

DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT

CHAPTER 16: LABOR

PUBLIC REPORT OF REVIEW OF
OFFICE OF TRADE AND LABOR AFFAIRS
U.S. SUBMISSION 2008-01 (GUATEMALA)



OFFICE OF TRADE AND LABOR AFFAIRS
BUREAU OF INTERNATIONAL LABOR AFFAIRS
U.S. DEPARTMENT OF LABOR

JANUARY 16, 2009

EXECUTIVE SUMMARY

Purpose of the Report

- On April 23, 2008, the Office of Trade and Labor Affairs (OTLA) received a public submission under Chapter 16 (the Labor Chapter) of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) from the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and six Guatemalan labor unions: the Union of Port Quetzal Company Workers (STEPQ); the Union of Izabal Banana Workers (SITRABI); the Union of International Frozen Products Workers (SITRAINPROCSA); the Coalition of Avandia Workers; the Union of Fribo Company Workers (SITRAFRIBO); and the Federation of Food and Similar Industries Workers of Guatemala (FESTRAS).¹
- On June 12, 2008, the OTLA accepted U.S. Submission 2008-01 (Guatemala), stating it met the criteria for acceptance, and published its decision in a *Federal Register* notice on June 18, 2008.² The OTLA has reviewed extensive documentation provided by the submitters and by the Government of Guatemala and conducted two visits, during which representatives from the OTLA met with workers, union leaders, employers, government officials, and other organizations in Guatemala that were relevant to the submission. The OTLA has consulted with the U.S. Department of State and the Office of the U.S. Trade Representative throughout the review process. The purpose of the report is to make public the OTLA's findings and recommendations based on information obtained in accordance with OTLA's Procedural Guidelines.

Summary of U.S. Submission 2008-01 (Guatemala)

- U.S. Submission 2008-01 focuses on allegations that the Government of Guatemala has violated Article 16.2.1(a), among others, of the Labor Chapter.³
- The submission outlines five separate cases (STEPQ, SITRABI, Coalition of Avandia Workers, SITRAFRIBO, SITRAINPROCSA, and FESTRAS) in which Guatemala allegedly failed to effectively enforce its domestic labor laws with regard to freedom of association, the right to organize and bargain collectively, and acceptable conditions of work.⁴
- The allegations related to freedom of association and the right to collective bargaining include: impunity for threats and violence against trade union leaders and members,

¹ Copies of the public submission are on file at the OTLA. It is available online at: http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/guatemala_petition.pdf

² 73 Fed. Reg. 34793 (June 18, 2008).

³ CAFTA-DR, 16.2.1 (a) (For the full text of the Agreement see http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html).

⁴ FESTRAS, a union federation in Guatemala, provided support for three of the Guatemalan unions that were the subject of the submission.

creating a climate in which trade union rights cannot be freely exercised; unlawful dismissals of union leaders and a subsequent failure to reinstate workers in violation of court orders as well as other forms of anti-union retaliation; failure to protect workers' associational and other rights in cases where ownership interests have changed in an enterprise; and failure to enforce provisions of Guatemalan labor law requiring employers to negotiate in good faith with recognized unions.

- The allegations related to acceptable conditions of work include failure to enforce correct legal severance payments and failure to enforce domestic legal provisions requiring employer contributions to the *Instituto Guatemalteco de Seguridad Social* (IGSS – Guatemalan Social Security Institute).

Findings

Throughout the review process, the Guatemalan government, under President Colom, has demonstrated a willingness to discuss with the U.S. government the issues raised in the submission. Guatemalan officials have met with U.S. government officials, provided requested information, and facilitated meetings with key government officials to address the allegations outlined in the submission. The OTLA notes that the Government of Guatemala has recently made efforts to address some of the issues raised in this report. The following is a summary of the OTLA's findings regarding the issues raised in the report.

