



WRONG TURN FOR WORKERS' RIGHTS:

THE U.S.-GUATEMALA CAFTA LABOR ARBITRATION RULING – AND WHAT TO DO ABOUT IT



AN ABRIDGED, EDITED, AND ANNOTATED VERSION OF THE 2017
U.S.-GUATEMALA CAFTA LABOR ARBITRATION RULING ©

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Note: this is an unofficial abridged/edited/annotated version of the arbitral panel's June 2017 decision in this arbitration case. This abbreviated version is offered to the international labor rights advocacy community as a convenient substitute for the entire 299-page decision. Commentary is added to guide the reader in transition from one section to the next.

Paragraph numbers are removed and some headings are added [in brackets]. Text is unchanged except where a [capital letter] starts a new sentence. Authors' comments and inserts are in italics. The use of "Guatemala" and "United States" means the government of each country. Authors' recommendations follow at the end of this edited version.

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BACKGROUND

On April 23, 2008, the AFL-CIO and six Guatemalan trade unions filed a complaint – known formally as a “public submission” – with the U.S. Department of Labor’s Office of Trade and Labor Affairs (OTLA) alleging that Guatemala was failing to effectively enforce its labor laws as required under Chapter 16 of the Dominican Republic - Central American Free Trade Agreement (DR-CAFTA). The complaint included five case studies where Guatemala failed to enforce its labor laws with regard to the right to freedom of association, to organize and to bargain collectively, as well as “acceptable conditions of work.” It also highlighted the troubling rise in anti-union violence since the passage of the trade deal.

On June 12, 2008, OTLA formally accepted the submission and began a six-month review process. As part of this process, the office reviewed additional documentation provided by the complainants and the Government of Guatemala, and conducted two visits where U.S. Government officials met with workers, union leaders, employers, government representatives and other organizations in Guatemala. On January 15, 2009, OTLA issued a public report finding “significant and systemic gaps” in Guatemala’s enforcement of its labor laws, including labor inspectors’ failure to obtain access to work sites and the failure to enforce court orders for reinstatement and payment of back wages. The public report did not, however, address the issue of violence against trade unionists, declining to argue that Guatemala’s failure to effectively investigate or prosecute violent crimes against trade unionists violated its obligations under Chapter 16 of the CAFTA.

The OTLA report did recommend a set of concrete steps Guatemala could take to address the violations but decided against formal consultation at that time. Instead, the office proposed an initial six-month period after which the U.S. would evaluate any progress made and determine next steps. During that period, Guatemala sent labor inspectors to three identified factories and resolved one dispute at a frozen vegetable processing plant to the satisfaction of the worker. However, another garment factory closed its doors without full payment to the workers, and in another factory some dismissed workers were reinstated only to face a new round of retaliation. These partial steps, which did nothing to address systemic concerns let alone provide an effective remedy for all the workers concerned, came close to persuading the U.S. to end the case. To keep it alive, unions submitted evidence of dozens of additional cases to the U.S. government.

In August 2011, after formal labor consultations between the two nations failed to yield results, the United States Trade Representative (USTR) filed for arbitration under the CAFTA dispute resolution chapter. This was the first time the United States ever brought a labor case to dispute settlement under a trade agreement. Shortly after this filing, USTR announced yet another delay while both governments negotiated a “labor enforcement plan,” which was not signed until April 2013. Guatemala failed to implement key components of the plan and, over a year later, on September 18, 2014, USTR announced it would restart the arbitration process.

The U.S. filed its first written materials on November 3, 2014, and the first hearing before the arbitration panel took place on June 2, 2015, in Guatemala City. Beset with numerous delays, including the resignation of one of the arbitrators in the middle of the case, the panel’s final decision was handed down on June 14, 2017 – nine years after the unions filed their submission.

DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES
FREE TRADE AGREEMENT (CAFTA-DR)
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

Professor Ricardo Ramírez Hernández

[Article 16.7 of the CAFTA labor chapter called for a roster of arbitrators, specifying at 2(a): “Labor roster members shall have expertise or experience in labor law or its enforcement, international trade, or the resolution of disputes arising under international agreements.”]

The disjunctive “or” made a difference. Panelists Posner (the U.S. appointee) and Ramírez Hernández (named by Guatemala) are international trade and trade dispute resolution experts employed by large corporate law firms. As is typical in the revolving-door arbitration system for trade dispute cases, they have served both as panelists in trade cases and as lawyers for corporate clients in other trade cases. They have no expertise or experience in labor law or its enforcement. Only Panel Chair Banks, a Canadian, is an expert with extensive experience in labor law and its enforcement.

