y mandato del Grupo Arbitral y el debido proceso), de previo y especial pronunciamiento, porque no puede iniciarse el procedimiento arbitral (escrito inicial, réplica, dúplica, audiencia, pruebas, informe final) sin que la misma se haya resuelto, bajo el principio de congruencia, que rige el procedimiento de solución de controversias (Capítulo 20 CAFTA-RD).

2) Hipotéticamente y sin prejuzgar, si el Grupo Arbitral, después de analizar el asunto, determinare que la Solicitud de Establecimiento de un Grupo Arbitral de fecha 9 de agosto de 2011, presentada por los EE.UU., no cumple con los requisitos exigidos en los artículos 16.2.1(a) y 20.6.1(a) CAFTA-RD, inexorablemente el procedimiento tendría que retrotraerse a esa etapa previa, por lo que no es razonable iniciar el procedimiento arbitral sin que el Grupo Arbitral haya analizado y resuelto la referida cuestión preliminar.

3) La Solicitud de Guatemala para una Decisión Procesal Preliminar de fecha 10 de octubre de 2014 supone una clara manifestación de voluntad de modificar la calendarización acordada con los EE.UU., por lo que debe entenderse que ya no existe consenso de las partes sobre la misma, así como que el Grupo Arbitral es el llamado a resolver. Al efecto, el artículo 27 de las Reglas de Procedimiento (Capítulo 20 CAFTA-RD) establece: “Cuando surja una cuestión procesal que no esté cubierta por estas reglas, el grupo arbitral puede adoptar un procedimiento apropiado que no sea inconsistente con el Tratado ni con estas reglas”.

4) Considerando que han transcurrido 38 meses desde que se presentó la Solicitud de Establecimiento de un Grupo Arbitral de fecha 9 de agosto de 2011, presentada por los EE.UU., y tomando en cuenta que el trabajo del Grupo Arbitral fue suspendido varias veces, hasta por 6 meses, no es razonable que el Grupo Arbitral, a pesar de aceptar que debe analizarse y resolverse la cuestión preliminar planteada, no se tome el tiempo necesario para discutir sobre objeciones a su autoridad (jurisdicción y mandato) y al debido proceso, antes de que se presente el escrito inicial por parte de los EE.UU.

5) Por simple economía procesal, no es razonable que el cuestionamiento u objeción de Guatemala, en cuanto a la autoridad (jurisdicción y mandato) del Grupo Arbitral y al debido proceso, a la Solicitud de Establecimiento del Grupo Arbitral de fecha 9 de agosto de 2011, presentada por los EE.UU., se resuelva junto con el asunto principal y no previamente.

**Annex 2: Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of Redacted Evidence**

English

DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES FREE TRADE  
AGREEMENT

ARBITRAL PANEL ESTABLISHED PURSUANT TO CHAPTER TWENTY

**IN THE MATTER OF**

**GUATEMALA – ISSUES RELATING TO THE OBLIGATIONS UNDER ARTICLE 16.2.1(a)**

Ruling on Request for Extension of Time to File Initial Written Submission and on the Treatment of  
Redacted Evidence

February 26, 2015

Panel Members

Professor Kevin Banks (Chair)

Mr. Mario Fuentes Destarac

Mr. Theodore R. Posner

## **Statement of Reasons of the Panel Majority**

### **I. Introduction and Disposition**

1. Guatemala requested that the panel extend the deadline to file its initial written submission, and that the panel instruct the United States to provide a complete set of non-redacted and legible versions of certain exhibits submitted in support of its initial written submission. Guatemala asked that the panel find that the initial written submission of the United States was not properly submitted until it has done so. In the alternative, Guatemala requested that the panel strike the redacted documents from the record. The United States opposed each of these requests.

2. On December 31, 2014 the panel issued the following majority determination:

The panel finds that it is without authority to instruct the United States to submit unredacted copies of the exhibits submitted with its initial written submission. The panel will assess what effects the redactions have, if any, on the probative value of those exhibits in the course of dealing with the dispute on its merits.

The panel declines to treat any evidence as inadmissible at this stage of the proceedings. The panel will keep under review the question of the treatment of evidence from anonymous sources and may revisit the question of the admissibility of such evidence at a later stage of the proceedings.

The panel hereby extends the deadline for the filing of Guatemala's initial written submission to February 2, 2015.

The panel notes that this extension will necessitate adjustments to other deadlines, including the deadline for the panel to submit its initial report to the disputing Parties (as would have been the case in any event under the previously agreed extension of the deadline for Guatemala's first written submission). The panel therefore invites the disputing Parties to confer with a view to agreeing on appropriate adjustments to the timetable for proceedings. In the absence of agreement between the disputing Parties on such matters by January 15, 2015, the panel will propose adjustments for the disputing Parties' consideration.

3. The reasons of the panel majority are set out immediately below.

### **II. Background**

4. In a letter to the disputing Parties of October 30, 2014, the panel confirmed a deadline of December 1, 2014 for Guatemala to file its initial submission. The panel also stated that

[if] Guatemala considers that it requires as a matter of due process additional time to prepare its initial written submission, the panel invites it to confer with the United States of America on an appropriate extension and thereafter, but in

any event by no later than November 10, 2014, make a request for such an extension to the panel.

5. In a letter to the panel dated November 10, 2014 Guatemala indicated that it had conferred with the United States regarding such an extension of time, but that the disputing Parties had not reached agreement. Guatemala requested that the panel extend the deadline for filing its initial written submission to February 1, 2015.

6. In a letter to the panel dated November 12, 2014 the United States objected to Guatemala's request, but stated that it would not object to an extension to January 9, 2015.

7. On November 18, 2014 the panel sent to the disputing Parties a letter asking if they would be amenable to extending the deadline in question to January 14, 2015, and requesting that each Party submit its answer to this question in writing to the Responsible Office by no later than Thursday, November 20, 2014.

8. On November 20, 2014 the United States responded to the panel's request by agreeing to that extension.

9. However, Guatemala's letter to the panel of that same day raised new issues. It drew the panel's attention to "the fact the United States redacted important information from 135 of its exhibits and, as of today, the United States has neither provided Guatemala nor the Panel with non-redacted versions of such exhibits."<sup>1</sup> Guatemala took the position that "[b]y redacting information from these exhibits, the United States is acting in a manner contrary to the Model Rules of Procedure ("MRP") and violated Guatemala's due process rights, including its right to have an adequate opportunity to prepare its case and to respond to adverse evidence."<sup>2</sup> Guatemala noted that "the information redacted from the exhibits includes the identity of the person providing the statements, the name of the judges participating the labor legal proceedings, the names of the inspectors from the General Inspection Directorate (GLI) in charge of inspections in the cases identified by the United States and the case number of certain domestic proceedings."<sup>3</sup>

10. The letter went on to request that the Panel instruct the United States to provide the Panel and Guatemala, without delay, a complete set of non-redacted and legible exhibits; that in the meantime, the panel treat the United States' initial written submission as not properly submitted; or that in the alternative the panel strike the redacted exhibits from the record of these proceedings.

11. Guatemala also stated in its November 20, 2014 letter that if the United States were to provide complete non-redacted versions of all exhibits by November 21, 2014, it would be in a position to file its initial written submission by Monday, February 2, 2015. On the other hand,

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<sup>1</sup> Letter from Guatemala to the panel Chair., para 3 (November 20, 2014).

<sup>2</sup> Ibid at para 4.

<sup>3</sup> Ibid at para 5.

in the event that the United States were to take more time in providing complete non-redacted versions of all the exhibits, Guatemala requested that the Panel adjust the deadline to file its written submission in the light of such delay. Finally, Guatemala stated that if the panel were to strike the redacted exhibits from the record it would be in a position to file its initial written submission by January 16, 2015.

12. On November 21, 2014 the panel sent a letter to the Disputing Parties extending the deadline for the filing of Guatemala's initial written submission to January 14, 2015. The panel indicated in that letter that it would consider whether a further extension was warranted, and requested that the United States provide any written response to Guatemala's November 20 letter by November 25, 2014.

13. On November 25, 2014 the United States sent a letter to the panel taking issue with Guatemala's requests of November 20, and refusing to agree to any extension of time beyond January 14, 2015. In its letter the United States stated that it had acted in accordance with the Rules (including, in particular, Rules 15 and 16) in the presentation of its initial written submission. It maintained that, as relevant here, the Rules address the treatment of information submitted to the Panel and other Parties and designated as "confidential," but they "do not address what information does or does not need to be submitted to the Panel and do not govern submitting evidence with material already redacted."<sup>4</sup> The United States then explained that the "redactions it has made to factual information are imperative to protect the safety and security of the workers who have provided their personal information, including in court records, for the purposes of these proceedings with the understanding that they would be protected by the Rules".<sup>5</sup> The letter went on to state that "the United States remains deeply concerned that disclosing information regarding these workers could subject them to retaliation in the workplace."<sup>6</sup>

14. On December 5, 2014 the panel sent a letter to the disputing Parties requesting that they attend a telephone hearing to address the following matters:

1. Whether the panel has authority to extend the deadline for filing Guatemala's initial written submission for under Rule 27 or Rule 34 to allow Guatemala additional time to locate documents and witnesses in response to evidence submitted by the United States from which identifying information had been removed;
2. How to calculate how much time Guatemala requires, as a matter of necessity, to locate such documents and witnesses; and
3. Whether the United States might assist in expediting that process by providing information (such as file numbers) enabling Guatemala to identify relevant files and documents.

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<sup>4</sup> Letter from the United States to the panel Chair, para 3 (November 25, 2014).

<sup>5</sup> Ibid, para 5.

<sup>6</sup> Ibid.

15. The disputing Parties attended a telephone hearing on December 11, 2014. At that hearing the panel heard submissions on each of the above matters. Guatemala stated that while it had located some of the court files in question, a number of courts were located in different municipalities in remote locations, and that it was difficult to make progress in view of the upcoming Christmas holiday season. As a result, Guatemala said that it would be difficult for it to commit to a fixed deadline. The United States stated that it could not agree to disclose any information that would identify, directly or indirectly, workers providing information to the panel, because those workers had made their statements on condition that the United States would not reveal their identity in the course of these proceedings. When asked by the panel Chair whether it might consider discussing with the workers in question the release of some potentially identifying information, such as court file numbers, in light of confidentiality safeguards provided under the Rules, the United States indicated the workers had insisted on remaining anonymous with an understanding of the operation of the proceedings.

16. The United States sent a letter to the panel (dated December 16, 2014, and transmitted by the Responsible Office to the Panel on December 17, 2014) discussing certain legal authorities to which it had referred in the course of the December 11 hearing, related to the use of evidence with redactions in other dispute settlement proceedings. On December 17, 2014, Guatemala requested an opportunity to respond. The panel, by letter dated December 18, 2014 requested that Guatemala provide any such response no later than December 22, 2014. Guatemala responded by letter of that date.

### **III. Positions of the Disputing Parties**

17. We first summarize the arguments of the disputing Parties with respect to Guatemala's request for an extension of time to file its initial written submission. Then we canvass their positions on Guatemala's request for further relief in respect of the redactions of evidence.

#### *Request for Extension of Time*

18. Guatemala's November 10, 2014 request for an extension of time to February 1, 2015 advances five arguments.

19. First, Guatemala submits that it should not be required to file its initial written submission in just one month and five days because the United States decided when to bring its complaint and took as much time as it needed to prepare its offensive case.

20. Second, Guatemala contends that the panel request of the United States was drafted in such broad and vague terms as to fail to present the problem clearly or provide Guatemala with the opportunity to know in advance the case it had to answer before the United States filed its initial written submission on November 3, 2014.

21. Third, Guatemala points out that it received the translation into Spanish of the initial written submission of the United States only on November 10, 2014 and that a number of Guatemalan officials who do not read English were not in a position to understand that

submission until November 17, 2014, ten days before the deadline for filing Guatemala's initial written submission.

22. Fourth, Guatemala maintains that the redaction of information from the exhibits of the United States places a burden on Guatemala to "search among thousands of administrative and judicial files to find those that support US allegations and to verify the status of each of the instances in which the United States claims that Guatemala allegedly failed to enforce labor laws"<sup>7</sup>, thus impeding its ability to prepare its initial written submission.

23. Finally, Guatemala notes that members of the team of officials assigned to Guatemala's case take vacations in November, December and January and that the team would be complete and fully operational only on January 16, 2015.

24. In its response of November 12, 2014 the United States affirms its willingness to extend the deadline in question to January 9, 2015 in light of translation requirements and conflicts with holidays created by those requirements. On the other hand, it takes the position that Guatemala's reasons for requesting an extension beyond January 9 are not compelling, arguing that the alleged breadth and vagueness of the US panel request is an issue for the panel to address at and following the hearing, that Guatemala's internal review processes cannot justify delaying the proceedings, and that Guatemala was able to begin searching for the documents that it needed to respond to the exhibits submitted by the United States upon receipt of Spanish versions of those exhibits.

25. In the course of the December 11, 2014 telephone hearing, Guatemala maintained that the panel has authority under Rule 34 to extend deadlines for due process reasons, and that it should do so in order to ensure that Guatemala has the opportunity to make a complete response to the allegations of the United States. (Guatemala's argument that such an opportunity is required by due process is summarized below as part of its arguments for relief against redacted evidence.) The United States acknowledged that, subject to Article 20.13.3 of the Agreement, the panel had the authority under Rule 34 to modify time periods where required as a matter of necessity for the appropriate management of the proceedings, but reiterated its view no such modification is justified in this case.

#### *Request for Further Relief in Respect of Redacted Evidence*

26. In its letter of November 20, Guatemala makes two arguments in support of its request for further relief in respect of the redacted documents.

27. First, Guatemala argues that the redactions of information from exhibits submitted by the United States are contrary to the Rules, because the Rules require that all information designated as confidential must be disclosed to approved persons of the other party.<sup>8</sup>

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<sup>7</sup> Letter from Guatemala to the panel Chair, para 6 (November 10, 2014).

<sup>8</sup> Supra note 1 at para 4.

28. Second, Guatemala submits that: “[w]ithholding information contained in exhibits provided as evidence from a respondent party violates the basic due process obligations recognized in international and municipal law” and that “[i]t is a fundamental tenet of due process that a party has a right to adequately prepare its defence and to see and respond to evidence put forward against it by the other party”.<sup>9</sup> Without the redacted information, Guatemala asserts, it is precluded from locating the administrative and judicial files referred to in the exhibits, from verifying the status of each of the cases cited by the United States in support of its arguments, and from verifying the accuracy and truthfulness of the exhibits provided by the United States. Taken together, Guatemala submits, these limitations severely constrain its ability to respond to the claims and evidence put forward by the United States and to prepare its own written submission within the deadline set by the panel.<sup>10</sup>

29. Guatemala also suggests in its November 20 letter that its rights to adequately prepare its defence and to see and respond to evidence put forward against it require disclosure of the identity of any witnesses providing evidence against it in these proceedings. Guatemala notes that both U.S. and Guatemalan labour statutes require disclosure of the identity of witnesses providing evidence in tribunal proceedings.<sup>11</sup> It points to Rule 35 of the International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings, which gives parties the right to examine witnesses and experts.<sup>12</sup> Guatemala argues that it is impossible to exercise such rights unless the identity of witnesses is disclosed to the examining party. Guatemala notes in addition that Article 6.3 of the European Convention on Human Rights gives persons the right to examine or have examined witnesses testifying against him or her, and argues that this right applies in both civil and criminal proceedings.<sup>13</sup> Finally, Guatemala cites the *Contador Velasco* decision of the Court of Arbitration for Sport noting that admitting anonymous evidence potentially infringes the right of a party to be heard and to a fair trial.<sup>14</sup> Guatemala notes that the confidentiality provisions of the Rules would prevent disclosure of the identities of the workers in question and submits that the purpose of the redactions is simply to obstruct the preparation of its defence.

30. In its response of November 25, 2014, the United States argues that the Rules deal only with the treatment of evidence that a Party chooses to submit to the panel and other Parties, and they do not require a Party to submit particular evidence even if it is in that Party’s possession. It

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<sup>9</sup> Ibid at para 17.

<sup>10</sup> Ibid at para 5.

<sup>11</sup> Ibid at paras 17 and 18.

<sup>12</sup> Ibid at 18.

<sup>13</sup> Ibid at para 20.