Administrative Measures

- According to Article 281 of the Labor Code, the Ministry of Labor has the authority to carry out inspections. It appears that in several instances detailed in this report, the Ministry of Labor was unable to effectively carry out this function. In three of the cases, labor inspectors were denied entrance a total of 12 times. Reviewing only the documents in our possession, the OTLA determined that Avandia refused entry to labor inspectors twice, INPROCSA refused entry three times, and Fribo refused entry seven times. The IGSS inspection power also appears to be limited. In the Fribo case alone, the IGSS made six attempts to meet and review payroll information at the factory, and never obtained access.
- The Ministry of Labor lacks authority to sanction labor law violations. As a purely administrative agency, it relies on the courts to enforce compliance. Interviewees indicated that the courts did not share documents with the Ministry of Labor upon request because, once referred to the judicial system, these cases were no longer subject to the Ministry of Labor's jurisdiction. This suggests that the Ministry of Labor and its inspectors cannot effectively track whether their findings have been upheld. For example, in the INPROCSA case, the Constitutional Court ruled that it was not "logical" that employers fired union organizers as a result of 'lack of work' or 'lack of materials,' and overruled the labor inspectors' findings. The Ministry of Labor was unaware of this

court ruling.⁵ Thus, their inspectors could continue to issue findings that the Constitutional Court has already found to be illogical.

Judicial Measures

- It falls within a Guatemalan court's jurisdiction to enforce its own orders.⁶ If the employer does not comply with a court order, the court is to certify the case so it can proceed to a criminal court for prosecution of the employer for failure to comply with the order.
- Based on our document review, the OTLA found that in four of the five cases included in this submission, 11 court orders were not complied with. In the Avandia case, there were seven court orders not complied with; in the INPROCSA case, there were two court orders not complied with; in the Fribo case, there was one court order not complied with; and in the STEPQ case, there was one court order not complied with.

These findings suggest serious problems with respect to the enforcement of court orders, most notably protective orders against retaliatory firing and reinstatement orders following unlawful dismissals of union members.

Violence Against Trade Unionists

- The OTLA recognizes that the murders in the STEPQ and SITRABI cases occurred within the context of a high level of violent crime in Guatemala, affecting not only the labor sector, but the country as a whole.
- The OTLA acknowledges that initial Government of Guatemala investigations indicate that the homicides were not directly linked to the union leaders' activities, but understands that the investigation is ongoing. Until the perpetrators have been convicted there cannot be any certainty with respect to their motive. Nonetheless, when a union leader is violently attacked with total impunity, the crime's impact can reach beyond the individual and cast a shadow of fear upon others, weakening the right of association and collective bargaining.

Inter-Agency Coordination

- Limits on the Ministry of Labor's enforcement powers and the enormous challenges facing the Guatemalan judicial system appear to have created challenges for the enforcement of domestic labor laws. The OTLA believes that some of these problems could be addressed through improved inter-agency coordination, specifically

⁵ Guillermo Gándara, Director of International Affairs, Planning and Cooperation, Ministry of Labor, preliminary response to USDOL questions, email communication to USDOL, October 25, 2008.

⁶ Guatemalan Constitution, (artículo 203): "... Corresponde a los tribunales de justicia la potestad de juzgar y promover la ejecución de lo juzgado;" Ley del Organismo Judicial, (artículo 156): "Debe ejecutar la sentencia el juez que la dictó en primera instancia;" Government of Guatemala, Labor Code Article 283: "...los Tribunales de Trabajo y Previsión Social, a quienes compete juzgar y ejecutar lo juzgado."

coordination designed to enforce court orders and ensure access to the worksite by the relevant executive agencies.

- The recently reactivated Multi Institutional Commission on Labor Relations in Guatemala (Commission) may provide a forum to address the issues outlined in the submission in a comprehensive and coordinated way. On November 6, 2008, the Ministry of Labor, the Ministry of Economy, the Ministry of Public Security (*Ministerio de Gobernación*), the Ministry of Justice (*Ministerio Público*), and the Ministry of Foreign Relations, met and reactivated this Commission, established by a Presidential decree on August 13, 2003.⁷
- As part of this coordination, the Ministry of Economy could play a critical role in a comprehensive response to certain issues highlighted in this report. Currently, the Ministry of Economy registers companies for tax exemptions and other benefits under Decree 28-98 and Decree 65-89.⁸ The Office of Industrial Policy at the Ministry of Economy provides these benefits only after it has certified that the company is exporting its product, is employing workers according to the national labor laws, and has paid the social security tax. It currently has approximately 640 companies registered to receive these benefits.⁹ The Ministry of Economy has used this ability to suspend (or threaten the suspension of) tax privileges in the past, but not for several years.¹⁰