One can only speculate to what extent the imbalance in trade and labor backgrounds of panel members contributed to the decision in favor of Guatemala. However, the decision is clearly based on a narrow, trade-oriented analysis divorced from labor law practice - particularly in a developing country like Guatemala. A focus on these practical realities might have led to a favorable outcome for workers. Notably, the Panel’s Table of Cases cited in the report lists 38 decisions, all of them trade disputes, 36 of them at the WTO. No labor decisions are cited, including from the ILO Committee on Freedom of Association, the Committee of Experts, or UN human rights bodies.]

“The decision is based on a narrow, trade-oriented analysis divorced from labor law reality - particularly in a developing country like Guatemala.”

INTRODUCTION

This dispute settlement proceeding between the United States and Guatemala takes place under Chapter 20 of the CAFTA-DR (“Dispute Settlement”) and the Rules of Procedure for Chapter Twenty of the CAFTA-DR (the “Rules”).

By letter of August 9, 2011...the United States requested “the establishment of an arbitral panel...to consider whether the Government of Guatemala is conforming to its obligations...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 Panel in this dispute was constituted on November 30, 2012...

[As shall be seen, the Panel’s decision is tied to the August 9, 2011, date of the U.S. request for arbitration and what the request alleged at that time. The Panel does not take note of the initial submission leading to this arbitration filed in April 2008. Again, the initial submission alleged that Guatemala was failing to enforce its labor laws and included detailed cases of anti-union discrimination, refusal to register unions and grant legal personality, employers’ refusal to pay minimum wages and provide legally required benefits, and a systematic failure to investigate and prosecute violence against trade unionists.]

Two cases cited in the initial 2008 CAFTA labor submission involve the murders of union leaders and threats of violence against union organizers. However, the USTR has taken the position that violence against trade unionists – assaults, death threats, and killings, sometime affecting family members – is a matter of criminal law, not labor law, and therefore is not encompassed in labor chapters of the earlier trade agreements calling for effective enforcement of labor law. It remains an open question as to whether anti-union violence is actionable under later trade agreements that incorporated stronger minimum labor obligations (known as the May 10, 2007 standard). Trade unions and NGOs submitted extensive, widely-known evidence of such violence, but USTR did not submit such evidence to the Panel. This precluded its consideration, since the scope of the Panel’s mandate was limited to issues presented by the complaining government, not by third parties. In the full 299-page decision of the Panel, not once does the word “violence” appear.]

[THE REDACTION DISPUTE]

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...

[The exhibits were workers’ affidavits and other legal documents about labor law violations and the Guatemalan labor ministry’s failure to enforce the law. The United States had promised anonymity and redacted the workers’ names because they reasonably feared reprisals by employers and government authorities if their identities were revealed – including that they might be targets of violence or killing]

...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...

[Throughout the entire proceeding, Guatemala continued to challenge redacted copies of exhibits with workers’ names removed. It argued that the Panel should “not afford any probative value” to redacted documents submitted by the United States because it violated due process rights. USTR steadily defended the redactions. The Panel said it would admit such evidence but weigh its probative value in the overall context of the proceeding. As shall be seen below, the Panel discounted some important evidence because of the redactions.]

[THE PUBLIC HEARING AND POST-HEARING PROCEEDINGS]

On June 2, 2015, a hearing on the merits was held in Guatemala City, Guatemala...The United States was represented by [naming 10 attorneys from USTR and other U.S. government offices.]...Guatemala was represented by [naming 11 Guatemalan government officials, 2 attorneys from a Guatemalan law firm, and 2 attorneys from a U.S law firm]...

[No one representing the trade unions who filed the original complaint was allowed to be heard at the arbitration hearing. Neither representatives of victimized Guatemalan workers nor workers themselves (nor employers, for that matter) who might have been able to provide clarifications or additional information upon examination were able to participate. Further, USTR did not invite the complaining organizations to help them strategize and frame the case. This was a fundamental flaw in the entire proceeding: it was treated primarily as a trade dispute and handled like a WTO case. Trade considerations, not workers' rights, drove the dynamic of the Panel's deliberations and analysis. The trade-first approach dictated the Panel's ultimate decision for Guatemala.]

By letter dated June 7, 2016 [Note: one year later] 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...The Panel delivered its initial report to the disputing Parties on September 27, 2016...The disputing Parties each delivered comments on the Panel's initial report on December 12, 2016...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.



“In the full 299-page decision of the Panel, not once does the word “violence” appear.”