<sup>14</sup> Ibid, citing CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC and CAS 2011/A/2386 WADA v. Alberto Contador Velasco and RFEC, <http://tas-cas.org/d2wfiles/document/5648/5048/0/FINAL20AWARD202012.02.06pdf>

submits that Guatemala's reliance on the Rules is therefore misplaced.<sup>15</sup> The United States also points out that all of the information provided to the panel has also been provided to Guatemala. It contends that Guatemala therefore in fact has an opportunity to see and respond to all of the evidence put forward by the United States in these proceedings.<sup>16</sup>

31. At the telephone hearing of December 11, 2014, Guatemala maintained that both the Rules and the due process principle that a party has the right to defend itself place an obligation on the United States to disclose the identity of witnesses providing evidence in these proceedings. It stated that it needs to know the identity of the witnesses at this stage of the proceedings to test the veracity of their evidence, to formulate its defence strategy, and to prepare for cross-examination. It argued that it should have a right at the hearing to cross-examine such witnesses in order to test the veracity of their statements. Guatemala submitted that the panel has authority by virtue of Rule 27 to grant the relief that it seeks in connection with redacted evidence, since the treatment of evidence is not covered by the Rules.

32. The United States responded that the Rules do not contemplate the examination of witnesses at hearings, that the Rules are designed for state-to-state dispute settlement, and that in any event the issue at hand is not the credibility of the witnesses but what actions Guatemala did or did not take to enforce its labour laws. The United States contended that Guatemala is in a position to state whether it has taken such action because it has information on employer company names and events that enable it to locate information relevant to its defence, even in the absence of information that personally identifies the workers in question. It also took the position that in any event the ability to cross-examine is not relevant to the filing of an initial written submission.

33. Guatemala replied that the United States is seeking to reverse the burden of proof. It also pointed out that some of the companies mentioned in the documents submitted by the United States do not exist anymore. It did not however identify which companies those were.

34. In its letter to the panel of December 16, 2014 the United States submits that "the use of evidence with redactions in international dispute settlement is not uncommon", and that "[w]hether applied to protect personally identifiable information, business confidential information, or state secrets, redactions are a frequent feature in state-to-state proceedings."<sup>17</sup> The United States refers the panel to dispute settlement panel reports in two WTO dispute settlement proceedings (*Argentina – Measures Affecting the Importation of Goods*<sup>18</sup> and *Turkey – Measures Affecting the Importation of Rice*),<sup>19</sup> and a party's memorial in an ICJ proceeding

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<sup>15</sup> Supra note 4 at para 3.

<sup>16</sup> Ibid at para 4.

<sup>17</sup> Letter from the United States to the panel Chair, para 2 (December 16, 2014).

<sup>18</sup> Ibid at para 3. The United States makes reference to the Panel Report, *Argentina- Measures Affecting the Importation of Goods*, WT/DS438/444/445/R circulated August 22, 2014, para 6.61.

<sup>19</sup> Ibid at para 4. The United States makes reference to the Panel Report, *Turkey- Measures Affecting the Importation of Rice*, WT/DS334/R adopted October 22, 2014, para 2.53..

(*Case Concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), Memorial of Croatia, March 1, 2001). The United States also refers to two WTO agreements -- the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade* (the Anti-Dumping Agreement), and the WTO *Agreement on Subsidies and Countervailing Measures* (the SCM Agreement) – and maintains that these agreements expressly anticipate and in some instances require the submission of evidence to panels with redactions. The United States notes that these agreements deal with domestic trade remedy actions in which certain information may be given to a domestic investigating authority on a confidential basis. It contends that when such actions are presented for review to a WTO dispute settlement panel, such information is redacted from documents submitted to the panel.<sup>20</sup> The United States contends that it cannot be required to disclose the identity of persons providing information to it in confidence. The United States further notes that in none of the instances cited above has a panel considered that it must extend deadlines in order for a party to take steps to discover the information that has been redacted.<sup>21</sup>

35. In its letter to the panel of December 22, 2014 Guatemala asserts that in most jurisdictions, including the United States, parties cannot be held liable or convicted on the basis of secret evidence. It further contends that none of the three cases cited by the United States offers support for admitting redacted evidence in these proceedings.<sup>22</sup> Specifically, Guatemala submits that in *Argentina – Measures Affecting the Importation of Goods*, the panel was seriously troubled by the parties’ refusal to disclose evidence, and elected to proceed cautiously and deliberately with the anonymous letters submitted to it.<sup>23</sup> It argues further that unlike Argentina, which in that case had the agreements that were most relevant to the proceedings in its possession, Guatemala does not have access to “a large number of statements submitted by the United States as part of its exhibits”, and therefore is not able to challenge the veracity of the statements to which it must respond.<sup>24</sup> Guatemala notes that in *Turkey – Measures Affecting the Importation of Rice* Turkey elected not to submit the redacted evidence at issue, and that consequently the panel found that it had failed to rebut the *prima facie* case of the complainant (the United States).<sup>25</sup> Guatemala maintains further that the provisions of the *SCM* and *Anti-Dumping* agreements to which the United States refers govern the treatment of confidential evidence by domestic tribunals rather than by international dispute settlement panels, and that in any event, in proceedings governed by those agreements, confidential information must be disclosed to the investigating authority and to adverse parties.<sup>26</sup> Finally, Guatemala contends that the *Croatia v. Serbia* case involved accusations of genocide and is therefore not comparable

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<sup>20</sup> Ibid at para 5.

<sup>21</sup> Ibid at Para 7.

<sup>22</sup> Letter from Guatemala to the panel Chair, para 3 (December 22, 2014).

<sup>23</sup> Ibid at para 4.

<sup>24</sup> Ibid at para 7.

<sup>25</sup> Ibid at para 11.

<sup>26</sup> Ibid para 12 and 13.

to the case at hand, that in any event the prosecution in that case deposited a document containing the names of anonymous witnesses with Registrar of the Court, and that the Court has yet to pronounce on its treatment of the anonymous evidence in question.<sup>27</sup>

#### **IV. Reasons for Decision**

36. We address Guatemala's requests in connection with redacted evidence first, as they subsume the extension of time requested by Guatemala in its letter of November 10, 2014.

##### *1. Request for interim relief against redactions of documents*

37. We begin by noting that all information submitted by the United States to the panel is in Guatemala's possession. What Guatemala seeks is the disclosure by the United States of information that the United States removed from documents submitted to the panel. The information in question is information that identifies workers who furnished statements that the United States submitted in evidence or allegedly could lead to the identification of such workers. The information includes the names of the workers, as well as the names of labor inspectors and judges and case numbers of the matters in question. The United States affirms that it made these redactions in response to concerns by the workers in question that they would be subject to reprisals should their identities become known in the course of these proceedings.

38. Guatemala notes that information as to the identities of the workers in question could be designated as confidential under the Rules. This would restrict its distribution to approved persons, prevent its disclosure to the public and require its destruction following these proceedings. Guatemala argues that, in light of these confidentiality protections, the redactions can only be construed as an attempt by the United States to obstruct Guatemala in the preparation of its defence.

39. We cannot conclude that this is the case. The information provided to the panel by the United States is that the workers in question appear not to have accepted the confidentiality provisions of the Rules as sufficient protection of their identities, and to have made non-disclosure of their identities a condition upon which they provided their evidence. While this is regrettable, we cannot conclude, without more, that it reflects bad faith on the part of the United States to have offered assurances to the workers in question that it would not disclose their identities in the course of these proceedings.

40. Guatemala's request for relief against the redactions is based on two arguments. First, Guatemala submits that by redacting exhibits in support of its initial written submission the United States has violated the Rules of Procedure. Second, Guatemala takes the position that allowing the United States to file redacted exhibits in support of its initial written submission would violate Guatemala's right to procedural fairness (i.e., due process) even apart from its inconsistency with particular provisions in the Rules. We consider each argument in turn.

##### *A. Whether the Redaction of Information Violates the Rules*

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<sup>27</sup> Ibid at para 16.

41. A Party to dispute settlement proceedings under Chapter 20 of the DR-CAFTA has a prerogative to submit such evidence as it sees fit in support of its position. A corollary to this proposition is that a Party may choose not to submit particular evidence. In other words, a Party may choose which evidence to submit and which evidence not to submit. The first issue before us is as follows: when a Party submits evidence in the form of witness declarations, do the Rules require that it also submit personal identifier or other information related to such declarations?

42. The answer is no. The Rules do not preclude a Party from submitting evidence in the form of anonymous witness declarations. Nor do they require a Party to supplement the submission of witness declarations by providing personal identifier or other information that could help to put such declarations in context. In fact, the Rules impose no affirmative obligation on CAFTA disputing Parties to assist the fact-finding process. In this regard, the CAFTA Rules differ from the WTO Dispute Settlement Understanding, of which the CAFTA Parties unquestionably were aware when they drafted the Rules. The WTO DSU contains, in its Article 13, a duty of collaboration whereby a disputing Party may have an obligation to produce certain information upon request by a dispute settlement panel even if the Party had not chosen to submit such information in the first instance.<sup>28</sup> The DR-CAFTA Rules contain no corresponding provision.

43. Guatemala submits that Rules 15 and 16 require a disputing Party to disclose to approved persons representing the other disputing Party all information that its has designated as confidential, and that therefore the United States must disclose to it all information redacted from the exhibits in question. However, the information designated as confidential under Rules 15 and 16 is factual information already included in a Party's submission or other document. As the heading under which they are located indicates, Rules 15 and 16 are rules regarding the public release of written submissions and other documents filed in panel proceedings. The wording of Rules 15 and 16 makes it clear that they deal only with information already contained in such documents and not with whether any particular information must be included in them. Rule 15 enables a participating Party to "designate... for confidential treatment specific *factual information it includes* in a Party submission" [emphasis added]. Rule 16 requires a Party that "designates information *contained in a document* as confidential" [emphasis added] to prepare a non-confidential version of the document (in which the confidential information is redacted and its own confidential information is summarized) for release to the public.

44. The United States has provided to the panel and to Guatemala all information designated as confidential in its initial written submission. The redaction of information from documents presented to both the panel and the other disputing Party is not a subject addressed by these Rules. The Rules therefore provide the panel with no authority to instruct the United States to provide the panel and Guatemala with unredacted copies of the exhibits submitted in support of its initial written submission. Nor do the Rules provide any basis upon which the panel could declare that the initial written submission of the United States was not properly submitted simply because it contains exhibits from which the United States has redacted information.

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<sup>28</sup> That article provides, among other things, that "A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate."

*B. Whether allowing the filing of redacted evidence in support of the initial written submission of the United States violates due process*

45. Guatemala submits that, apart from any express requirement of the Rules, “due process” – by which we understand Guatemala to mean fundamental procedural fairness -- requires that a Party have an adequate opportunity to prepare its defence and to respond to evidence put forward against it. It argues that the redactions deprive it of those opportunities by undermining or impairing its ability to identify and locate evidence in support of its defence, to verify and challenge the accuracy and truthfulness of the exhibits provided by the United States, and to prepare to cross-examine witnesses providing evidence against it.

46. The first question we must address is whether the two procedural standards to which Guatemala refers – *i.e.*, an adequate opportunity for a respondent to prepare its defence and an adequate opportunity for a respondent to respond to evidence put forward against it – are elements of the process that is due to a disputing Party in a proceeding under CAFTA Chapter 20. If they are, then the next question we must address is whether admission into the record of the redacted documents submitted by the United States would be contrary to either of those standards.

47. The first question is easily addressed. We see no controversy in accepting the proposition that a respondent in a CAFTA Chapter 20 dispute settlement proceeding is entitled to an adequate opportunity to respond to evidence submitted against it. As noted in our reasons for decision of November 20, 2014, although the WTO agreements are not at issue in this proceeding, both disputing Parties have referred to reports of WTO dispute settlement panels and the Appellate Body as persuasive. We find it helpful to refer to WTO precedent here. We note, in particular, the Appellate Body’s observation in one of its very first cases that “a [dispute settlement] panel must . . . be careful to observe due process, which entails providing the parties with an adequate opportunity to respond to the evidence submitted”.<sup>29</sup> Equally important, the Appellate Body has stated that “[a] party must not merely be given an opportunity to respond, but that opportunity must be meaningful in terms of the party’s ability to defend itself adequately.”<sup>30</sup> It is reasonable to conclude that the CAFTA Parties would have expected the application of this principle in panel proceedings under Chapter 20.

48. Guatemala also asserts that due process rights include the right of a party to “an adequate opportunity to prepare its case.”<sup>31</sup> This would appear to include but extend beyond the right to an adequate opportunity to respond to evidence. For present purposes the panel need not canvass the full extent of any such right. We observe that it must include an adequate opportunity to formulate a response to evidence submitted by an opposing party, as this is a logical extension of the right to an adequate opportunity to respond to evidence, and therefore also an element of due

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<sup>29</sup> Appellate Body Report, *Australia – Salmon*, WTO Doc. WT/DS18/AB/R, 20 October, 1998, para 272

<sup>30</sup> Appellate Body Report, *US – Gambling*, WT/DS285/AB/R, 7 April 2005, para 270.

<sup>31</sup> *Supra* note 1 at para 4.

process. If the redactions substantially impair either opportunity, allowing the United States to submit the redacted evidence at issue would violate applicable due process norms. We turn therefore to whether this has happened in the case at hand.

49. The initial written submission of the United States alleges numerous instances of failure by Guatemalan government and court officials to act in accordance with obligations under Article 16.02 of the Agreement. Some of those allegations are based upon statements of anonymous employees claiming to have had dealings with those officials. Many of the documents submitted in support of the allegations have been redacted so as to remove one or more of the identity of the person making the statement, the name or names of the judges or labor inspectors involved in a particular case, or the case number.

50. Guatemala raises three particular due process concerns with these redactions.

51. First, Guatemala asserts that the redaction of case numbers prevents it from locating the administrative and judicial files referred to in the exhibits, and therefore from verifying the status of each of the cases cited by the United States in support of its arguments.

52. If the redactions entirely prevented Guatemala from locating files documenting the handling of cases that are the subject of allegations in the written submission of the United States, they might substantially impair Guatemala's ability to adequately respond to the case against it.

53. However, the evidence before the panel does not establish that the redactions in question make locating the relevant files impossible. In its November 10, 2014 letter Guatemala notes that the redactions would require it to "search among thousands of judicial files to find those that support US allegations and to verify the status of each of the instances in which the United States claims that Guatemala failed to effectively enforce labor laws".<sup>32</sup> This suggests that locating the files will be time-consuming and burdensome, but not impossible. As the United States notes, information upon which to base a file search - such as the dates of relevant events and names of employers - was not redacted from the exhibits. When asked at the telephone hearing to explain the difficulties that it faced in locating the relevant files, Guatemala pointed to the remote location of some of the court offices in which documents were located, but did not offer any information on particular problems with searching court and inspectorate records. In its December 22, 2014 letter to the panel, Guatemala describes the task of locating the files in question in the absence of file numbers as "extremely burdensome" but offers no reason to think that it cannot be done given reasonable time. We cannot conclude on the basis of the evidence before us that locating the relevant records is impossible.

54. To the extent that the redaction of information makes the location of necessary evidence burdensome and time-consuming but not impossible, the appropriate response of the panel is to consider an extension of time. The panel returns to this question below.

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<sup>32</sup> Ibid at para 6.

55. A second argument raised by Guatemala is that the redactions “preclude it from verifying the accuracy and truthfulness of the exhibits submitted by the United States”.<sup>33</sup> On its face this could be an important concern from a due process perspective, since an ability to verify or refute the accuracy and truthfulness of evidence is a key element of a meaningful opportunity to adequately respond to it. There appear to be two aspects to Guatemala’s concern. The first is that Guatemala may be precluded from verifying or refuting the factual assertions made by witnesses in the exhibits at issue. The second is that Guatemala may be precluded by the anonymity of those witnesses from examining characteristics or personal motives that may affect the reliability of their evidence. We consider each aspect in turn.

56. With respect to the first, the panel cannot conclude at this time that Guatemala is precluded from verifying or refuting the material allegations contained in the redacted exhibits submitted by the United States. It may be that by reference to its own files and interviews of its own officials, Guatemala is able to verify or refute the allegations of the United States. However, if and to the extent that proves to be impossible, the panel will consider at the appropriate time whether particular redactions have prevented the United States from meeting its burden of establishing the facts it has alleged or whether further relief may be required.

57. Turning to the second aspect, tribunals should treat anonymous evidence with caution. The anonymity of a witness may conceal possible motives or characteristics of the witness that affect the reliability of his or her evidence. If the reliability of a witness remains unexamined, a decision can be unfair.

58. On the other hand, not all anonymous evidence necessarily presents these problems. 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.

59. At this point in the proceedings, it would be premature for the panel to determine whether the credibility of the witnesses whose anonymous testimony was submitted by the United States is at issue and whether the inability to test that credibility precludes Guatemala from verifying or refuting the accuracy and truthfulness of the assertions in question. Should the evidence and argument in Guatemala’s initial written submission put the credibility of the anonymous witnesses into question, then the panel would have to consider what weight, if any, to give to the disputed anonymous evidence. At this time, however, it would be inappropriate for the panel to presume that the credibility of the anonymous witnesses will be at issue and that absent an opportunity to test that credibility Guatemala would be unable to verify or refute the accuracy and truthfulness of particular assertions, and based on that presumption to exclude the redacted evidence submitted by the United States.