[The Panel delivered its final report on June 14, 2017 – nearly nine years after the initial complaint was filed, and nearly six years after the United States initiated arbitration. Much of the delay was due to the parties themselves requesting delays while they engaged in (unsuccessful) consultations to resolve the dispute].

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.

Jurisdiction

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.

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:

- 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.

...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... [because it] 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’.”...

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...

[While it pointedly underscored reliance on WTO rulings, the Panel discounted reports and decisions by the ILO, United Nations human rights bodies, international trade unions, and respected international human rights NGOs. These reports all detail widespread labor law violations in Guatemala and widespread governmental failure to enforce labor laws.

The Panel explained that these reports might contain evidence of systemic failure but did not address events in the specific workplaces cited in the United States' original submission of August 2011, which formed the basis of the U.S. claim: "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 ILO and UN reports described the government's widespread failure to enforce its labor laws, supported by evidence in many specific cases. These cases preceded the specific cases at issue in the arbitration. However, rather than citing these reports, decisions and cases to support findings of violations, the Arbitral Panel refused to consider them. The Panel's blinkered analysis, in which it refused to look beyond "particular instances of failure" – and only such instances alleged by the United States that occurred before 2011 – became fatal to the U.S. case. Indeed, this tunnel-vision approach to labor rights cases under the CAFTA language model, which appears in all other labor chapters in U.S. trade agreements, guarantees that a complaining government can never prevail. Only when "particular instances" are seen in the context of an overall broken system of labor justice, as in Guatemala, can workers' rights be vindicated.]

Guatemala's procedural objection concerns the first of these elements. 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...

[T]he United States...claims that the failures it has identified include three in particular. Those three are:

- 1) the failure of Guatemala's Ministry of Labor to investigate alleged labor law violations;
- 2) the failure of the Ministry of Labor to take enforcement action after identifying labor law violations; and
- 3) the failure of Guatemala's courts to enforce Labor Court orders in cases involving labor law violations.

[After this point, the Panel collapsed these three failures into two categories: 1) failure to enforce court orders, and 2) failure to conduct proper inspections. The first is treated in Part A below at pp. 15-22. The second is treated in Part B at pp. 22-27.

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...

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...

[W]e 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...

[Neglecting to specify failure to register unions within required time limits in its initial filing of August 2011 was a significant lapse by the USTR legal team. Such failure to enforce Guatemalan labor law severely interfered with workers' organizing and bargaining rights. However, the Panel could have ruled that in three years of consultations and successive enforcement plan extensions between the two countries, Guatemala had more than adequate notice and specificity on these claims. In refusing to take this step, the Panel persisted in its narrow, trade-fixated analytical approach to the case.]

Interpretive Issues

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)...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 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...

[This is one of many points in the decision where, as we have already seen, the Panel disregards reports by trade unions, legal associations, and NGOs, as well as by intergovernmental agencies (particularly the United Nations and the ILO), in fashioning its ruling in the case.]



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“Labor Laws”

[Guatemala argued that “labor laws” refers only to executive branch action and that failure by the judicial branch to enforce labor laws – and even failure by the executive branch to enforce court orders – were outside the purview of the arbitral panel.]

[W]e conclude that the obligation is not limited to conduct of Guatemala’s executive body...[F]or 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...

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,” to “promote conditions of fair competition in the free trade area,” 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.”... 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...

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.

“Sustained or Recurring Course of Action or Inaction”

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...

[W]e 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...

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... 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...

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... below.

[This issue is not treated in depth in the Part A discussion because the Panel did not rely on the “sustained or recurring course” test in making its decision. With regard to “course of action or inaction,” the Panel noted that “course” must mean more than “sustained or recurring” or it would be redundant. The Panel said that the use of “course” indicates that actions or inactions must be connected in the way that a “line of conduct or behavior” is connected.]

Although the Panel did not follow this line of analysis to a conclusion (deciding the case on the “manner affecting trade” test discussed below), its hairsplitting discussion of the “sustained or recurring course” test

bodes ill for future cases. When the Panel demands “sufficient similarity of behavior over time or place to indicate that the similarity is not random, but connected,” it is not clear how similar the behavior must be, how much “time” is meant by “over time,” what proximity is necessary for the “place” criterion, and other cavils.]

“In a Manner Affecting Trade”

[We devote more attention to this issue because it turned out to be the Achilles Heel of the U.S. case.]

...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...and that “trade” includes “commerce” or “buying and selling or exchange of commodities for profit, especially between nations.” 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.

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 [and 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...

Guatemala submits that there must be a relationship of cause and effect between a course of action or inaction and a trade effect, and that Article 16.2.1(a) requires an “unambiguous showing that the challenged conduct has an effect on trade between the Parties...”