60. Guatemala suggests that the anonymity of evidence submitted by the United States, by putting it in the position of having to submit evidence in order to respond to it, is effectively seeking to reverse the burden of proof. By this we understand Guatemala to be saying that allowing the United States to redact identifying information from the exhibits in question

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<sup>33</sup> Supra note 1 at para 5..

effectively prevents Guatemala from simply challenging the credibility of the witnesses testifying in those exhibits without producing independent evidence of its own.

61. We do not agree that the redaction of certain information from evidence submitted by the United States amounts to reversing the burden of proof. Guatemala remains free to submit evidence of its own or to refrain from doing so, just as it would be if the United States had not redacted information from the documents it submitted. In either situation, Guatemala could argue that the United States had failed to make out a *prima facie* case, thus relieving Guatemala of the burden to put on any affirmative evidence of its own; or it could accept that the United States had made out a *prima facie* case and put on its own evidence to rebut that case; or it could argue the two different positions in the alternative. We fail to see how the redactions by the United States affect the options available to Guatemala. Likewise, in either situation, if Guatemala chose to challenge the credibility of witnesses, it presumably would do so either by arguing that the testimony at issue is not credible or by producing evidence demonstrating its incredibility. That would be so regardless of whether the witness's identity were known or not. It is possible that knowing a witness's identity would enable Guatemala to find evidence about the witness that might help to impeach his or her credibility. But, as stated above, at this stage of the proceeding, it is premature to state whether the credibility of particular witnesses is at issue and, if so, how to address the contested credibility in our weighing of the evidence.

62. If Guatemala contended that the United States had failed to make out a *prima facie* case and therefore declined to put on any evidence of its own, the panel would be required, as it would be in any event, to assess the probative value of any evidence submitted by the United States in the course of determining whether the latter has met its burden of proof. In doing so, the panel would be required to take into account all aspects of the evidence, including the fact that the knowledge, characteristics and motives of witnesses had remained unexamined, a matter which may affect the probative value assigned to such evidence.

63. In sum, while it is theoretically possible that a consequence of the United States' redactions could be an inability for Guatemala to verify or refute the accuracy and truthfulness of certain exhibits submitted by the United States, and while such inability could implicate the due process standards to which Guatemala has referred, it is premature at this stage of the proceeding to conclude that this necessarily will be the case. Therefore, at this time we reject Guatemala's second argument for seeking exclusion of the redacted exhibits submitted by the United States.

64. Guatemala's third argument is that the redaction of identifying information from exhibits, by maintaining the anonymity of the witnesses in question, prevents it from preparing to cross-examine them. Guatemala submits that without being able to prepare for cross-examination it is denied an adequate opportunity to defend itself.

65. For the reasons that follow, we do not accept this position.

66. First, Guatemala's argument presumes that ordinarily it would have the right to cross-examine witnesses. However, the CAFTA Rules of Procedure do not contemplate such a right. Rules 44 and 45 envisage that hearings will provide an opportunity only for argument by the disputing Parties on the basis of previously submitted documents. The fact that other

international instruments, such as the ICSID Arbitration Rules, do provide for cross-examination of witnesses simply makes the absence of such a provision under the CAFTA Rules all the more notable.

67. That the CAFTA Rules do not provide for the cross-examination of witnesses is not contrary to fundamental procedural fairness. First, due process standards do not require in every case the right to examine witnesses with respect to statements submitted in evidence. In some instances such statements will not be material to the issues before the panel. In others, the truthfulness or accuracy of the statement will not be in issue. In such situations a right of examination could serve no useful purpose as it would neither advance the enquiry of the panel nor enable a Party to defend itself. In the present case, for reasons discussed above, it is premature to conclude that the credibility of any particular statement by an anonymous witness is in issue.

68. Second, even when the credibility of a written statement by an author not available for examination is in issue, the prejudice to a Party seeking to challenge that statement may be fully addressed by a tribunal's partially or fully discounting the weight attached to the statement in question, or by excluding it from the record. The panel can keep under review the question of the treatment of evidence from anonymous sources and may revisit the question of the admissibility and probative value of such evidence if and when its credibility becomes an issue.

69. Guatemala suggests, relying upon the example of Articles 6.1 and 6.3 of the European Convention on Human Rights (ECHR), that due process includes the right of a Party to these proceedings to examine or have examined any witness submitting evidence against it, and therefore that the identity of such witnesses must be disclosed at this stage of the proceedings so that it can prepare to examine them. We do not see this example as applicable. The rights to examine or have examined witnesses as provided in Article 6.3 of the ECHR (to which neither Guatemala nor the United States is a party) apply only in criminal prosecutions.<sup>34</sup> We do not see the present state-to-state proceedings as analogous to criminal prosecutions. Because criminal proceedings concern potential findings of criminal wrongdoing and deprivations of liberty, and because a criminal defendant is generally in a position of structural disadvantage as an individual person confronting the prosecutorial resources of the state, due process mandates the highest degree of procedural protection in criminal trials. State parties to a trade dispute are not in the position of criminal defendants. They may fashion more flexible procedures suitable to the resolution of their disputes without compromising due process. And, as already noted, the inclusion of a right of cross-examination in instruments such as the ECHR serves to highlight the deliberate decision of the CAFTA Parties to exclude such a right from the CAFTA Rules of Procedure.

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<sup>34</sup> Contrary to Guatemala's assertion, Article 6.3 of the European Convention on Human Rights does not apply in civil proceedings as it pertains exclusively to criminal proceedings. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm>

70. We therefore cannot conclude that all or any of the redactions to documents submitted by the United States with its initial written submission deprive Guatemala of an adequate opportunity to respond to the evidence of the United States or to defend itself. We therefore decline to instruct the United States to produce unredacted copies of those documents or to strike them from the record. We also conclude that there is no basis for an extension of time in addition to the extension that we discuss in section 2 of this statement of reasons, below.

71. The panel will assess what effects the redactions have, if any, on the probative value of the exhibits submitted by the United States in the course of dealing with the dispute on its merits. The panel will keep under review the question of the treatment of evidence from anonymous sources and may revisit the question of the admissibility of such evidence at a later stage of the proceedings. In the event that Guatemala does challenge allegations of fact made by the United States that are supported by anonymous evidence, it will be appropriate at that point for the panel to consider whether to adopt a procedure to investigate allegations by the United States contained in anonymous declarations that are disputed by Guatemala, whether to exclude anonymous evidence, or what weight, if any, should attach to anonymous evidence in the fact-finding process. As discussed above, the Rules do not contemplate the examination of witnesses; the right to examine witnesses is not necessarily required for due process in these proceedings, provided that unexamined evidence going to a material question of fact can be discounted or excluded from the record where appropriate; and in any event the panel has no power to compel the disclosure of information that a disputing Party chooses to withhold from it. By extension, the panel has no power to compel the attendance of a witness at a panel hearing. The question potentially raised by the anonymity of witness statements is therefore simply how the panel should treat such evidence, and in particular whether the panel should seek the cooperation of the disputing Parties to examine it, exclude it from the record, discount the weight attached to it, or simply treat it with caution. That question would have to be considered in light of the particular disputed questions of fact and evidence before the panel.

## *2. Request for Extension of Time*

72. We turn now to Guatemala's request, in its letter of November 10, 2014, for additional time to prepare its initial written submission, which Guatemala says it requires "as a matter of due process." We consider Guatemala's request to be a request for us to exercise our discretion under Rule 34, which provides as follows:

A panel may, after consulting the participating Parties, modify any time period applicable in the panel proceeding and make such other procedural or administrative adjustments as may be required in the proceeding, such as where a panelist is replaced.

73. Rule 34 gives the Panel discretion to adjust the timetable for proceedings, but it subjects that discretion to two conditions. First, the panel must consult the participating Parties before modifying any time period. Second, any adjustment the panel makes must be "required."

74. The first condition has been met. The panel has received written submissions from the participating Parties on the question of modifying the deadline for Guatemala's first written

submission, and it heard the participating Parties' oral submissions during a teleconference on December 11, 2014.

75. The question then is whether modifying Guatemala's deadline (and making any additional modifications that would be required as a consequence of modifying Guatemala's deadline) is "required" as that term is used in Rule 34. The ordinary meaning of "required" in this context is "requisite" or "necessary."<sup>35</sup> Rule 34 gives a specific example of a circumstance in which procedural or administrative adjustments may be "required" – *i.e.*, where a panelist is replaced. That example must inform our understanding of whether Rule 34's condition of an adjustment being "required" is met.

76. The circumstances that require a procedural or administrative adjustment may be of a practical nature or a legal nature. Replacement of a panelist, the situation referred to expressly in Rule 34, is an example of a circumstance in which, as a practical matter, procedural or administrative adjustments may be required. There may be other circumstances in which, absent a procedural or administrative adjustment, a Party would be denied a meaningful opportunity to be heard or deprived of some other aspect of fundamental procedural fairness, such that an adjustment is required as a legal matter. We understand Guatemala's contention that an adjustment to the deadline for its initial written submission is required to be of the latter variety, and we turn now to the question of whether such an adjustment is required as a legal matter.

77. As noted above, the Agreement and the Rules contemplate expeditious proceedings. It follows that disputing Parties will foresee and devote the resources required to resolve disputes expeditiously. The panel should not relieve disputing Parties of obligations to meet timelines established under the Rules and Agreement because of circumstances that may be reasonably considered usual and foreseeable.

78. The Agreement and the Rules therefore contemplate that disputing Parties will allocate the personnel required to comply with these timetables for proceedings. This includes taking into account vacation time. Vacation schedules do not usually justify varying the timetable provided under the agreement and the Rules on due process grounds.

79. The Parties should similarly anticipate and allocate resources to review translations. The time required for this does not justify changing the timelines on due process grounds.

80. The length of preparation time available to the complainant is not relevant. The wording of the Agreement and Rules do not take it into account. Due process does not require that it be taken into account. What matters is that a Party complained against can mount a defense within the time available to it. The Parties to the CAFTA-DR clearly contemplated that such a Party could mount a defense within the timeframes established by the Rules, or they would have provided for different dispute settlement procedures. Further, we recall that the CAFTA provides for multiple levels of consultations before a request for an arbitral panel can be filed.<sup>36</sup> These

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<sup>35</sup> "Required, adj." *OED Online*. Oxford University Press, December 2014. Web. 6 February 2015

<sup>36</sup> See CAFTA, Arts. 16.6, 20.4 & 20.5.

processes provide ample opportunities to discuss and clarify the particulars of the measure or other matter at issue. In this case, the United States first requested consultations with Guatemala on July 30, 2010; it requested consultations under the auspices of the CAFTA Free Trade Commission on May 16, 2011; and it requested the establishment of a panel on August 9, 2011. Even then, the panel was not composed until November 30, 2012, and we understand that consultations between the Parties continued during the intervening 15-month period. After the panel was composed, proceedings were suspended for a period of almost two years, during which time we understand that additional consultations occurred. Accordingly, we decline to find the length of time the United States had in which to prepare its complaint as a circumstance requiring an adjustment to the deadline for Guatemala to submit its initial written submission.

81. A failure of a panel request to provide particulars about the complaining Party's allegations and claims may deprive a responding Party of the ability to prepare its defense, if it in fact results in that Party not receiving adequate notice of the case to which it must respond. Due process may, in such circumstances, require that the Party in question receive an extension of time to prepare that defense. On the other hand, the panel should not presume that a broadly worded request for a panel makes it impossible for a disputing Party to properly prepare a defense within the time frames provided by the Rules.

82. Under the circumstances of this case, we need not decide whether the wording of the United States' panel request was such as to require an extension of time for the submission of Guatemala's initial written submission. This is so for two reasons. First, between the submission of the panel request on August 9, 2011 and the September 18, 2014 letter of the United States asking the panel to resume its work after multiple successive suspensions, a period of more than three years elapsed during which time we understand the Parties were engaged in consultations regarding the subject matter of this dispute. Thus, even if Guatemala correctly characterizes the panel request as "fail[ing] to present the problem clearly" (a question on which we do not opine at this time), it is reasonable to presume in the absence of evidence to the contrary that the basis of the complaint was clarified during the course of those consultations. In light of these circumstances, Guatemala has not established at this point in the proceedings that it did not in fact have notice of the subject matter of the complaint. Second, after the proceedings resumed, in the disputing Parties' joint communication of October 10, 2014, Guatemala expressly agreed to a timetable wherein its initial submission would have been due four weeks after the written submission of the United States.

83. To be clear, in rejecting Guatemala's argument that, as a matter of due process, the alleged vagueness of the United States' panel request requires an extension of the deadline for Guatemala's initial submission, we do not take a position on Guatemala's separate request for a preliminary ruling that the United States' request fails to meet CAFTA's pleading requirements and therefore the Panel "does not have the authority to proceed with the analysis of the merits of this dispute."<sup>37</sup> As discussed in the November 20, 2014 statement of reasons in support of our

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<sup>37</sup> Preliminary Ruling Request, October 10, 2014, para. 126.

October 30, 2014 procedural ruling, we have that request under consideration and will address it in due course.<sup>38</sup>

84. Finally, we turn to Guatemala's contention that the redacting of evidence presented by the United States imposes burdensome and time-consuming research requirements on Guatemala that will necessarily delay its initial written submission. We accept this contention. The redaction of information from the testimonial evidence on which the United States intends to rely is not a circumstance Guatemala could have foreseen upon reviewing the United States' panel request. Nor is it a circumstance Guatemala could have foreseen when it initially agreed to a timetable in the disputing Parties' joint communication of October 10, 2014. As discussed above, the matter of the burden flowing from having to respond to factual allegations contained in anonymous declarations goes to the ability of Guatemala to defend itself and, therefore, is a matter of procedural fairness. Accordingly, under the circumstances of this case, we find that an adjustment to the timetable is required in order to ensure that Guatemala has an adequate opportunity to respond to the case against it to the extent that case is based on anonymous testimonial evidence.

85. Further, while the panel should not accept that in usual circumstances the scheduling of vacations justifies an extension of time, it should recognize that vacations previously scheduled during a major holiday season can limit the ability of a disputing Party to respond to unusual circumstances. Given the situation at hand, therefore, a factor that must be taken into account in determining the length of any required schedule adjustment is that an extension of time to allow Guatemala to undertake the investigation necessary to respond to allegations contained in anonymous declarations would fall during a period in which the ability to pursue such investigation would be limited.

86. The panel has little precise information upon which to determine what length of extension is required, notwithstanding its request for such information at the December 11, 2014 hearing. In the circumstances we are prepared to treat the Guatemala's extension request of November 10, 2014 as a good faith and reasonable estimate of the time required to locate evidence in response to the redacted exhibits submitted by the United States. Given the number of redacted exhibits, we are prepared to treat the difficulties of locating evidence in response to them as a sufficient justification for the entire extension requested in that letter. Since February 1, 2015 does not fall on a working day, we extend the deadline for the filing of Guatemala's initial written submission to February 2, 2015.

### **Statement of Dissenting Reasons of the Panel Minority**

#### **I. ARGUMENTS AND COUNTER ARGUMENTS:**

##### **I.1 ARGUMENTS FROM GUATEMALA (Letter dated November 20, 2014):**

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<sup>38</sup> See Ruling on the Procedure for Addressing Guatemala's Request for a Preliminary Ruling, Op. of the Panel Majority, para. 55 (Nov. 20, 2014).

(i) "(...) The information redacted includes the identity of the person providing testimony, the name of the judges who participated in the labor judicial process, the names of the inspectors of the General Labour Inspectorate (IGT) in charge of inspections in the cases identified by the US and the number for some domestic judicial processes. Without this information, Guatemala is precluded from verifying the accuracy and truthfulness of the exhibits provided by the United States. Moreover, the redaction of the case numbers prevents Guatemala from locating the administrative and judicial files referred to in these exhibits and verifying the status of the cases cited by the United States, in support of its arguments. Taken together, these limitations severely constrain Guatemala's ability to respond to the claims and evidence put forward by the United States and to prepare its own writing submission within the deadlines established by the Panel".

(ii) "(...) The United States disclosed the names of the companies against which the employees complaints are directed despite the fact that the names of these companies were included in the exhibits double brackets. As such, the United States should not have publicly disclosed the names of companies, by including their names in its written submission. The United States' position of designating information as confidential, while itself disclosing the information disclosed publicly is completely incoherent (...)".

(iii) "(...) Guatemala requests the Panel to instruct the United States to provide the Panel and Guatemala, without delay, a complete set of non-redacted and legible exhibits, as identified in the attached table. In the meantime, the United States' initial written submission should not be considered properly submitted until it provides Guatemala and the Panel with the complete non-redacted versions of all exhibits (...)".

(iv) "(...) If the United States were to provide complete non-redacted versions of all exhibits by November 21, 2014, Guatemala would be in a position to file its initial written communication by Monday, February 2, 2015. However, if the United States were to take more time in providing complete non-redacted versions of all exhibits identified in the attached table Guatemala respectfully requests that the Panel adjust the deadline for Guatemala to file its written submission in the light of the United States' delay in properly filing such exhibits. On the contrary, if the United States were to refuse to abide by the MRP by failing to provide non-redacted versions of any exhibits, Guatemala requests that the Panel declare such exhibits inadmissible and that it strike them from the record of these proceedings. In this case, Guatemala would be in a position to file its initial submission by Friday, January 16, 2014 (...)".

## I.2 COUNTER ARGUMENTS FROM THE UNITED STATES (Letter dated November 25, 2014):

(i) "(...) 1 United States did not intend to create a new category by marking the first page of certain exhibits as "CONFIDENTIAL" and other exhibits with the notation "CONTAINS CONFIDENTIAL INFORMATION." This clerical difference resulted from the use of a "CONFIDENTIAL" stamp on some of the original documents in hard copy form. All documents with the word "CONFIDENTIAL" on the front page should be treated as containing confidential information (...)".

(ii) "(...) The United States notes that the Rules addressing confidentiality apply only to information submitted to the Panel and other Parties. In particular, the Rules govern the handling of confidential information submitted by a Party to ensure its confidentiality is maintained in making public submission. Guatemala's complaint does not concern treating as confidential information that submitted. Guatemala argues instead that the Rules obligate the United States to disclose information that is not submitted. In fact, the Rules do not address what evidence does or does not need to be submitted to the Panel and do not govern submitting evidence with material already redacted. As a result, Guatemala's reliance on Rules 15 and 16, and Appendix 2 is misplaced and is based on fundamental misreading of those Rules (...)"

(iii) "(...) The United States would also emphasize that the redactions it has made to factual information are imperative to protect the safety and security of the workers who have provided their personal information, including in court records, for purposes of these proceedings with the understanding that they would be protected under the Rules. The United States remains deeply concerned that disclosing identifying information regarding these workers could subject them to retaliation in the workplace, and the evidence submitted to the Panel amply justifies such concerns (...)"

## II. TECHNICAL LEGAL ANALYSIS:

1) The position of Guatemala goes beyond seeking the simple extension of the deadline to present an initial submission. Guatemala presented a problem regarding a lack of access to part of the evidence presented by the United States, since this part, for alleged confidentiality reasons, was not disclosed in totality to Guatemala or to the Panel, preventing its analysis, assessment and evaluation.

2) In accordance with Article 15 of the Rules of Procedure, arbitrators should ensure that confidential information is not disclosed to the public; however, confidentiality does not assume that within the process, the arbitrators and the parties would not have access to confidential information that has been presented as evidence.

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3) Not allowing a party to have full access to a means of proof submitted by another party is equivalent to placing it in a situation of inequality, disadvantage and helplessness, and of not applying the principle of contradiction (adversarial process), implicit in the rights to equality, to defend oneself, and to due process.

4) The requirement that parties present a version containing confidential information and another version without confidential information is precisely so that the arbitrators and the parties can access the first version, and the public in general the second version.

597.

5) Guatemala's request is legitimate in the sense that the United States should provide the information marked as confidential to the Panel and to Guatemala, without prejudice to the obligation of the Panel and the parties not to disclose to the public.

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6) In the event that the United States does not provide such confidential information, the initial submission of the United States cannot be considered as validly presented, and therefore the pre-established timeline should be suspended.

### III. CONCLUSIONS:

1) Articles 15 and 16 of the Rules prohibit disclosure of information or documents submitted by a party under the guarantee of confidentiality to the public, and not that the Panel and the other disputing party should have unrestricted access to such information and documents. Without such access, we face a clear retention of evidence that not only limits or restricts the right of the other party to defend itself, but also prevents the arbitrators from making a fair appraisal of the evidence.

2) The position of Guatemala not only concerns the extension of the deadline for the submission of its initial written submission, but also the factual and legal impossibility of accessing information and supporting documents. So much so, that in its letter dated November 20, 2014, Guatemala states: "If the United States were to provide complete non-redacted versions of all exhibits by November 21, 2014, Guatemala would be in a position to file its initial written communication by Monday, February 2, 2015. However, if the United States were to take more time in providing complete non-redacted versions of all exhibits identified in the attached table Guatemala respectfully requests that the Panel adjust the deadline for Guatemala to file its written submission in the light of the United States' delay in properly filing such exhibits."

3) The arbitral panel cannot expressly or implicitly accept retention of evidence, and must request that the United States present the documentary evidence withheld, of course under a guarantee of confidentiality, in accordance with Articles 15 and 16 of the Rules.

4) The decision to extend the deadline for Guatemala to present its initial written submission to February 2, 2015 without also addressing its request to the effect that "[i]f the United States were to provide complete non-redacted versions of all exhibits by November 21, 2014, Guatemala would be in a position to file its initial written communication by Monday, February 2, 2015," and without dealing with the matter of retention of evidence by the United States, constitutes a violation of the directing principles of due process and of congruency, that is, of correspondence between decision and request for relief, and of the principle of contradiction.

Spanish

TRATADO DE LIBRE COMERCIO ENTRE REPUBLICA DOMINICANA– CENTRO  
AMÉRICA – ESTADOS UNIDOS

GRUPO ARBITRAL ESTABLECIDO SEGÚN EL CAPÍTULO VEINTE

**EN MATERIA DE**

**GUATEMALA – TEMAS RELACIONADOS CON LAS OBLIGACIONES BAJO EL  
ARTÍCULO 16.2.1(a)**

Fallo sobre la solicitud para la extensión de tiempo para presentar el escrito inicial y sobre el  
tratamiento de la prueba con censuras

26 febrero, 2015

Miembros del grupo arbitral  
Profesor Kevin Banks (Presidente)  
Sr. Mario Fuentes Destarac  
Sr. Theodore R. Posner

## **Exposición de motivos de la mayoría del grupo arbitral**

### **I. Introducción y disposición**

1. Guatemala solicitó que el grupo arbitral extienda la fecha límite para presentar su escrito inicial, y que el grupo arbitral instruya a los Estados Unidos a proporcionar una versión completa sin censura y legible de ciertas pruebas presentadas en apoyo de su escrito inicial. Guatemala solicitó que el grupo arbitral decida que el alegato escrito inicial de Estados Unidos no fue presentado adecuadamente hasta que lo haga. En la alternativa, Guatemala solicitó que el grupo arbitral elimine del registro todas pruebas censuradas. Estados Unidos se opuso a todas estas solicitudes.

2. El 31 de diciembre de 2014, el grupo arbitral emitió la siguiente determinación mayoritaria:

El grupo arbitral considera que no tiene autoridad para instruir a los Estados Unidos a presentar copias sin censuras de las pruebas documentales presentadas con su alegato escrito inicial. El grupo arbitral evaluará qué efectos tienen las censuras, en su caso, sobre el valor probatorio de dichas pruebas en el curso de abordar los méritos de la disputa.

El grupo arbitral declina a tratar por inadmisibles cualquier evidencia en esta fase del procedimiento. El grupo arbitral mantendrá en examen la cuestión del tratamiento de la evidencia de fuentes anónimas y puede volver a la cuestión de la admisibilidad de tales pruebas en una etapa posterior del procedimiento.

El grupo arbitral por la presente extiende el plazo para la presentación del alegato escrito inicial de Guatemala al 2 de febrero de 2015.

El grupo arbitral señala que esta extensión requerirá ajustes en otros plazos, incluyendo el la fecha límite para el grupo arbitral presentar su informe inicial a las Partes contendientes (como hubiera sido el caso, en todo caso bajo la extensión previamente acordada de la fecha límite para el alegato escrito inicial de Guatemala). Por tanto, el grupo arbitral invita a las Partes contendientes a conferir con el fin de ponerse de acuerdo sobre los ajustes apropiados al calendario de procedimientos. A falta de acuerdo entre las Partes contendientes sobre estas cuestiones por fecha del 15 de enero de 2015, el grupo propondrá ajustes para la consideración de las Partes contendientes.

3. Los motivos de la mayoría del grupo arbitral se exponen a continuación.

### **II. Antecedentes**

4. En una carta a las partes contendientes con fecha del 30 de octubre de 2014, el grupo arbitral confirmó una fecha límite de el 1 de diciembre de 2014 para que Guatemala presente su escrito inicial. El panel también declaró que:

[e]n el caso de que, tras la recepción del alegato escrito inicial de los Estados Unidos de América, Guatemala considera que se requiere como una cuestión de debido proceso más tiempo para preparar su alegato escrito inicial, el panel le invita a conferir con los Estados Unidos de América sobre una extensión adecuada y después de eso, pero en todo caso no más tarde que el 10 de noviembre de 2014, presentar una solicitud de dicha prórroga al grupo arbitral.

5. En una carta al grupo arbitral con fecha 10 de noviembre de 2014, Guatemala indicó que había consultado con los Estados Unidos en relación a dicha extensión del plazo de tiempo, pero que no habían llegado a un acuerdo. Guatemala solicitó al grupo arbitral extender la fecha límite para su presentación del escrito inicial al 1 de febrero de 2015.

6. En una carta al grupo arbitral con fecha 12 de noviembre de 2014, los Estados Unidos objetó a la solicitud de Guatemala, pero declaró que no objetaría a una extensión al 9 de enero de 2015.

7. El 18 de noviembre de 2014, el grupo arbitral envió a las partes contendientes una carta preguntando si ellas estarían de acuerdo con una extensión de la fecha límite en cuestión al 14 de enero de 2015, y solicitando que cada parte presente su respuesta a esta pregunta por escrito a la Oficina Responsable a más tardar el jueves, 20 de noviembre de 2014.

8. El 20 de noviembre de 2014, los Estados Unidos respondió a la solicitud del grupo arbitral diciendo estar de acuerdo con dicha extensión.

9. Sin embargo, la carta de Guatemala del mismo día trajo a luz nuevos asuntos. Llevó a la atención del grupo arbitral el “hecho que Estados Unidos había censurado información importante de 135 de sus pruebas y que, a partir de hoy, Estados Unidos no ha proporcionado ni a Guatemala ni al Panel versiones sin censuras en las pruebas”.<sup>1</sup> Guatemala tomó la posición que “[a]l censurar la información de estas pruebas, Estados Unidos está actuando de manera contraria a las Reglas de Procedimiento (“MRP”) y violó los derechos de debido proceso de Guatemala, incluyendo su derecho a tener oportunidad adecuada a preparar sus casos y a responder a la evidencia adversa”.<sup>2</sup> Guatemala establece que “la información censurada de las pruebas incluye la identidad de la persona proporcionando las declaraciones, el nombre de los jueces participando en el en proceso legal laboral, los nombres de los inspectores de la Dirección de Inspección General (GLI) a cargo de las inspecciones en los casos identificados por Estados Unidos y el número de caso de ciertos procesos locales”.<sup>3</sup>

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<sup>1</sup> Carta de Guatemala al Presidente del grupo arbitral, párrafo 3 (Noviembre 20, 2014).

<sup>2</sup> *Ibidem*, párrafo 4.

<sup>3</sup> *Ibidem*, párrafo 5.

10. La carta también solicitó que el grupo arbitral diera instrucciones a los Estados Unidos de proporcionar al grupo y a Guatemala, sin retraso, un juego completo de evidencia sin censuras y legibles; entretanto, el grupo arbitral debería tratar la presentación escrita inicial de los Estados Unidos como presentada de manera incorrecta; o en la alternativa, el grupo arbitral debe eliminar las pruebas con información omitida del registro de este proceso.

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11. Guatemala declaró en su carta con fecha 20 de noviembre de 2014 que si los Estados Unidos proporciona versiones completas sin censuras de todas las pruebas el 21 de noviembre de 2014, estaría en la posición de presentar su versión escrita para el día lunes, 2 de febrero de 2015. Por otro lado, en la eventualidad que los Estados Unidos tome más tiempo en proporcionar versiones sin censuras y completas de todas las pruebas, Guatemala solicita que el grupo arbitral ajuste la fecha límite para presentar su escrito debido a dicho retraso. Finalmente, Guatemala declaró que si el grupo arbitral elimina las pruebas con censuras del registro estaría en una posición para presentar su escrito inicial para el 16 de enero de 2015.

12. El 21 de noviembre de 2015 el grupo arbitral envió una carta a las partes contendientes extendiendo la fecha límite para presentar el escrito inicial de Guatemala al 14 de enero de 2015. El grupo arbitral indicó en dicha carta que consideraría si fuera necesaria una extensión adicional, y solicitó que los Estados Unidos proporcione cualquier respuesta por escrito a la carta enviada a Guatemala el día 20 de noviembre para el 25 de noviembre de 2014.

13. El 25 de noviembre de 2014, los Estados Unidos envió una carta al grupo arbitral disintiendo con la solicitud de Guatemala para el 20 de noviembre, y rehusándose a estar de acuerdo con cualquier extensión de tiempo más allá del 14 de enero de 2015. En su carta, los Estados Unidos declaró que había actuado de acuerdo con las Reglas (incluyendo, en particular, las Reglas 15 y 16) en la presentación de su escrito inicial. Sostuvo, como relevante aquí, que las Reglas abordan el trato de la información presentada al grupo arbitral y a las otras Partes designada como “confidencial”, y al contrario “las Reglas no abordan qué prueba tiene que o no tiene que ser presentada al Panel y no gobiernan la presentación de prueba con materia ya redactada”.<sup>4</sup> Los Estados Unidos luego explicó que las “redacciones que ha hecho a la información factual son imprescindibles para proteger la seguridad de los trabajadores quienes hayan facilitado sus datos personales, incluso en documentos judiciales, para el presente procedimiento, con el entendimiento de que serían protegidos bajo las Reglas”.<sup>5</sup> La carta también declaraba que “Los Estados Unidos todavía está profundamente preocupado que la divulgación de información de identificación con respecto a estos trabajadores podría someterlos a represalias en el lugar de trabajo”.<sup>6</sup>

14. El 5 de diciembre de 2014, el grupo arbitral envió una carta a las Partes contendientes solicitando que atiendan una llamada telefónica para abordar los siguientes asuntos:

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<sup>4</sup> Carta de los Estados Unidos al Presidente del grupo arbitral , párrafo 3 (Noviembre 25, 2014).

<sup>5</sup> Ibidem, párrafo 5.

<sup>6</sup> Ibidem.

4. Si el grupo arbitral tiene la autoridad de extender la fecha límite para presentar el escrito inicial de Guatemala bajo la Regla 27 o la Regla 34 para otorgarle a Guatemala tiempo adicional para ubicar documentos y testigos en respuesta a las pruebas presentadas por Estados Unidos que contienen información de identificación eliminada;
5. Como calcular cuánto tiempo requiere Guatemala, como asunto de necesidad, para ubicar dichos documentos y testigos; y
6. Si los Estados Unidos puede asistir en agilizar este proceso al proporcionar información (como número de archivos) facilitando a Guatemala la identificación de archivos y documentos relevantes.

15. Las partes contendientes atendieron la audiencia vía llamada telefónica el día 11 de diciembre de 2014. Al momento de la audiencia, el grupo arbitral escuchó las presentaciones de acuerdo a cada uno de los asuntos descritos previamente. Guatemala declaró que mientras había logrado ubicar algunos de los archivos de tribunales en cuestión, cierto número de tribunales estaban en diferentes municipalidades en lugares remotos, y que era difícil avanzar en vista de las vacaciones de fin de año. Como resultado, Guatemala dijo que sería difícil comprometerse a una fecha límite. Los Estados Unidos declaró que no podría estar de acuerdo en divulgar la información que identificaría, directa o indirectamente, a los trabajadores proporcionando la información al panel, porque aquellos trabajadores habían declarado con la condición que los Estados Unidos no revelaría su identidad en el curso del proceso. Cuando el Presidente del grupo arbitral preguntó si consideraría discutir con los trabajadores en cuestión la divulgación de alguna información que potencialmente podría identificarlos, como el número de expediente del tribunal, en vista de las salvaguardas de confidencialidad proporcionadas bajo las Reglas, los Estados Unidos indicó que los trabajadores habían insistido en permanecer anónimos con el entendimiento de cómo opera el proceso.

16. Los Estados Unidos envió una carta al grupo arbitral (con fecha 16 de diciembre de 2014, y esta fue transmitida por la Oficina Responsable al grupo arbitral el día 17 de diciembre de 2014) discutiendo ciertas autoridades legales a las cuales se refirieron en la audiencia llevada a cabo el día 11 de diciembre en relación al uso de pruebas con censuras en otros procesos de solución de diferencias. El 17 de diciembre de 2014, Guatemala solicitó una oportunidad para responder. El grupo arbitral, en la carta con fecha 18 de diciembre de 2014 solicitó que Guatemala proporcionara una respuesta a más tardar el día 22 de diciembre de 2014. Guatemala respondió vía carta con esa fecha.