[A]n 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...

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

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.

[W]e 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...

Whether any given failure to effectively enforce labor laws affects conditions of competition by creating a competitive advantage is a question of fact... 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...

[The foregoing paragraphs reflect a narrow, economic view of workers' rights to associate, form trade unions, and bargain collectively. "Labor laws impose costs" is the Panel's main focus, rather than labor laws' higher importance in protecting workers' exercise of fundamental rights. Even taken at face value, breaking workers' organizing efforts is clearly meant to confer an advantage on the company by being able to provide goods, including in trade, at a more competitive price than unionized firms. The Panel concedes this, but then dismisses it because workers' affidavits proffered by the United States did not include specific information on this point. This also fails to appreciate business's "capture" of the Guatemalan government widely recognized in scholarly literature on private sector dominance of Central American states (except, to some degree, Costa Rica).]

Determinations

[W]e 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...

[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...

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...

[This is an example where USTR consultations with trade unions and NGOs involved in the case could have borne fruit. The civil society groups and USTR might have arrived at a strategy in which USTR introduced the groups' evidence on the overall functioning of the Guatemalan labor courts and labor inspectorates, using UN and ILO reports. Certainly, the overall functioning of the labor law system has direct bearing on each particular case raised by the United States. However, the Panel disregarded such evidence from civil society groups because the United States failed to submit it.]

“Labor laws impose costs” is the Panel’s main focus, rather than labor laws’ higher importance in protecting workers’ exercise of fundamental rights.

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. 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...

[T]he 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...

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.

[Here the emphases on “particular” and “specific” are added. The Panel applies the narrowest possible interpretation of its mandate, focusing on problems at “particular worksites” rather than widespread, widely documented evidence of systemic labor rights abuses and failure to effectively enforce labor law. Then, as shall be seen below, the near-impossibility of demonstrating trade effects at particular worksites scuttled the U.S. case.]

The Probative Value of Redacted Evidence

We consider first the arguments by Guatemala that the Panel should categorically attribute no probative value to documents redacted by the United States... 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... Guatemala contends that according probative weight to this redacted evidence... deprives it of the opportunity to respond to such documents, and thus to adequately prepare its defense...

[W]e 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...

[T]he 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... a panel must find clear indicia of reliability before accepting statements as establishing that their contents are more likely than not to be true...

[Here the Panel re-emphasizes the problems with redacted exhibits, setting the stage for discounting many of them. The United States was between a rock and a hard place: it had to honor its promise to witnesses not to reveal their identity, but the lack of identity led the Panel to devalue their statements. Of course, Guatemala had possession of all complaints, inspection reports, judicial opinions etc. created through workers' interaction with the labor justice system, so its objections as to these documents would appear particularly unfounded. However, lacking power to subpoena documents, the Panel was stuck with redacted versions which it tended to discount.]



Admissibility and Relevance of Certain Statistics and Reports

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. The United States nonetheless tenders with its Rebuttal Submission some evidence with respect to the overall functioning of Guatemala’s labor law enforcement institutions...

[Here was another lapse by the U.S. legal team, which could easily have included with its initial submission even in 2011 the already extensive body of reports by international bodies, trade unions, and NGOs on labor rights violations in Guatemala to supplement its allegations. Instead, it tried to insert such reports later in the proceeding, prompting this response by the Panel:]

[T]he United States referred the Panel to statistics posted on the website of the Guatemalan Judiciary... to reports by the ILO and by United Nations officials... to [a 2009] International Labour Office Technical Memorandum... The United States does not seek, however, to prove the extent or duration of the problems identified, but... simply to support its claim...with respect to failures to enforce at particular employers...

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 focused exclusively on the “particular” rather than the systemic, despite extensive evidence submitted by the United States and by other organizations detailing systemic labor law violations and failure to enforce the law. The Panel repeatedly insisted on considering only particular instances, workplaces, employers, failures, times, goods, services – the word “particular” appears 37 times in the decision. Nothing in the CAFTA labor chapter or dispute resolution chapter requires this approach. It appears to be rather a knee-jerk approach of trade lawyers comfortable with WTO proceedings, rather than labor law experts who understand what workers are up against in the Guatemalan context.]

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. 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.

[The Panel here offers a weak excuse for not considering extensive evidence from UN and ILO oversight bodies and experts. It warns that it would have to undertake substantially more work analyzing “the methodologies and sources of information underlying those reports” when it could rather accept the reports as credible studies by expert bodies. Indeed, international courts and most countries’ high courts world-wide accept and rely on such reports in deciding labor rights cases. Again, nothing in the CAFTA labor or dispute resolution chapter requires the narrow approach chosen by the Panel in this case.]

A. The Claim of Failures to Ensure Compliance with Court Orders

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

[The Panel goes on to recount the facts and circumstances at each of the eight named companies. They all involved Guatemala's failure to enforce court orders to reinstate a total of 76 workers unlawfully dismissed because of union activity.]

“The Panel made conclusive findings that Guatemala failed to effectively enforce its labor laws in violation of the central obligation of the CAFTA labor chapter.”

Conclusions

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...

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.

[The Panel here made conclusive findings that Guatemala failed to effectively enforce its labor laws in violation of the central obligation of the CAFTA labor chapter. The U.S. legal team can take some solace in this vindication of its efforts and arguments. However, two more hurdles remained: whether the violations reflected a sustained or recurring course of action or inaction, and whether they were in a manner affecting trade.]

Sustained or Recurring Course of Action or Inaction

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). 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 given year is not enough to demonstrate a linkage reflecting consistent or repeated conduct or a pattern.

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 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...

[The conclusion is “provisional” because, as shall be seen below, the Panel decided that where it found a “sustained or recurring course,” it did not affect trade, and that the single instance it found did affect trade was not “sustained or recurring.” This “Catch-22” resulted in Guatemala winning the case.]

In a Manner Affecting Trade Between the Parties

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.

The United States alleges that those failures enabled employers to evade or forego...costs associated with having a functioning union or a collective labor agreement in the workplace. 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."

[Here the United States itself offered a narrow, cost-focused view of trade unions' role that played into the hands of Guatemala and of a reluctant arbitral panel. In contrast, the United States could have asserted a broader claim that employers terminated workers to maintain unilateral power and control in the workplace and deny workers their fundamental rights to associate, organize and bargain collectively – rights that the labor chapter is meant to protect. This minimalist U.S. approach made it easier for the Panel to avoid addressing the fundamental rights argument.]

[W]e 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;
- 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.

The Shipping Companies

...[T]here 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... 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.

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...



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The Garment Manufacturers

The evidence indicates that the employers in question were engaged in CAFTA-DR trade at the relevant time...

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.

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.

[The Panel here created an unworkably high barrier for a submitting party when it demands evidence of total amounts owed to workers and those amounts' relation to overall labor costs of each firm. The access to books and records and other forensic accounting challenges are enormous; in fact impossible for USTR's small legal team and support staff to undertake. Not only does this contribute decisively to the negative decision in this case; it creates a deterrent to filing any future cases if this Panel's "manner affecting trade" analysis serves as precedent.]

We turn next to the question of whether each of these firms avoided unionization costs...to an extent sufficient to have conferred upon it a competitive advantage.

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...

[This creates other enormous practical hurdles. It would be a huge undertaking for U.S. officials to obtain statements from union organizers or workers in other workplaces to show what the Panel is looking for. They would be bound to promise anonymity to any organizers or workers willing to give such statements, so the Panel would likely devalue their probative weight to near-zero.]

[W]e 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... 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. 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...

[The Panel here engages in a head-spinning contradiction of its own argument. It correctly declares that impunity for anti-union dismissals gives employers a competitive advantage. Indeed, the panelists "do not doubt" such a result. But then they demand proof that failure to enforce laws protecting workers' rights has such an effect in "each case" – an impossible demand requiring a level of detail and forensic accounting that can never be achieved.]

[T]he United States seems to suggest that the relevant causal relationships follow inevitably or automatically given the nature of the conduct in question... 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.

[And this would be the correct position, entirely in keeping with and fulfilling the purpose of the CAFTA labor rights chapter.]

[T]he 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.

[Again: "an employer..." This is the key to the Panel's decision, and it is not compelled by the CAFTA labor chapter. The Panel could have used a broader interpretation fulfilling the purposes of the chapter.]

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...

[The foregoing is the key to the Panel's decision in favor of Guatemala. It requires showing that an employer gained a competitive advantage, with sufficient financial evidence and analysis to prove it. However, only the most intimate cost/sales/profits information in the hands of that employer alone could support such a showing. The employer would certainly be unwilling to hand it over to the United States. The CAFTA dispute resolution system does not provide for subpoenas or other elements of compulsory process or "discovery," so a complaining party could never prove what the Panel demands.]

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.

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.

We do not consider the record evidence sufficient to prove that the failure to effectively enforce labor laws against [other garment companies] altered conditions of competition... 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 [the other companies].

[The Panel makes an impossible-to-meet demand for evidence on how labor law violations and the government's failure to enforce the law affected workers' ability to organize. The workers were fired; by definition it affected their ability to organize.]