### **III. Posiciones de las Partes Contendientes**

17. Primero debemos resumir los argumentos de las partes contendientes en relación con la solicitud de Guatemala para extender el tiempo para presentar su escrito inicial. Luego discutimos sus posiciones sobre las solicitudes de Guatemala en relación a las censuras en las pruebas.

#### *Solicitud de extensión de tiempo*

18. La solicitud de Guatemala del 10 de noviembre de 2014 para una extensión de tiempo al 1 de febrero de 2015 presenta cinco argumentos.

19. Primero, Guatemala presentó que no debería ser obligado a proporcionar su escrito inicial en solo un mes y cinco días porque los Estados Unidos decidió cuando presentaría una denuncia y se tomó el tiempo que necesitó para preparar su caso de ofensiva.

20. Segundo, Guatemala sostiene que la solicitud al panel presentado por los Estados Unidos fue redactado en términos tan amplios y vagos que no presenta el problema de manera clara ni le proporciona a Guatemala la oportunidad de conocer el caso al cual que debía responder antes de que los Estados Unidos presentó su escrito inicial el día 3 de noviembre de 2014.

21. Tercero, Guatemala declara que recibió la traducción al español del escrito inicial de los Estados Unidos el 10 de noviembre de 2014 y que varios oficiales guatemaltecos que no leen inglés no estaban en una posición de entender dicha presentación antes del día 17 de noviembre de 2014, diez días antes de la fecha límite para presentar el escrito inicial de Guatemala.

22. Cuarto, Guatemala sostiene que la censura de información de las pruebas de los Estados Unidos coloca una carga sobre Guatemala para “investigar entre miles de expedientes administrativos y judiciales para encontrar aquellos en los que se apoyan las alegaciones de los Estados Unidos y verificar el estado en el que cada una de las instancias citadas por Estados Unidos son utilizadas para reclamar que Guatemala supuestamente ha dejado de cumplir con su legislación laboral”<sup>7</sup>, por lo tanto, impidiendo su habilidad para preparar su escrito inicial.

23. Finalmente, Guatemala declara que los miembros del equipo de oficiales asignado al caso de Guatemala toman vacaciones en noviembre, diciembre y enero y que el equipo solo estaría completo y completamente operativo el 16 de enero de 2015.

24. En su respuesta del 12 de noviembre de 2014, los Estados Unidos afirma su disposición de extender la fecha límite en cuestión al 9 de enero de 2015 en vista de requerimientos de traducción y conflictos con las fiestas de fin-de-año creados por aquellos requerimientos. Por otra parte, toma la posición que las razones de Guatemala para pedir una extensión más allá del 9 de enero no son contundentes, argumentando que los supuestos amplitud y vago de la solicitud del grupo arbitral de los Estados Unidos es un tema para que el grupo arbitral aborde en y después de la audiencia, que los procesos internos de revisión de Guatemala no pueden justificar el retraso del proceso, y que Guatemala habría podido empezar a buscar los documentos que necesitaba para responder a las pruebas presentadas por los Estados Unidos al recibir las versiones en español de aquellas pruebas.

25. En el curso de la audiencia telefónica del 11 de diciembre de 2014, Guatemala sostuvo que el grupo arbitral tiene la autoridad bajo la Regla 34 de extender fechas límites por razones de debido proceso, y que debería hacerlo para asegurar que Guatemala tenga la oportunidad de formular una respuesta completa a los alegatos presentados por los Estados Unidos. (El argumento de Guatemala que dicha oportunidad se requiere para el debido proceso se resume

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<sup>7</sup> Carta de Guatemala al Presidente del grupo arbitral, párrafo 6 (Noviembre 10, 2014).

abajo como parte de sus argumentos a favor de una reparación por la evidencia censurada). Estados Unidos reconoció que, sujeto al Artículo 20.13.3 del Acuerdo, el grupo arbitral tenía la autoridad bajo la Regla 34 para modificar períodos de tiempo donde sea requerido como asunto de necesidad para el manejo adecuado del proceso, pero reiteró su punto de vista que ninguna modificación está justificada en este caso.

#### *Solicitud para recursos en relación a las pruebas censuradas*

26. En su carta del 20 de noviembre, Guatemala hace dos argumentos a favor de su solicitud de recursos adicionales en relación a los documentos censurados.

27. Primero, Guatemala argumenta que la censura de información de las pruebas presentadas por los Estados Unidos es contraria a las Reglas, porque las reglas requieren que toda la información designada como confidencial debe ser divulgada a las personas aprobadas de la otra parte.<sup>8</sup>

28. Segundo, Guatemala declara que: “[o]cultar información contenida en los documentos presentados como prueba en contra de una parte demandada viola las obligaciones básicas del debido proceso, reconocidas en el derecho internacional y doméstico” y que “[e]s un principio fundamental del debido proceso que una de las partes tenga el derecho de preparar adecuadamente su defensa, así como ver y responder a las pruebas presentadas en su contra por la otra parte.”<sup>9</sup> Sin la información censurada, Guatemala afirma, se impide a Guatemala a de ubicar los archivos administrativos y judiciales referidos en las pruebas, de verificar el estado de cada uno de los casos citado por los Estados Unidos en apoyo de sus argumentos, y de verificar la precisión y fidelidad de las pruebas proporcionadas por los Estados Unidos. Tomados juntos, Guatemala declara, estas limitantes severamente restringen su habilidad de responder a la demanda y pruebas presentadas por los Estados Unidos para preparar su propio escrito dentro de las fechas límites establecidas por el grupo arbitral.<sup>10</sup>

29. En su carta del 20 de noviembre Guatemala también sugiere que su derecho de preparar su defensa de manera adecuada y de ver y responder a las evidencias presentadas en su contra requiere divulgación de la identidad de cualquier testigo proporcionando evidencia contra Guatemala en este proceso. Guatemala declara que los estatutos laborales de ambos los Estados Unidos y Guatemala requieren divulgación de la identidad de testigos proporcionando pruebas en el proceso ante el tribunal.<sup>11</sup> Guatemala señala que la Regla 35 del Centro Internacional de Arreglo de Diferencias Relativas a Inversiones Internacional (CIADI), Reglas procesales aplicables a los procedimientos de Arbitraje (Reglas de arbitraje), da derecho a las partes a examinar a los testigos y a los expertos.<sup>12</sup> Guatemala argumenta que es imposible ejercer dichos

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<sup>8</sup> Supra nota 1, párrafo

<sup>9</sup> Ibídem, párrafo 17.

<sup>10</sup> Ibídem, párrafo 5.

<sup>11</sup> Ibídem, párrafos 17 y 18.

<sup>12</sup> Ibídem párrafo 18.

derechos al menos que la identidad de los testigos sea divulgada a la parte examinadora. Guatemala también hizo notar que el Artículo 6.3 de la Convención Europea de los Derechos Humanos le da a una persona el derecho a examinar o de hacer examinado los testigos atestiguando contra él o ella, y argumenta que este derecho aplica en procesos civiles y penales.<sup>13</sup> Finalmente, Guatemala cita la decisión *Contador Velasco* del Tribunal de Arbitraje del Deporte declarando que presentar pruebas anónimas infringe potencialmente el derecho a la parte a ser escuchada y a un juicio justo.<sup>14</sup> Guatemala declara que las disposiciones de confidencialidad de las Reglas prevendrían la divulgación de las identidades de los trabajadores en cuestión y declara que el propósito de la censuras es simplemente para obstruir la preparación de su defensa.

30. En su respuesta el 25 de noviembre de 2014, los Estados Unidos argumenta que las Reglas solo incluyen el manejo de la evidencia que una Parte decide presentar al grupo arbitral y otras Partes, y que ellas no requieren que una Parte presente pruebas particulares aún si está en manos de la Parte. Declara que el respaldo que Guatemala busca en estas Reglas está mal fundado.<sup>15</sup> Los Estados Unidos también declara que toda la información proporcionada al grupo arbitral también ha sido proporcionada a Guatemala, aduciendo que por lo tanto, Guatemala tiene una oportunidad de ver y responder a toda la evidencia presentada por Estados Unidos en este proceso.<sup>16</sup>

31. En la audiencia telefónica del 11 de diciembre de 2014, Guatemala sostuvo que ambas las Reglas y el principio del debido proceso que una parte tiene derecho a defenderse colocan una obligación sobre los Estados Unidos para divulgar la identidad de los testigos proporcionando evidencia en estos procesos. Guatemala declaró que necesita saber la identidad de los testigos en esta etapa del proceso para comprobar la veracidad de la evidencia, formular su estrategia de defensa, y preparar un examen cruzado. Guatemala argumentó que tiene el derecho a hacer el contra-interrogatorio de dichos testigos para poder comprobar la veracidad de sus declaraciones. Guatemala presentó que el grupo arbitral tiene la autoridad, en virtud de la Regla 27, de otorgar la asistencia que necesita en relación a la evidencia censurada, ya que el manejo de la evidencia no está cubierto en las Reglas.

32. Los Estados Unidos respondió que las Reglas no contemplan la interrogación de los testigos en las audiencias, que las Reglas están diseñadas para solucionar controversias entre estados, y que en cualquier eventualidad, el tema actual no es la credibilidad de los testigos sino cuales acciones emprendió o no emprendió Guatemala para hacer cumplir sus leyes laborales. Los Estados Unidos sostiene que Guatemala está en una posición en la cual puede declarar si ha emprendido dichas acciones porque tiene la información de las compañías empleadoras y los eventos que le facilitan ubicar la información relevante para su defensa, aún en la ausencia de la

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<sup>13</sup> *Ibidem*, párrafo 20.

<sup>14</sup> *Ibidem*, refiriéndose a CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC and CAS 2011/A/2386 WADA v. Alberto Contador Velasco and RFEC, <http://tas-cas.org/d2wfiles/document/5648/5048/0/FINAL20AWARD202012.02.06pdf>.

<sup>15</sup> *Supra* nota 4, párrafo 3.

<sup>16</sup> *Ibidem*, párrafo 4.

información que identifica a los trabajadores en cuestión. También tomo la posición que en cualquier eventualidad la habilidad de contra interrogar no es relevante a la presentación del escrito inicial.

33. Guatemala respondió que los Estados Unidos está buscando revertir la carga de prueba. También mencionó que algunas compañías mencionadas en los documentos presentados por los Estados Unidos ya no existen. Sin embargo, no identificó cuales eran esas compañías.

34. En su carta al grupo arbitral con fecha 16 de diciembre de 2014, los Estados Unidos declaró que “el uso de la evidencia con censura en solución de diferencias internacionales no es inusual”, y que “[s]i es aplicado a proteger información de identificación personal, información confidencial de negocio, o secretos de estado, redacciones son características frecuentes en procesos entre estados.”<sup>17</sup> Los Estados Unidos refiere el grupo arbitral a informes de paneles de solución de diferencias en dos procesos de solución de diferencias de la OMC (*Argentina – Medidas afectando la importación de mercancías*<sup>18</sup> y *Turquía – Medidas afectando la importación de arroz*<sup>19</sup>), y el memorial de una parte en un proceso de la CIJ (*Caso en relación a la aplicación de la Convención sobre la Prevención y la Sanción del delito de genocidio* (Croacia v. Serbia), Memorial de Croacia, 1 de marzo de 2001). Los Estados Unidos también se refirió a dos Acuerdos de la OMC – el *Acuerdo relativo a la aplicación del artículo VI del Acuerdo General sobre Aranceles Aduaneros y Comercio* (el Acuerdo Anti-dumping), y el Acuerdo de OMC sobre *Subsidios y medidas compensatorias* (Acuerdo SMC) – y sostiene que estos acuerdos expresamente anticipan que en algunas instancias se requiere presentar pruebas a los paneles con censura. Los Estados Unidos nota que estos acuerdos tratan con acciones correctivas de comercio interior en donde cierta información puede ser dada a una autoridad de investigación nacional sobre una base de confidencialidad. Los Estados Unidos aduce que cuando tales medidas son presentadas para revisión a una solución de diferencias de la OMC, dicha información está censurada de los documentos presentados al panel.<sup>20</sup> Los Estados Unidos sostiene que no puede ser requerido a divulgar la identidad de las personas proporcionando información dada en confianza. Los Estados Unidos además declara que en ninguna de las instancias citadas arriba, el panel ha considerado que debe extender fechas límite para que una parte pueda tomar medidas para descubrir la información que ha sido censurada.<sup>21</sup>

35. En su carta al grupo arbitral del 22 de diciembre de 2014, Guatemala asegura que en la mayoría de jurisdicciones, incluyendo los Estados Unidos, las partes no pueden ser consideradas responsables o condenados con base en pruebas secretas. Además sostiene que ninguno de los

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<sup>17</sup> Carta de los Estados Unidos al Presidente del grupo arbitral, párrafo 5 (Diciembre 16, 2014).

<sup>18</sup> *Ibidem* párrafo 3. Los Estados Unidos hace referencia al reporte , *Argentina – Medidas afectando la importación de mercancías*, WT/DS438/444/445/R circulado el 22 de Agosto , 2014, párrafo 6.61

<sup>19</sup> *Ibidem*, párrafo 4. Los Estados Unidos hace referencia al reporte, *Turquía – Medidas afectando la importación de arroz of Rice*, WT/DS334/R adoptado el 22 de Octubre, 2014 párrafo 2.53.

<sup>20</sup> *Ibidem*, párrafo 5.

<sup>21</sup> *Ibidem*, párrafo 7.

tres casos citados por los Estados Unidos ofrece apoyo para la admisión de evidencias censuradas en estos procesos.<sup>22</sup> Específicamente, Guatemala presenta que en el caso de *Argentina – Medidas afectando la importación de mercancías*, el panel estaba sumamente confundido porque las partes se rehusaban a divulgar evidencia, y decidió seguir con cautela y deliberadamente con las cartas anónimas presentadas.<sup>23</sup> Además, argumenta que a diferencia de Argentina, que en ese caso tenía los acuerdos que eran más relevantes a los procesos en sus manos, Guatemala no tiene acceso a “grandes números de declaraciones presentadas por los Estados Unidos como parte de sus pruebas”, y por lo tanto, no puede retar la veracidad de las declaraciones a las cuales debe responder.<sup>24</sup> Guatemala resalta que en el caso de *Turquía – Medidas afectando la importación de arroz*, Turquía decidió no presentar las pruebas censuradas en el momento, y que consecuentemente el panel encontró que había fracasado en rebatir el caso *prima facie* del demandante (Los Estados Unidos).<sup>25</sup> Guatemala también sostiene que las disposiciones de los acuerdos *SMC* y *Anti-dumping* a lo cual Estados Unidos refiere que gobiernan el trato de pruebas confidenciales para tribunales nacionales en lugar de por paneles de solución de diferencias, y que en cualquier caso, en procesos gobernados por estos acuerdos, la información confidencial debe ser divulgada a la autoridad que está investigando y a las partes contrarias.<sup>26</sup> Finalmente, Guatemala sostiene que el caso de *Croacia v. Serbia* se refiere a acusaciones de genocidio y por lo tanto no es comparable con el caso entre manos, que en todo caso los fiscales en ese caso depositaron un documento conteniendo los nombres de testigos anónimos con el Registrador del Tribunal, y que el Tribunal todavía debe pronunciar sobre el trato que se le dará a las pruebas anónimas en cuestión.<sup>27</sup>

#### IV. Decisión

36. Primero, abordamos las solicitudes de Guatemala en relación con las pruebas censuradas, ya que subsumen la extensión de tiempo solicitada por Guatemala en su carta con fecha 10 de noviembre de 2014.

##### 2. *Solicitud para alivio interino contra la censura en los documentos*

37. Empezamos con tomar nota que toda la información presentada por los Estados Unidos al grupo arbitral está en manos de Guatemala. Lo que Guatemala busca es la divulgación por parte de los Estados Unidos de la información que los Estados Unidos eliminó de los documentos presentados al grupo arbitral. La información en cuestión es la información que identifica a los trabajadores quienes dieron las declaraciones que los Estados Unidos presentó en pruebas o la

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<sup>22</sup> Carta de Guatemala al Presidente del grupo arbitral, párrafo 6 (22 diciembre, 2014).

<sup>23</sup> *Ibidem*, párrafo 4.

<sup>24</sup> *Ibidem*, párrafo 7.

<sup>25</sup> *Ibidem*, párrafo 11.

<sup>26</sup> *Ibidem*, párrafos 12 y 13.

<sup>27</sup> *Ibidem*, párrafos 16.

información que supuestamente podría llevar a la identificación de dichos trabajadores. La información incluye los nombres de los trabajadores, así como los nombres de los inspectores de trabajo y los jueces y los números de expediente de los casos en cuestión. Los Estados Unidos afirma que hizo estas censuras en respuesta a las preocupaciones de los trabajadores en cuestión de que ellos serían sujetos a represalias si sus identidades se llegaran a conocer en el curso del proceso.