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 [Guatemala Labor Code] 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. [However] we conclude that the failure of Guatemala to effectively enforce court orders against Avandia conferred some competitive advantage upon it.

[Again, the Panel creates an impossibly high bar. A complainant would have to conduct a survey of employers and workers in other companies to see if the employers knew what happened and were prompted to resist workers' organizing efforts thereby, and if it workers knew what happened and thus were afraid to organize. The practical problems with conducting such a survey (how? – a telephone survey? An on-line survey? Access to non-union factories to interview employers and workers?) make it impossible in the Guatemalan context.]



Conclusions

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 [affected trade]... [A]lthough 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...

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...

[W]hichever 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.

[Here again is the Catch-22 in the Panel’s decision: the failure is recurring, but does not affect trade; the failure affects trade, but is not recurring.]

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.”... [I]t 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.

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.

[In characterizing the purposes of Chapter 16 as “centered around ensuring fair conditions of competition within CAFTA-DR trade,” the Panel forgets its earlier characterization of the chapter as having the “object and purpose... “to protect, enhance, and enforce basic workers’ rights” 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.” Instead, the Panel made plain its bias toward sterile, trade-focused analysis. If a “center” is to be found in the purposes of Chapter 16, a rights-focused analysis would say the purposes are centered around protecting workers’ fundamental rights, not competition in the free trade area.]

“A rights-focused analysis would say CAFTA labor chapter is meant to protect workers’ fundamental rights, not competition in the free trade area.”

B. The Claim of Failure to Conduct Proper Inspections and Failure to Impose Penalties

[In this Part B, the panel moves to consideration of labor law enforcement through the labor inspection system, starting first with the “sustained or recurring” test. As shall be seen, the application of the “sustained or recurring” test was sufficient for the Panel to rule against the United States. It did not consider the “manner affecting trade” test.

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:

- 1) 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
- 2) Inspectors failing to impose penalties or otherwise follow up after finding that an employer had violated labor laws.

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.

Subject-Matter of Allegations Covered by the Inspections/Penalties Claim

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)...

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. 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.

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.

[There are two notable problems here. On one hand, if indeed the United States failed to link "acts or omissions at particular workplaces" to "system-wide dysfunction" in Guatemala, it demonstrates a distressing strategic mistake by the U.S. legal team. On the other hand, it is self-evident that the United States cited international reports to buttress its case that Guatemala breached its obligations under the CAFTA labor chapter.

The Panel could well have gone ahead and "understood" the United States to be asking the Panel to find violations of the CAFTA labor chapter, because there was no other reason for USTR to cite such reports other than to buttress its case that Guatemala breached its obligations. Instead, the Panel's gratuitous "we do not understand it to be asking" evasion confirms its already-demonstrated resistance to considering evidence of systemic failure.]

Temporal Scope of Allegations Covered by The Inspections/Penalties Claim

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. 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.

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 Panel here cites nine instances in agricultural and garment sector workplaces in which labor ministry inspectors were alleged to have failed to act or acted improperly on various dates 2011-2014, after the August 9, 2011 U.S. request for arbitration.]* 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 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 Panel cites five instances in agricultural and garment sector workplaces in which labor ministry inspectors were alleged to have failed to act or acted improperly before August 9, 2011.]*

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.

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?

In making these determinations, we recall our observations 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.



The Coffee Farms

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).” The United States claims, first that despite these complaints “Guatemala failed to inspect the worksites in such a way as to determine whether the employer had violated the relevant laws...”

The questions we must decide are whether the United States has established a failure to effectively enforce labor laws at...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...a few other identified farms...

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...

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.

[Again note the Panel’s fixation on “particular” coffee farms, demanding evidence on “each and every one” of 70 other farms – a nearly impossible research job in practical terms. And again, the Panel discounts statements from workers and worker advocates gathered by the United States through intensive research efforts at remote workplaces around Guatemala. And so the coffee farms are eliminated...]

[GARMENT SECTOR INSPECTIONS]

Koa Modas

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.

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. The United States also cites a collective statement by four individuals who are members of the Koa Modas workers union...

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... 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...

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.

Fribo

[T]he 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...

[W]e 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.

[Here the Panel finds enforcement failure in one 2007 inspection. This will be important later, when the Panel applies the "sustained or recurring" test.]

We turn now to the second part of the Fribo claims, concerning the inspections conducted in July 2009... [A]ccording to the United States, despite conducting two follow-up inspections, the inspectors never verified and compelled the company's correction of these violations (either the health and safety violations or the non-payment of wages)...

[T]he 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... 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.

[The Panel again creates impossible logistical hurdles for the United States to overcome. There are two ways to learn what happened after July 27, 2009. One would be for Guatemala to voluntarily offer evidence of what happened. But Guatemala is the charged party; it has no incentive whatsoever to offer evidence that would confirm the U.S. allegations. And the Panel has no compulsory power to compel such evidence; the dispute resolution system does not accommodate "discovery" to produce needed evidence.

A second method for learning what happened after July 27, 2009 would be having affected workers reconstruct events. But again, this is an impossible challenge. It would mean expecting workers to make contemporaneous notes and keep careful files and records – workers who barely eke out a living under exploitative conditions, often with forced overtime, with family care responsibilities and so on – and to have those records available when someone shows up from the U.S. government in 2011 or 2013 or 2015 asking the worker to sign an affidavit about what happened. And even if the worker (theoretically – it would never happen in real life) produced such records and signed an affidavit, the worker's name would be redacted because of a well-founded fear of reprisal, and the Panel then ignores or devalues its probative weight.

Either method of discerning what happened after July 2009 is completely unviable. It is unfair for the Panel to require such efforts by the United States or by affected workers, and then to use its own unfair expectations to dismiss a claim of violation.]

“The Panel knows full well that there is a widespread failure of the labor inspection service, but discounts ILO, UN, and NGO evidence.”

Summary of Findings

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...

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 each of the other cases, we determined that the evidence did not support a finding of failure to effectively enforce labor laws...

We turn now to the “sustained or recurring course of action or inaction” prong... [the Fribo case] appears to us to have been a discrete instance of failure to effectively enforce the law.

[The Panel knows full well that there is a widespread failure of the labor inspection service, but by discounting the voluminous ILO, UN, and NGO evidence, which they claim was not properly pled in the United States’ initial submission (only introduced in the rebuttal brief responding to Guatemala’s arguments), it arrives at a conclusion redolent of casuistry – defined in the Oxford English Dictionary as “a quibbling or evasive way of dealing with difficult cases of duty.”]

Conclusion

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.

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, 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.

[The Panel avoids considering extensive evidence of violations and enforcement failures in the 2011-2014 period, which were thoroughly discussed by the two governments in bilateral talks and while reviewing the 2013 labor enforcement plan. Despite the fact that Guatemala had full knowledge of the evidence submitted by the United States in the post-2011 period, the Panel refused to consider it.]

FINAL CONCLUSIONS

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.

[Again, the Panel refuses to consider additional extensive evidence submitted by the United States, of which Guatemala was fully aware based on three years of consultation by the countries in 2011-2014 and of the continuing failure of the enforcement plans stemming from those consultations. Thus, the Panel allows Guatemala to prevail notwithstanding its conclusive findings that the government failed to effectively enforce its labor laws in many of the “particular instances” cited by the United States in the case.]

For its part, the Guatemalan government seized on the favorable bottom-line decision to boast of complete vindication in the case. Its crowing led to headlines like “Guatemala Says It Won U.S. Labor Suit, Avoids \$15 Million Fine – The Central American country says a panel cleared it of allegations by the USTR and AFL-CIO that it abused workers trying to unionize in the apparel sector,” when in fact precisely the opposite was the Panel’s finding (see article by Ivan Castano, Women’s Wear Daily, June 25, 2017, at <http://wwd.com/business-news/government-trade/guatemala-says-it-won-u-s-labor-suit-avoids-15-million-fine-10929234/>.)

AUTHOR'S RECOMMENDATIONS

As the first case ever to proceed through the entire dispute resolution process under the labor chapter of any trade agreement, the arbitral panel's decision is a devastating setback for advocates of workers' rights in the global economy. It is even more harmful to workers themselves who seek protection under labor chapters in trade agreements. The panel's pinched, hyper-technical, trade-first, nit-picking-the-evidence approach sets a terrible precedent on many fronts. It calls into question the viability of all labor chapters, and undermines the progress, however slight, in the evolution of such labor rights provisions since the CAFTA agreement, such as the "May 10" template which strengthened standards, obligations, and enforcement mechanisms in agreements with Peru, Korea, Colombia and other countries. They all contain the "in a manner affecting trade" formulation which was the death warrant in this case.