38. Guatemala declara que la información en relación a las identidades de los trabajadores en cuestión podría ser designada confidencial bajo las Reglas. Esto restringiría su distribución para personas aprobadas, prevendría su divulgación al público y requeriría su destrucción siguiendo este proceso. Guatemala argumenta que, en vista de estas protecciones de confidencialidad, las censuras solo pueden ser consideradas como un intento de los Estados Unidos para obstruir a Guatemala en la preparación de su defensa.

39. No podemos concluir que ese sea el caso. La información proporcionada al grupo arbitral por los Estados Unidos es que los trabajadores en cuestión parecen no haber aceptado las estipulaciones de confidencialidad de las Reglas como protección suficiente de sus identidades, y han proporcionado su evidencia bajo la condición de no divulgación de sus identidades. Mientras esto es lamentable, no podemos concluir que es un reflejo de mala fe por parte de los Estados Unidos el haber ofrecido garantías a los trabajadores de que no divulgaría sus identidades en el curso de este proceso.

40. La solicitud de Guatemala por recurso contra las censuras se basa en dos argumentos. Primero, Guatemala sostiene que al censurar las pruebas en apoyo de su escrito inicial, los Estados Unidos violó las Reglas del Proceso. Segundo, Guatemala toma la posición que permitir a los Estados Unidos presentar pruebas censuradas en soporte de su escrito inicial, viola los derechos de Guatemala de un proceso justo (i.e., debido proceso) independientemente de que si es consistente con disposiciones particulares en las Reglas. Consideramos cada argumento a su vez.

#### *A. Si la censura de la información viola las reglas*

41. Una parte contendiente en un proceso de solución de diferencias bajo el Capítulo 20 del DR-CAFTA tiene una prerrogativa de presentar dichas pruebas como mejor le convenga en apoyo de su posición. Un corolario a esta propuesta es que la Parte puede decidir no presentar pruebas en particular. En otras palabras, una Parte puede decidir que pruebas presentar y que pruebas no presentar. El primer problema ante nosotros es el siguiente: cuando una Parte presenta pruebas como declaraciones juradas de testigo, ¿Las reglas requieren que también presente un identificador personal u otra información relacionada a sus declaraciones?

42. La respuesta es no. Las Reglas no evitan que la Parte presente pruebas en forma de declaraciones de testigo anónimas. Ni requiere que la Parte suplemente la presentación de declaraciones juradas al proporcionar un identificador personal u otra información que podría ayudar a colocar dichas declaraciones en contexto. De hecho, las Reglas no imponen una obligación afirmativa sobre partes del CAFTA en diferencia para asistir el proceso para buscar hechos. En relación a esto, las Reglas del CAFTA difieren del Entendimiento de Solución de

diferencias de la OMC, de el cual las Partes del CAFTA sin lugar a dudas estaban conscientes cuando redactaron las Reglas. La OMC ESD contiene, en su Artículo 13, un deber de colaboración por medio del cual las Partes contendientes puede tener la obligación de producir cierta información bajo solicitud de un panel de solución de diferencias aún si la parte no había decidido presentar dicha información en primera instancia.<sup>28</sup> Las Reglas del DR-CAFTA no contienen una disposición correspondiente.

43. Guatemala afirma que las Reglas 15 y 16 requieren que una Parte en diferencia divulgue toda la información que ha designado como confidencial a las personas aprobadas representando a la otra parte en diferencia, y que por lo tanto, Estados Unidos debe divulgar toda la información censurada de las pruebas en cuestión. Sin embargo, la información designada como confidencial bajo las Reglas 15 y 16 es información incluida en la presentación de la Parte u otro documento. Bajo el título donde se ubican, las Reglas 15 y 16 son reglas en relación a la divulgación pública de las presentaciones escritas y otros documentos presentados en el proceso del panel. La redacción de las Reglas 15 y 16 hacen que quede claro que solo tratan con información ya contenida en dichos documentos y no trata con la cuestión de que información en particular debe ser incluida. La Regla 15 facilita a la Parte participante a “designar...para trato confidencial *información que incluye* en una presentación de la Parte” [se agrega énfasis]. La Regla 16 requiere que una Parte “designe información *contenida en un documento* como confidencial” [se agrega énfasis] para preparar una versión no-confidencial del documento (en el cual la información confidencial está censurada y su propia información confidencial está resumida) para divulgación al público.

44. Los Estados Unidos ha proporcionado al grupo arbitral y a Guatemala toda la información designada como confidencial en su escrito inicial. La información censurada de los documentos presentados a ambos el grupo arbitral y la otra parte en diferencia no es un tema abordado por estas reglas. Las Reglas por lo tanto no proporcionan al grupo arbitral autoridad para instruir a los Estados Unidos a proporcionar al grupo arbitral y a Guatemala copias sin censura de las pruebas presentadas en apoyo a su escrito inicial. Las reglas tampoco proporcionan una base sobre la cual el grupo arbitral puede declarar que el escrito inicial de los Estados Unidos no fue presentado de manera adecuada simplemente porque contiene evidencias de las cuales los Estados Unidos eliminó información.

*B. Si el permitir la presentación de las pruebas censuradas como soporte del escrito inicial de Estados Unidos viola el debido proceso*

45. Guatemala sostiene que, aparte de cualquier requerimiento expreso de las Reglas, el “debido proceso” – por el cual entendemos que Guatemala quiere decir un proceso fundamentalmente justo – requiere que una parte tenga una oportunidad adecuada para preparar su defensa y responder a la evidencia presentada en su contra. Guatemala argumenta que las censuras le privan de aquellas oportunidades, al soslayar o impedir su habilidad de identificar y ubicar la evidencia de soporte de su defensa, para verificar y retar la exactitud y veracidad de las

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<sup>28</sup> Ese artículo proporciona, entre otras cosas, que “Un miembro debe responder oportuna y plenamente a cualquier solicitud por parte del panel de dicha información según el panel considera necesario y adecuado”.

pruebas proporcionadas por los Estados Unidos, y para preparar la contra interrogación de los testigos proporcionando pruebas en su contra.

46. La primera pregunta que debemos abordar es que si los dos estándares de proceso al cual Guatemala se refiere - *i.e.*, una oportunidad adecuada para que un demandado prepare su defensa y una oportunidad adecuada para que un demandado a responda a las pruebas en su contra – son elementos del proceso que se le deben a la Parte contendiente en el proceso bajo el Capítulo 20 de CAFTA. Si lo son, entonces la siguiente pregunta que debemos abordar es si sería contrario a cualquiera de los dos estándares si se admiten al registro los documentos con la información censurada presentados por los Estados Unidos.

47. La primera pregunta se aborda fácilmente. No vemos ninguna controversia en aceptar la propuesta de que un demandado bajo el proceso de solución de diferencias del Capítulo 20 de CAFTA tiene derecho a oportunidad adecuada a responder a la evidencia presentada en su contra. Como se establece en nuestros motivos de decisión del 20 de noviembre de 2014, aunque los acuerdos del OMC no están en discusión en este proceso, ambas partes contendientes han referido informes de paneles de solución de diferencias y del Órgano de apelación como persuasivo. Encontramos que es de ayuda referir a precedentes de la OMC aquí. Sostuvimos, en particular, la observación del Órgano de apelación en una de sus primeras decisiones que “un panel [de solución de diferencias] debe...tener cuidado de observar el debido proceso, que incluye proporcionar a las partes con una oportunidad de respuesta a las pruebas presentadas”.<sup>29</sup> Igualmente importante, el Órgano de apelación ha declarado que “[una] parte no debe meramente recibir una oportunidad de responder, pero que la oportunidad debe ser significativa en términos de la habilidad de la parte para defenderse de manera adecuada”.<sup>30</sup> Es razonable concluir que las Partes de CAFTA esperarían la aplicación de este principio en el proceso del panel bajo el Capítulo 20.

48. Guatemala también afirma que los derechos de debido proceso incluyen el derecho de una Parte a “una oportunidad adecuada a preparar su caso”.<sup>31</sup> Esto parecería incluir pero va más allá del derecho a una oportunidad adecuada de responder a la evidencia. Para los propósitos actuales, el grupo arbitral no necesita discutir la cobertura total de dicho derecho. Observamos que esto debe incluir una oportunidad adecuada para formular una respuesta a la evidencia presentada por una parte opositora, ya que esta es una extensión lógica del derecho a una oportunidad adecuada a responder a la evidencia, y por lo tanto, también un elemento del debido proceso. Si la censuras sustancialmente perjudican cualquier de estas oportunidades, permitir a los Estados Unidos de presentar la evidencia censurada en cuestión por ende violaría las normas aplicables del debido proceso. Entonces vamos a considerar si esto ha sucedido en el caso actual.

49. El documento inicial escrito presentado por los Estados Unidos afirma numerosas instancias de fallas por parte del gobierno de Guatemala y de los tribunales oficiales de actuar en acuerdo con las obligaciones bajo el Artículo 16.02 del Acuerdo. Algunos de los argumentos se

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<sup>29</sup> Informe de los Órganos de apelación, *Australia – Salmon*, WTO Doc. WT/DS18/AB/R, 20 octubre, 1998, para 272.

<sup>30</sup> Informe de los Órganos de apelación, *US – Gambling*, WT/DS285/AB/R, 7 abril 2005, para 270.

<sup>31</sup> Supra nota 1, párrafo 4.

basan en las declaraciones anónimas de empleados reclamando tener discusiones con esos oficiales. Muchos de los documentos presentados en soporte de los argumentos han sido censurados para remover uno o más datos que pueden identificar a la persona haciendo la declaración, el nombre o los nombres del (los) juez (jueces) o inspectores de trabajo involucrados en el caso particular o el número de expediente.

50. Guatemala trae a la discusión tres preocupaciones en relación al debido proceso con estas censuras. Abordamos cada una de manera individual.

51. Primero, Guatemala afirma que la censura del número de los casos impide localizar los expedientes administrativos y judiciales a los cuales se hace referencia para verificar el estado de cada uno de los casos citados por los Estados Unidos en soporte de sus argumentos.

52. Si las censuras evitaran completamente que Guatemala ubicara los expedientes documentando el manejo de los casos que son la base de los alegatos de la presentación escrita presentada por los Estados Unidos, podrían sustancialmente impedir la habilidad de Guatemala de responder adecuadamente al caso en su contra.

53. Sin embargo, la evidencia ante el grupo arbitral no establece que las censuras en cuestión hagan imposible localizar los expedientes en cuestión. En su carta del 10 de noviembre de 2014, Guatemala sostiene que las censuras requerirían “investigar entre miles de expedientes administrativos y judiciales para encontrar aquellos en los que se apoyan las alegaciones de los Estados Unidos y verificar el estado en el que cada una de las instancias citadas por Estados Unidos son utilizadas para reclamar que Guatemala supuestamente ha dejado de cumplir con su legislación laboral”.<sup>32</sup> Esto sugiere que ubicar los expedientes sería laborioso y oneroso, pero no imposible. Como establece los Estados Unidos, la información sobre la cual pueden basar la búsqueda de los expedientes, como fechas relevantes de los eventos y nombres de empleados, no fueron censurados en las pruebas. Cuando se le preguntó durante la audiencia telefónica que explica las dificultades que tendría en ubicar los expedientes relevantes, Guatemala hizo notar la ubicación remota de algunas oficinas de tribunales en las cuales se ubican los documentos, pero no ofreció ninguna información sobre los problemas relacionados con la búsqueda de los expedientes en tribunales o inspectorías. En su carta al grupo arbitral del 22 de diciembre de 2014, Guatemala describe la tarea de ubicar los expedientes en cuestión en ausencia de los números de expediente como “extremadamente laboriosa” pero no ofrece una razón para asumir que no puede realizarse dado un tiempo prudencial. No podemos concluir, con base en la evidencia ante nosotros, que ubicar los registros relevantes es imposible.

54. La respuesta correcta del grupo arbitral es considerar una extensión de tiempo en la situación donde la información censurada hace la ubicación de evidencia necesaria onerosa y laboriosa pero no imposible. El grupo arbitral regresa a esta cuestión abajo.

55. Un segundo argumento de Guatemala es que las censuras le “impiden verificar la precisión y veracidad de las pruebas presentadas por los Estados Unidos”.<sup>33</sup> En su superficie eso

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<sup>32</sup> *Ibidem*, párrafo 6.

<sup>33</sup> *Ibidem*, párrafo 5.

podría ser una importante preocupación desde la perspectiva de debido proceso, ya que una habilidad para verificar o refutar la precisión y la veracidad de pruebas es un elemento clave de la oportunidad de responder adecuadamente a ellas. Parecen haber dos aspectos que preocupan a Guatemala. La primera es que Guatemala puede ser excluida de verificar o refutar las aseveraciones de hechos realizadas por los testigos en las evidencias disputadas. La segunda es que Guatemala puede ser excluida por la anonimidad de aquellos testigos de examinar características o motivos personales que puedan afectar la confiabilidad de su evidencia. Consideramos cada aspecto de manera individual.

56. En relación a la primera, el grupo arbitral no puede concluir en éste momento que Guatemala está excluida de la verificación o refutación de los alegatos materiales contenidos en las pruebas censuradas presentadas por los Estados Unidos. Puede ser que por referencia a sus propios expedientes y entrevistas de sus propios oficiales, Guatemala pueda verificar o refutar los alegatos de los Estados Unidos. Sin embargo, si y en la medida en que sea imposible, el panel puede considerar en el momento apropiado si las censuras particulares han impedido que los Estados Unidos cumpla con su parte de establecer los hechos que ha alegado, o si se necesitan recursos adicionales.

57. En relación al segundo aspecto, los tribunales deben tratar pruebas anónimas con precaución. La anonimidad de los testigos puede ocultar los motivos y las características de los testigos que afectan la confiabilidad de sus pruebas. Si la confiabilidad del testigo permanece sin investigación, la decisión puede ser injusta.

58. Por otro lado, no toda evidencia anónima necesariamente presenta estos problemas. Cuando un testigo anónimo simplemente presenta información fácilmente verificable a través de otras fuentes, puede que la credibilidad del testigo en cuestión no sea un problema material porque las partes pueden fácilmente verificar la precisión de la información.

59. En este momento del proceso, sería prematuro para el grupo arbitral determinar si la credibilidad de los testigos cuyo testimonio anónimo fue presentado por los Estados Unidos está en controversia y si la incapacidad de probar la credibilidad evita que Guatemala pueda verificar o refutar la precisión y veracidad de las aseveraciones en cuestión. Si la evidencia y el argumento en la presentación escrita de Guatemala pone la credibilidad de los testigos anónimos en cuestión, el grupo arbitral tendrá que en ese momento considerar el peso, si lo hubiese, que le daría a la evidencia anónima en disputa. Sin embargo, en este momento sería inapropiado para el grupo arbitral asumir que la credibilidad de los testigos anónimos será un aspecto debatido y que a falta de una oportunidad de probar la credibilidad, Guatemala no podrá verificar o refutar la precisión y veracidad de las aseveraciones en particular, y con esa presunción como base excluir la evidencia redactada presentada por los Estados Unidos.

60. Guatemala sugiere que la anonimidad de la evidencia presentada por los Estados Unidos, al colocarle en una posición de tener que presentar evidencia para poder responder a ella, esta efectivamente buscando revertir la carga de la prueba. Por esto entendemos que Guatemala está diciendo que permitir a los Estados Unidos censurar la información de identificación de las pruebas en cuestión efectivamente evita que Guatemala simplemente impugne la credibilidad de los testigos en dichas pruebas sin producir pruebas independientes propias.

61. No estamos de acuerdo de que la censura de información en las pruebas presentadas por los Estados Unidos revierta la carga de la prueba. Guatemala sigue en la libertad de presentar sus propias pruebas o de abstenerse de hacerlo, así como sería si los Estados Unidos no hubiera censurado información de los documentos que presentó. En cualquiera de las dos situaciones, Guatemala podría argumentar que los Estados Unidos ha fallado en presentar un caso *prima facie*, por lo tanto eximiendo a Guatemala de la carga de tener que presentar sus propias pruebas; o podría aceptar que los Estados Unidos presentó un caso *prima facie* y presentar su propia evidencia para refutar el caso; o podría argumentar las dos posiciones, en la alternativa. Pero no vemos como las censuras realizadas por los Estados Unidos afectan las opciones disponibles a Guatemala. De la misma manera, en cualquier situación, si Guatemala decide desafiar la credibilidad de los testigos, lo haría ya sea argumentando que el testimonio controvertido no es creíble o al producir evidencia demostrando su falta de credibilidad. Eso lo haría no obstante si la identidad de los testigos es conocida o no. Es posible que conociendo la identidad de los testigos le facilitaría a Guatemala encontrar la evidencia sobre los testigos que podría ayudar a impugnar su credibilidad. Pero, como se declaró previamente, en esta etapa del proceso, es prematuro declarar si la credibilidad de testigos particulares está en controversia y si es así, como abordar la credibilidad controvertida en nuestra ponderación de las pruebas.