The foregoing analysis of the arbitral panel's decision leads to the following recommendations for future cases. These recommendations also apply to any negotiation or re-negotiation of labor protections in trade agreements – starting right now with NAFTA re-negotiation. They can also be accomplished by supplemental agreements codifying these recommendations in existing labor chapters, without need for comprehensive re-negotiation:

1. **Composition of the arbitral panel**

To guard against treatment of labor rights cases by trade-only experts who analyze a case through a WTO lens, a clause on composition of a roster or panel of arbitrators should say:

Labor roster members or any other panelist in a case arising under the labor chapter of this agreement shall have expertise or experience in international law on human rights, labor rights and labor standards, and labor law and its enforcement under one or more national labor law systems. They may additionally have expertise in international trade or the resolution of disputes arising under international agreements.

A modified version might apply this requirement to "a majority of an arbitral panel created under this agreement."

2. **Standing for complaining parties and victimized workers**

Trade unions and NGOs who file initial complaints under labor chapters in trade agreements, as well as representatives of workers affected by a country's failure to effectively enforce its labor law – or such workers themselves, if they so choose – should have "standing" to participate fully at every stage of proceedings that follow the initial complaint. These include consultations between governments, the shaping and monitoring of an enforcement plan, and the arbitration process itself. These civil society groups should also be empowered to move cases to the next level of treatment when delays become intolerable and consultations are going nowhere.

3. Full weight for evidence from international human rights and labor rights institutions

Similarly, an arbitral panel should give full consideration to civil society submissions of reports and findings of international courts and bodies such as the UN and the ILO, and their relevant expert committees. Obviously, the Panel must apply rules of evidence and due process, but it should not discount evidentiary submissions by such parties simply because they represent civil society rather than governments, as happened here.

4. Full submission and treatment of evidence on violence against trade unionists

USTR should revise its view of anti-labor violence as a criminal law matter, not a labor law matter, and submit all the evidence it can muster on violence against trade unionists. In this effort USTR should collaborate closely with unions and human rights NGOs who can provide such evidence, as well as findings of international bodies such as the UN and the ILO who investigate and report on such abuses.

5. Priority for human rights and labor rights purposes, not trade rationales

The arbitral panel in this case noted three purposes in the CAFTA labor chapter: “to protect, enhance, and enforce basic workers’ rights,” to “promote conditions of fair competition in the free trade area,” 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.” But its decision prioritized “fair competition in the free trade area,” subordinating the rights-based principles. This order of priority should be reversed: the central goal of the labor chapter is to protect workers’ rights, not to grease the skids of trade. In this light, new language should be adopted to make clear the priority of rights-based considerations.

6. Simplify the “sustained or recurring course” jumble

The panel in this case tied itself in knots trying to parse the meaning of “a sustained or recurring course of action or inaction,” with analyses of “sustained,” “recurring” and “course” worthy of medieval scholastics. It did not resolve its contorted linguistic exercise because it did not consider this necessary to make its decision. But to avoid such problems in future cases, the test should be simply “repeated action or inaction,” and let the contending parties argue about how much repetition must be shown.

7. Correct the “in a manner affecting trade” defect

The panel decision in this case set a standard for meeting the “in a manner affecting trade” test that makes it impossible for any complaining party or government to prevail in a labor chapter case. A party would have to have access to a “particular company’s” (a favorite phrase of the panel) labor cost structure and other cost information, pricing practices, balance sheets and other intimate financial information that can never be obtained without subpoena power. And even if it were obtained, the cost of employing forensic accountants and other experts to review such information would be prohibitive.

Instead, new language should clarify or substitute for “in a manner affecting trade” to make clear that failure to effectively enforce labor laws involving employers and workers in a firm or sector involved in trade (such as the port workers, plantation workers, and apparel factory workers involved in this case) is sufficient to meet the “manner affecting trade” test.

8. **Alternatively: make the labor chapter a human rights chapter**

Another way to cure the destructive precedents created by the panel decision in this case is to remove trade-relatedness altogether as a requirement for a cause of action. This is how intellectual property rights are treated under CAFTA and other trade agreements signed by the United States: the intellectual property chapter has no equivalent of the “in a manner affecting trade” requirement. Intellectual property rights stand on their own foundation, worthy of protection as a basic right of copyright and patent holders.

In the same way, labor rights could stand on their own foundation as basic rights of the workers who hold them – a human rights foundation, not rights that vary in enforceability depending on their relationship to trade. The United States could take the position that privileges and benefits of a trade agreement shall not extend to countries that fail to enforce national laws on workers’ rights and labor standards, whether or not abuses occur in traded sectors. For example, countries that fail to act against the worst forms of child labor in a non-traded sector (such as bonded child labor in stone quarries or brick kilns) or against trafficked labor in non-trade sectors should not get a free pass into the U.S. marketplace simply because such abuses are not “in a manner affecting trade.”