62. Si Guatemala sostiene que los Estados Unidos ha fallado en hacer un caso *prima facie* y por lo tanto, rechaza presentar sus propias pruebas, se le requeriría al grupo arbitral, como lo sería en cualquier eventualidad, evaluar el valor probatorio de cualquier evidencia presentada por los Estados Unidos en el curso de la determinación de si ésta hubiera cumplido con la carga de la prueba. En hacerlo, al grupo arbitral se le requeriría tomar en cuenta todos los aspectos de las evidencia, incluyendo el hecho que el conocimiento, las características y los motivos de los testigos han permanecido sin examinación, un asunto que puede afectar el valor probatorio asignado a dicha evidencia.

63. En resumen, mientras teóricamente es posible que una consecuencia de las censuras de los Estados Unidos podrían ser una incapacidad para Guatemala para verificar o refutar la precisión y exactitud de ciertas pruebas presentada por los Estados Unidos, y mientras dicha incapacidad podría implicar los estándares del debido proceso a los cuales Guatemala se ha referido, es prematuro en esta etapa del proceso concluir que esto necesariamente será el caso. Por lo tanto, en este momento rechazamos el segundo argumento de Guatemala de buscar excluir las pruebas censuradas presentadas por los Estados Unidos.

64. El tercer argumento de Guatemala es que la censura de la información de identificación de las pruebas, al mantener el anonimato de los testigos en cuestión, le impide prepararse para contra-interrogarlos. Guatemala declara que sin poder prepararse para la contra-interrogación, se le niega una oportunidad adecuada para defenderse.

65. Por las siguientes razones, no aceptamos esta posición.

66. Primero, el argumento de Guatemala asume que normalmente tendría el derecho a hacer la contra-interrogación a los testigos. Sin embargo, las Reglas de Proceso de CAFTA no contemplan dicho derecho. Las Reglas 44 y 45 conciben que las audiencias proporcionarán una

oportunidad solo para argumentar entre las partes con base en documentos presentados previamente. El hecho que otros instrumentos internacionales, tales como las Reglas de arbitraje CIADI, si proporcionan la contra interrogación de testigos simplemente hace que la ausencia de dicha disposición bajo las Reglas del CAFTA sea más notable.

67. Que las reglas de CAFTA no proporcionan contra-interrogación de testigos no es contraria a la equidad procesal fundamental. Primero, los estándares de debido proceso no requieren el derecho de contra-interrogación de testigos en todos los casos en relación con las declaraciones presentadas en evidencia. En algunas instancias dichas declaraciones no serán materiales a los problemas ante el panel. En otras, la veracidad o la precisión de la declaración no será un problema. En tales situaciones, un derecho a examen no podría servir un propósito útil ya que no avanzaría el caso ante el panel ni facilitaría la defensa de la parte en sí. En el presente caso, por razones que se discutieron anteriormente, es prematuro concluir que la credibilidad de cualquier declaración en particular por un testigo anónimo está en contienda.

68. Segundo, aun cuando la credibilidad de la declaración escrita por un autor que no esta disponible en el examen está en contención , el prejuicio a la Parte buscando desafiar la declaración puede ser completamente abordada si un tribunal parcialmente o plenamente descuenta el peso adjunto de la declaración en cuestión, o lo excluye del registro. El grupo arbitral puede guardar bajo revisión la pregunta de cómo se va tratar la evidencia de fuentes anónimas y puede visitar la cuestión de las admisibilidad y el valor probatorio de dicha evidencia si y cuando su credibilidad se vuelve un problema.

69. Guatemala sugiere ampararse en el ejemplo de los Artículos 6.1 y 6.3 de la Convención Europea Sobre Los Derechos Humanos (CEDH), que el debido proceso incluye el derecho de la Parte a estos procesos para interrogar o haber interrogado cualquier testigo presentando evidencia en su contra, y por lo tanto que la identidad de dichos testigos debe ser divulgada en esta etapa del proceso para que los pueda interrogar. No vemos que este ejemplo aplique. Los derechos a interrogar y contra-interrogar como están provistos en el Artículo 6.3 de la CEDH (de la cual ni Guatemala ni los Estados Unidos son parte) aplican solo en acciones penales.<sup>34</sup> Nosotros no vemos el proceso actual entre estados como análogo a los procesos penales. Porque los procesos penales incluyen hallazgos potenciales de infracciones penales y privaciones de libertad, y porque un acusado penal generalmente está en posición de desventaja estructural como una persona individual confrontando los recursos del fiscal del estado, el debido proceso demanda el grado más alto de protección de procedimiento en juicios penales. Los estados partes en una solución de diferencias de comercio no están en la posición de los acusados penales. Ellos pueden delimitar procesos adecuados más flexibles a la resolución de sus controversias sin comprometer el debido proceso. Y, como ya se afirmó, la inclusión del derecho a contra-interrogación en instrumentos tales como la CEDH sirve para destacar la decisión deliberada de las partes del CAFTA de excluir dicho derecho de las reglas de proceso del CAFTA.

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<sup>34</sup> Contrario a la aseveración de Guatemala, Artículo 6.3 de la Convención europea sobre derechos humanos no aplica a procesos civiles. Consejo de Europa, *Convención Europea sobre los Derechos Humanos, emendada por el Protocolo numero 11 y 14*, 4 Noviembre 1950, ETS 5, disponible en: <http://conventions.coe.int/treaty/en/treaties/html/005.htm>

70. Por lo tanto, nosotros no podemos concluir que todo o parte de la censura en los documentos presentados por los Estados Unidos con su escrito inicial priva a Guatemala de una oportunidad de responder a las pruebas de los Estados Unidos o de defenderse. Por lo tanto, nos rehusamos a instruir a los Estados Unidos a producir copias sin censura de aquellos documentos o de borrarlos del registro. Concluimos también que no hay una base para una extensión de tiempo además de la extensión que discutimos en la sección 2 de esta decisión, por abajo.

71. El grupo arbitral evaluará que efectos tienen las censuras, si los hubiese, sobre el valor probatorio de las pruebas presentadas por los Estados Unidos en el curso del presente proceso sobre méritos. El grupo arbitral mantendrá la pregunta de la manera en que se tratan las pruebas de fuentes anónimas y puede volver a la pregunta de la admisibilidad de estas pruebas en una etapa más tardía del proceso. En la eventualidad que Guatemala rete los alegatos de hecho realizados por los Estados Unidos que tienen soporte de evidencia anónima, será apropiado para el grupo arbitral en ese momento considerar si adoptar un proceso de investigación de los alegatos de los Estados Unidos conteniendo declaraciones anónimas que son disputadas por Guatemala, ya sea para excluir evidencia anónima, o que peso, si hubiese, se le puede adjuntar a la evidencia anónima en el proceso de buscar los hechos. Como se discutió previamente, las Reglas no contemplan la interrogación de testigos; el derecho a interrogar a los testigos no se requiere necesariamente para el debido proceso en el presente procedimiento, a condición de que las pruebas no examinadas y relevantes a una pregunta importante de hecho se pueden ser descontadas o excluidas del registro si es apropiado de hacerlo; y en cualquier eventualidad el grupo arbitral no tiene el poder de solicitar la divulgación de la información que una parte contendiente opta retener de ella. Por extensión, el grupo arbitral no tiene el poder de obligar la asistencia de un testigo a una audiencia. La posible pregunta levantada por el anonimato de las declaraciones de testigos es por lo tanto simplemente como el grupo arbitral debe tratar dicha prueba, y en particular, si el grupo arbitral debe buscar la cooperación de las partes contendientes para examinarla, excluirla del registro, descontar el peso adjunto a ella, o simplemente tratarla con precaución. Esa pregunta tendría que considerarse en vista de las preguntas disputadas específicas de hecho y prueba ante el panel.

## *2. Solicitud para una extensión de tiempo*

72. Ahora vemos la solicitud de Guatemala, en su carta con fecha del 10 de noviembre de 2014, de tiempo adicional para preparar la presentación inicial escrita, que Guatemala dice requiere como “cuestión de debido proceso”. Consideramos que la solicitud de Guatemala es una solicitud donde debemos ejercer nuestra discreción bajo la Regla 34, que estipula lo siguiente:

Un panel puede, después de consultar a las Partes participantes, modificar cualquier periodo de tiempo establecido en el proceso del panel y asegurarse que los otros ajustes administrativos o de proceso se hagan conforme se requieran en el proceso, tal y como donde un panelista es reemplazado.

73. La Regla 34 le da al grupo arbitral la discreción de ajustar el calendario del proceso, pero la discreción esta sujeta a dos condiciones. Primero, el grupo arbitral debe consultar a las partes participantes antes de modificar cualquier período de tiempo. Segundo, cualquier ajuste que el grupo arbitral hace debe ser “requerido”.

74. La primera condición ha sido cumplida. El grupo arbitral ha recibido presentaciones escritas de las partes participantes en la cuestión de modificación de la fecha límite para la presentación inicial escrita, y escuchó las presentaciones orales de las partes participantes durante una teleconferencia el 11 de diciembre de 2014.

75. La pregunta de si modificar la fecha límite de Guatemala (y hacer cualquier modificación adicional que sería requerida como consecuencia de modificar la fecha límite) es “requerido” es un término que se usa en la Regla 34. El significado ordinario de “requerido” en este contexto es “requerimiento” o “necesario”.<sup>35</sup> La regla 34 da un ejemplo específico de la circunstancia en la cual los ajustes de proceso o administrativos pueden ser “requeridos” – *i.e.*, donde se reemplaza un panelista. Ese ejemplo debe informar nuestro entendimiento de si la condición de la Regla 34 siendo “requerido” es cumplida.

76. Las circunstancias que requieren un ajuste de proceso o administrativo pueden ser de naturaleza práctica o de naturaleza legal. El reemplazo de un panelista, es referido específicamente en la Regla 34, este es un ejemplo de una circunstancia en la cual, como un asunto práctico, se pueden requerir ajustes procesales o administrativos. Pueden haber otras circunstancias en las cuales, donde hay ajustes procesales o administrativos ausentes, una Parte puede ser negada una oportunidad significativa de ser escuchada o negada de otro aspecto de equidad procesal fundamental, tanto así que un ajuste se requiera como asunto legal. Entendemos que la contención de Guatemala es que se requiere un ajuste de la fecha límite para la presentación de su escrito inicial, y ahora abordamos la pregunta de que si tal ajuste es requerido como asunto legal.

77. Como se estipula anteriormente, el Acuerdo y las Reglas contemplan procesos expeditos. Se entiende que las partes en solución de diferencias preverán y dedicarán los recursos requeridos para resolver disputas de manera expedita. El grupo arbitral no debe eximir a las partes en disputa de sus obligaciones de cumplir con las fechas límite establecidas bajo las Reglas y Acuerdos por las circunstancias que pueden ser razonablemente consideradas usuales y predecibles.

78. El Acuerdo y las Reglas por lo tanto contemplan que las partes en disputa colocarán el personal requerido a cumplir con el calendario del proceso. Esto incluye tomar en cuenta los períodos vacacionales. Los calendarios de vacaciones usualmente no justifican variar el calendario establecido bajo el acuerdo y las Reglas con base en el debido proceso.

79. De manera similar, las Partes deben anticipar y colocar recursos para revisar traducciones. El tiempo requerido para esto no justifica cambiar los tiempos establecidos con base en el debido proceso.

80. El tiempo de preparación disponible a la parte reclamante no es relevante. La redacción del Acuerdo y las Reglas no lo toman en cuenta. El debido proceso no requiere que esto se tome en cuenta. Lo importante es que la parte demandada pueda montar una defensa dentro del tiempo

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<sup>35</sup> Requerido adj." *OED Online*. Oxford University Press, Diciembre 2014. Miércoles. 6 Febrero 2015

disponible. Las Partes al DR-CAFTA claramente contemplan que dicha parte puede montar una defensa dentro de los marcos de tiempo establecidos por las Reglas, o las hubieran proporcionado diferentes procesos de resolución de diferencias. Además, recordamos que el CAFTA proporciona múltiples niveles de consulta antes de poder presentar una solicitud para el establecimiento de un grupo arbitral.<sup>36</sup> Estos procesos proporcionan amplias oportunidades para discutir y aclarar los detalles de las medidas u otros asuntos en contienda. En este caso, los Estados Unidos primero solicitó consultas con Guatemala el 30 de julio de 2010; solicitó consultas bajo los auspicios de la Comisión de libre comercio CAFTA el día 16 de mayo de 2011; y solicitó el establecimiento de un grupo arbitral el día 9 de agosto de 2011. Aun así, el grupo arbitral no se estableció hasta el 30 de noviembre de 2012, y entendemos que las consultas entre las partes continuaron durante el período de intervención de 15 meses. Después del establecimiento del grupo arbitral, los procesos fueron suspendidos por un período de casi dos años, tiempo durante el cual entendemos que ocurrieron consultas adicionales. De manera acorde, nos eximimos de encontrar el tiempo que tuvo los Estados Unidos para preparar su reclamación como circunstancia requiriendo un ajuste a la fecha límite para que Guatemala presente su escrito inicial.

81. Una falla en la solicitud de un grupo arbitral de proporcionar detalles sobre los alegatos y quejas de la parte reclamante puede privar a la parte demandada de la habilidad de preparar su defensa, si de hecho resulta que dicha parte no tenga suficiente aviso del caso al cual debe responder. El debido proceso puede, en dichas circunstancias, requerir que la parte en cuestión reciba una extensión del período de tiempo para preparar su defensa. Por otro lado, el grupo arbitral no debe asumir que una solicitud ampliamente redactada hace imposible que una parte contendiente prepare una defensa dentro de los marcos de tiempo proporcionados por las Reglas.

82. Bajo las circunstancias del caso, no necesitamos decidir si la redacción de la solicitud de establecimiento de un grupo arbitral por los Estados Unidos era tal como para requerir una extensión de tiempo para la presentación del escrito inicial de Guatemala. Esto es por dos razones. Primero, entre la presentación de la solicitud del grupo arbitral del 9 de agosto de 2011 y la carta del 18 de septiembre de 2014 de los Estados Unidos solicitando al panel retomar su trabajo, después de múltiples suspensiones sucesivas, un período de más de tres años pasó durante el cual entendemos que las partes estaban involucradas en consultas en relación al tema de esta solución de diferencias. Por lo tanto, aún si Guatemala caracteriza de manera correcta la solicitud al panel como “falló en presentar el problema de manera clara” (una cuestión sobre la cual no opinamos en esta ocasión), es razonable asumir, en la ausencia de pruebas al contrario, que la base de la queja fue aclarada durante el curso de las consultas. En luz de dichas circunstancias, Guatemala, en este momento, no ha establecido que de hecho no tuvo notificación del tema de la queja durante el proceso. Segundo, después de resumir los procesos, en la comunicación conjunta de las partes involucradas en la solución de diferencias del 10 de octubre de 2014, Guatemala acordó expresamente a un calendario en el cual su alegato escrito inicial habría sido debido a cuatro semanas después del alegato escrito de los Estados Unidos.

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<sup>36</sup> Ver CAFTA, Artículos. 16.6, 20.4 & 20.5.

83. Para quedar claros, al rechazar el argumento de Guatemala, como asunto de debido proceso, que la supuesta ambigüedad de la solicitud del establecimiento del grupo arbitral por los Estados Unidos requiere una extensión de la fecha de entrega de Guatemala para su alegato escrito inicial, no presentamos una posición sobre la solicitud por separado de Guatemala de un fallo preliminar que la solicitud de los Estados Unidos no cumple con los requerimientos del CAFTA y que por lo tanto el Panel “no tiene la autoridad de proceder con el análisis de los méritos de esta solución de diferencias”.<sup>37</sup> Como discutimos en la declaración de motivos del 20 de noviembre de 2014 para nuestra decisión procesal del 30 de octubre de 2014, tenemos esa solicitud bajo consideración y la abordaremos en su debido momento.<sup>38</sup>

84. Finalmente, vemos la contienda de Guatemala que la redacción de las pruebas presentadas por los Estados Unidos imponen requerimientos de investigación laboriosos y onerosos a Guatemala que de manera necesaria retrasarán su presentación inicial escrita. Aceptamos esta contienda. La redacción de la información de las pruebas de testigos sobre la cual los Estados Unidos tiene la intención de respaldarse no es una circunstancia que Guatemala hubiera podido prever cuando inicialmente acordó el calendario en el comunicado conjunto de las partes en solución de diferencias del 10 de octubre de 2014. Como se discutió anteriormente, el asunto de la carga que fluye de tener que responder a los alegatos de hecho contenidos en declaraciones anónimas tiene que ver con la habilidad de Guatemala de defenderse y, por lo tanto, es cuestión de equidad procesal. De la misma manera, bajo las circunstancias de este caso, encontramos que un ajuste al calendario es requerido para poder asegurar que Guatemala tenga una oportunidad adecuada para responder al caso en su contra hasta donde dicho caso se basa en pruebas testimoniales anónimas.

85. Además, mientras que el grupo arbitral no debe aceptar que bajo circunstancias ordinarias los horarios de vacaciones justifican extender el tiempo, si debe reconocer que las vacaciones previamente establecidas en una época de días festivos importante limitan la habilidad de la parte en disputa de responder a circunstancias inusuales. Por lo tanto, dada la situación a la mano, un factor que debe ser tomado en cuenta para determinar la cantidad de cualquier ajuste del calendario requerida es que una extensión de tiempo para permitir a Guatemala realizar la investigación necesaria para responder a los alegatos contenidos en las declaraciones anónimas caería durante un período en el cual la habilidad de realizar la investigación estaría limitada.

86. El grupo arbitral tiene poca información precisa sobre la cual determinar que extensión de tiempo es requerida, no obstante su solicitud de este tipo de información en la audiencia del día 11 de diciembre de 2014. Bajo las circunstancias, estamos preparados para tratar la solicitud de Guatemala del día 10 de noviembre de 2014 como un estimado de buena fe y razonable del tiempo necesario para poder ubicar la evidencia en respuesta a las pruebas censuradas presentadas por los Estados Unidos. Dado el número de pruebas censuradas, estamos dispuestos a tratar las dificultades de ubicar las pruebas en respuesta a ellos como justificación suficiente para la extensión completa solicitada en dicha carta. Ya que el 1 de febrero de 2015 no es un día

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<sup>37</sup> Solicitud de fallo preliminar, 10 de octubre, 2014, para. 126.

<sup>38</sup> Ver fallo sobre el Proceso para abordar la solicitud de la solicitud de Guatemala para un fallo preliminar, Opinión del Panel Mayoritario, para. 55 (20 de noviembre de 2014).

habíl, se extiende la fecha límite de la presentación del escrito de Guatemala al 2 de febrero de 2015.

### **Exposición de motivos de la minoría disidente del grupo arbitral.**

#### **I. ARGUMENTOS Y CONTRA ARGUMENTOS:**

##### **I.1 ARGUMENTOS DE GUATEMALA (Carta de fecha 20 de noviembre de 2014):**

(i) “(...) La información censurada de las pruebas incluye la identidad de la persona que proporciona su testimonio, el nombre de los jueces que participaron en los procesos judiciales laborales, los nombres de los inspectores de la Inspección General de Trabajo (IGT) a cargo de las inspecciones en los casos identificados por Estados Unidos y el número de caso de algunos procesos judiciales internos. Sin esta información, se impide a Guatemala poder corroborar la exactitud y veracidad de las pruebas presentadas por Estados Unidos. Además, la censura de los números de casos impide que Guatemala pueda identificar los archivos administrativos y judiciales a los que se refieren estas pruebas, así como verificar el status de cada uno de los casos citados por estados Unidos, como respaldo a sus argumentos. Tomadas en conjunto, estas limitaciones restringen severamente la capacidad de Guatemala de responder a los reclamos y pruebas presentados por Estados Unidos y de preparar su propio escrito inicial, dentro de los plazos establecidos por el Grupo Arbitral (...).”

(ii) “(...) Estados Unidos dio a conocer los nombres de las compañías contra las cuales los empleados plantearon quejas, a pesar de que los nombres de estas compañías formaban parte del texto en corchetes dobles. De esta forma, Estados Unidos no debería haber divulgado al público en general los nombres de las compañías, al incluir sus nombres en su escrito. La posición de Estados Unidos de designar información como confidencial, mientras que por sí mismo la divulgó al público es incoherente (...).”

(iii) “(...) Guatemala solicita al Grupo Arbitral que instruya a Estados Unidos proporcionar al Grupo Arbitral y a Guatemala sin demora, un juego completo de pruebas no censuradas y legibles, tal como se identifica en la tabla adjunta. Entretanto, el escrito inicial de Estados Unidos no debería ser considerado como adecuadamente presentado, sino hasta que proporcione a Guatemala y al Grupo Arbitral versiones completas no censuradas de todas las pruebas (...).”

(iv) “(...) Si Estados Unidos proporcionara versiones completas no censuradas de todas las pruebas el 21 de noviembre de 2014, Guatemala estaría en posición de presentar su escrito inicial el lunes 2 de febrero de 2015. Sin embargo, si Estados Unidos requiriera de más tiempo para proporcionar la versión de todas las pruebas no censuradas identificadas en la tabla adjunta, Guatemala respetuosamente solicita al Grupo Arbitral ajustar el plazo fijado para que Guatemala presente su escrito, a la luz del retraso de Estados Unidos en la presentación de dichas pruebas. Por el contrario, en caso de que Estados Unidos rechazara cumplir con las RMP al no

proporcionar las versiones no censuradas de las pruebas, Guatemala solicita al Grupo Arbitral declarar dichas pruebas inadmisibles y eliminarlas del registro de este proceso. En este caso, Guatemala estaría en capacidad de presentar su escrito inicial el viernes 16 de enero de 2014 (...).”

I.2 CONTRA ARGUMENTOS DE LOS EE.UU. (Carta de fecha 25 de noviembre de 2014):

(i) “(...) 1 Los Estados Unidos no tenía la intención de crear una nueva categoría distinta de la información confidencial, marcando la primera página de ciertos documentos de prueba con “confidencial” y otras exposiciones con la inscripción “contiene información confidencial.” Esta diferencia clerical fue resultado de la utilización de un sello que dice “confidencial” en algunos de los documentos originales en forma impresa. Todos los documentos con la palabra “confidencial” en la primera página deben ser tratados como información confidencial (...).”

(ii) “(...) Los Estados Unidos señala que las Reglas sobre confidencialidad sólo aplican a la información presentada al Panel y otras Partes. En particular, las Reglas regulan el manejo de la información confidencial presentada por una Parte para asegurar su confidencialidad se mantiene en hacer una presentación pública. La queja de Guatemala no se refiere a tratar como confidencial la información presentada. Guatemala argumenta en cambio que las Reglas obligan a los Estados Unidos a revelar información que no ha presentado. De hecho, las Reglas no abordan qué prueba tiene que o no tiene que ser presentada al Panel y no gobiernan la presentación de prueba con materia ya redactada. Como resultado, la dependencia de Guatemala en las Reglas 15 y 16, y en el Apéndice 2 está fuera de lugar y se basa en una interpretación errónea fundamental de estas Reglas (...).”

(iii) “(...) Los Estados Unidos también subraya que las redacciones que ha hecho a la información factual son imprescindibles para proteger la seguridad de los trabajadores quienes hayan facilitado sus datos personales, incluso en documentos judiciales, para el presente procedimiento, con el entendimiento de que serían protegidos bajo las Reglas. Los Estados Unidos todavía está profundamente preocupado que la divulgación de información de identificación con respecto a estos trabajadores podría someterlos a represalias en el lugar de trabajo, y las pruebas presentadas al Panel justifica ampliamente esas preocupaciones (...).”

## II. ANÁLISIS TÉCNICO JURÍDICO:

1) El planteamiento de Guatemala va más allá de la simple extensión del plazo para presentar su alegato inicial. Guatemala presenta el problema de la inaccesibilidad a algunas de las pruebas presentadas por los EE.UU., ya que estos, bajo un supuesto criterio de confidencialidad, no han revelado a Guatemala ni al Grupo Arbitral el contenido íntegro de las mismas, lo que impide su análisis, apreciación y valoración.

2) De acuerdo con el artículo 15 de las Reglas Modelo de Procedimiento, los árbitros deben velar porque la información con carácter de confidencial no sea divulgada al público; sin

embargo, la confidencialidad no supone que dentro del proceso los árbitros y las partes no tengan acceso a la información confidencial que ha sido presentada como prueba.

3) Impedirle a una parte que tenga acceso pleno a un medio de prueba que ha presentado la contraparte, equivale a colocarla en una situación de inequidad, desventaja e indefensión, y de no aplicar el principio de contradicción (contradictorio), sustentado en los derechos de igualdad, de defensa y al debido proceso.

4) La exigencia de que se presente una versión con la información confidencial y otra versión sin la información confidencial es precisamente para que los árbitros y las partes puedan acceder a la primera versión y el público en general a la segunda versión.

5) La petición de Guatemala es legítima en cuanto a que los EE.UU. debe proveer la información tachada como confidencial al Grupo Arbitral y a Guatemala, sin perjuicio de la obligación del Grupo Arbitral y de las partes a no divulgarla al público.

6) En tanto los EE.UU. no suministre dicha información confidencial, el alegato inicial de los EE.UU. no puede tenerse como válidamente presentado y, por tanto, la calendarización preestablecida debe quedar en suspenso.

### III. CONCLUSIONES:

1) Los artículos 15 y 16 de las Reglas Modelo prohíben que la información o documentos probatorios rendidos por una parte bajo garantía de confidencia se divulgue al público en general y no que el Grupo Arbitral y la contraparte tengan acceso a dicha información y documentos sin restricción alguna. Si esto último ocurre o se permite estamos frente a una clara retención de prueba que no solo limita o restringe el derecho de defensa de la contraparte, sino que impide a los árbitros hacer una justa valoración de la prueba.

2) El planteamiento de Guatemala no solamente se refiere a la prórroga del plazo para la presentación de su alegato inicial, sino a la imposibilidad material y jurídica de acceder a informaciones y documentos probatorios. Tanto es así que, en la carta de fecha 20 de noviembre de 2014, Guatemala expresa: "Si Estados Unidos proporcionara versiones completas no censuradas de todas las pruebas el 21 de noviembre de 2014, Guatemala estaría en posición de presentar su escrito inicial el lunes 2 de febrero de 2015. Sin embargo, si Estados Unidos requiriera de más tiempo para proporcionar la versión de todas las pruebas no censuradas identificadas en la tabla adjunta, Guatemala respetuosamente solicita al Grupo Arbitral ajustar el plazo fijado para que Guatemala presente su escrito, a la luz del retraso de Estados Unidos en la presentación de dichas pruebas".

3) El Grupo Arbitral no puede aceptar expresa ni tácitamente una retención de prueba, y debería solicitar a los EE.UU. que aporte la prueba documental retenida, por supuesto bajo garantía de confidencia, conforme los artículos 15 y 16 de la Reglas Modelo.

4) La decisión de ampliar el plazo al 2 de febrero de 2015 para que Guatemala presente su alegato inicial, sin resolver la solicitud condicionada de Guatemala en el sentido que

“Si Estados Unidos proporcionara versiones completas no censuradas de todas las pruebas el 21 de noviembre de 2014, Guatemala estaría en posición de presentar su escrito inicial el lunes 2 de febrero de 2015”, y sin abordar la cuestión de la retención de prueba por parte de los EE.UU., supone la violación a los principios rectores del debido proceso de congruencia, es decir la adecuación entre lo pedido y lo resuelto, y de contradicción.

**Annex 3: Ruling on Further Request By Guatemala for Decision in Respect of Redacted Evidence – Letter of the Panel May 5, 2015**

English

May 5, 2015

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

Clara Luz de Lucero  
Responsible Office of Guatemala

RE: FURTHER REQUEST BY GUATEMALA FOR DECISION IN RESPECT OF  
REDACTED EVIDENCE

Dear Ms. de Lucero,

The panel has considered the letter of Guatemala of March 19, 2015, the letter in response from United States of America dated April 6, 2015, and the letter in reply from Guatemala dated April 17, 2015.

For the reasons set out in its decision of February 26, 2015, a majority of the panel finds that the panel is without authority to require the United States of America to provide to the panel and to Guatemala information that it has chosen not to submit to the panel, including the information that the United States of America has disclosed to the ICSID Secretary General and her staff.

The panel is unanimously of the view that the admissibility and probative value of all evidence submitted by the disputing Parties, including the declaration of the ICSID Secretary General, are matters to be determined by the panel in the light of the submissions of the Parties and their arguments at the hearing.

Kevin Banks  
Panel Chair

Spanish

5 de mayo de 2015

En el asunto de Guatemala - *Asuntos Relacionados con las obligaciones establecidas en el Artículo 16.2.1 (a) del CAFTA-DR*

Clara Luz de Lucero  
Oficina Responsable de Guatemala

RE : PETICIÓN ADICIONAL DE GUATEMALA DE UNA DECISIÓN RESPECTO A PRUEBAS CENSURADAS

El grupo arbitral ha considerado la carta de Guatemala del 19 de marzo de 2015, la carta en respuesta de los Estados Unidos de América del 6 de abril de 2015, y la carta en respuesta de Guatemala de fecha 17 de abril 2015.

Por las razones expuestas en su decisión del 26 de febrero de 2015, una mayoría del grupo arbitral considera que el grupo arbitral no tiene autoridad para exigir a los Estados Unidos de América que proporcione al grupo y a Guatemala la información que no ha elegido a presentar al grupo arbitral, incluyendo la información que los Estados Unidos de América ha dado a conocer a la Secretaría General del CIADI y su personal.

El grupo arbitral es de la unánime opinión que la admisibilidad y el valor probatorio de todas las pruebas presentadas por las partes contendientes, incluyendo la declaración de la Secretaria General del CIADI, son asuntos que a el grupo arbitral determinará a la luz de los alegatos de las partes y de sus argumentos en la audiencia.

Kevin Banks  
Presidente del grupo arbitral

**Annex 4: Dissenting Minority Opinion of a member of the Arbitral Panel – Letter of the Panel of May 5, 2015**

English

**DISSENTING MINORITY OPINION OF THE ARBITRATIONAL PANEL – LETTER OF THE PANEL OF MAY 5, 2015**

The minority of the arbitral panel dissents from the ruling by the arbitral panel majority, in the second paragraph of the letter from the panel dated May 5, 2015 addressed to the Parties for the following technical-juridical reasons:

- (1) Articles 15, 16 and 21 of the Model Rules prohibit that information or documents rendered under guarantee of confidentiality be disclosed to the public in general, and not that the arbitral panel and the other Party have access to such information and documents without any restriction. If the latter occurs or is allowed we are facing a clear retention of evidence which not only limits or restricts the right to defense of the opposing Party, but prevents the panel from making a fair assessment of the evidence.
- (2) The arbitral panel should not accept retention of evidence either expressly or implicitly, and should request that the United States provide the retained documentary evidence, of course under the guarantee of confidentiality, in accordance with articles 15 and 16 of the Model Rules.
- (3) Retaining evidence by the United States means the violation of the principles of due process, congruency between the claim and the result, and of contradiction that, in evidentiary terms, supposes the definite possibility for the interested party to control, supervise, and challenge the evidence of the opposing party, as well as take advantage of the same in a context of the full exercise of the rights of legal equality, defense and due process.

**VOTO DISIDENTE RAZONADO DE LA MINORÍA DEL GRUPO ARBITRAL –  
CARTA DEL GRUPO ARBITRAL DEL 5 DE MAYO, 2015**

En relación a lo resuelto por el Grupo Arbitral, por decisión mayoritaria, en el párrafo segundo de la carta de fecha 5 de mayo de 2015, dirigida a las partes, la minoría del Grupo Arbitral disiente o discrepa de dicha decisión por las siguientes razones técnico-jurídicas:

- (1) Los artículos 15, 16 y 21 de las Reglas Modelo prohíben que la información o documentos probatorios rendidos por una parte bajo garantía de confidencia se divulgue al público en general y no que el Grupo Arbitral y la contraparte tengan acceso a dicha información y documentos sin restricción alguna. Si esto último ocurre o se permite estamos frente a una clara retención de prueba que no solo limita o restringe el derecho de defensa de la contraparte, sino que impide a los árbitros hacer una justa valoración de la prueba.
- (2) El Grupo Arbitral no debería aceptar expresa ni tácitamente una retención de prueba, y debería solicitar a los EE.UU. que aporte la prueba documental retenida, por supuesto bajo garantía de confidencia, conforme los artículos 15 y 16 de la Reglas Modelo.
- (3) La retención de prueba por parte de los EE.UU. supone la violación a los principios rectores del debido proceso de congruencia, es decir la adecuación entre lo pedido y lo resultado, y de contradicción, que, en materia probatoria, supone la posibilidad concreta para la parte interesada de controlar, fiscalizar, contraprobar e impugnar las pruebas de la contraparte, así como aprovecharse de las mismas, en un contexto de pleno ejercicio de los derechos de igualdad jurídica, de defensa y al debido proceso.