Recommendations

The Guatemalan government has demonstrated its interest in resolving the issues outlined in this report and has taken some critical initial steps. In view of the positive engagement between the OTLA and the Government of Guatemala generated by this review, the OTLA suggests several additional concrete actions which the Guatemalan government could take to support its progress. The OTLA will continue to work with the Government of Guatemala to evaluate progress in addressing the issues raised in the report. Such actions could include the following steps:

- Enforce outstanding arrest warrants in the murders of union members and conduct criminal proceedings.
- Advance the investigation of pending cases of violence against trade unionists and issue/enforce arrest warrants as warranted.
- Strengthen the Special Prosecutor's Unit for Crimes against Trade Unionists (e.g., hiring additional staff and establishing an electronic case management system, which would allow searches for related crimes).

⁷ *Ayuda de memoria, reactivación de la Comisión de Trabajo Multi Institucional para las Relaciones Laborales en Guatemala, Acuerdo Gubernativo No. 430-2003*, November 6, 2008.

⁸ Ley de Fomento y Desarrollo de La Actividad Exportadora y de Maquila, Congreso de la República de Guatemala, Decreto 28-98; Ley de Zonas Francas, Congreso de la República de Guatemala, Decreto Numero 65-89.

⁹ Telma Doris de León, Director of Department of Industrial Policy, Trade and Commercial Services, Ministry of Economy, interview with USDOL officials, October 31, 2008.

¹⁰ U.S. Department of State, Unclassified Cable, Guatemala 01813, July 15, 2003.

- Explore options to ensure the Ministry of Labor’s ability to conduct inspections of work sites.
- Enforce court orders for the reinstatement of unlawfully dismissed workers, including prosecution of employers who continue to ignore these orders.
- Develop and issue guidelines to clarify the criteria for the applicability of Article 23 (regarding changes in business ownership), to ensure that it cannot be circumvented by new owners.
- Enhance inter-agency collaboration in the effective promotion and protection of labor rights and the processing of existing labor disputes. Such collaboration could possibly include:
 - Development of coordination mechanisms between the Special Prosecutor’s Unit and other relevant agencies in the cases of violence against trade unionists;
 - Review of previous experience linking export licenses or tax privileges to compliance with court orders, and exploration of other possible mechanisms to ensure compliance; and
 - Development and implementation of proposals to ensure entry by Ministry of Labor inspectors to work sites.
- Develop and publicly disseminate guidelines to clarify the right to reinstatement for an illegally fired worker who has accepted severance payment, and ensure that workers who have been illegally fired are informed of this right.
- Promote an information-sharing process with the court system (and improve public dissemination of judicial actions) to ensure that the Ministry of Labor can access court decisions in order to more adequately review inspectors’ performance and efficiency.
- Ensure effective enforcement of provisions requiring payments to the IGSS, and ensure that workers whose IGSS payments were deducted from their salaries have access to IGSS services as required by law.

Cooperative Labor Consultations Under Article 16.6.1 of CAFTA-DR

According to the OTLA’s Procedural Guidelines, its public report shall include any recommendations made to the Secretary of Labor as to whether the United States should request consultations with another Party pursuant to Article 16.6.1 of the CAFTA-DR, as relevant and appropriate.¹¹

Throughout the review process, the Guatemalan government, under President Colom, has demonstrated a willingness to discuss with the U.S. government the issues raised in the submission. They have met with U.S. government officials, provided requested information, and facilitated meetings with key government officials to address the allegations outlined in the

¹¹ 71 Fed. Reg. 76691 (Dec. 21, 2006).

submission. The OTLA notes that the Government of Guatemala has recently made efforts to address some of the issues raised in this report, such as the reactivation on November 6, 2008, of the Multi Institutional Commission on Labor Relations in Guatemala (Commission), established by a Presidential decree on August 13, 2003 -- a critical first step to providing a coordinated response from the Government of Guatemala.¹²

In the present case, the OTLA does not recommend requesting consultations pursuant to Article 16.6.1 of the CAFTA-DR. The OTLA will continue its efforts to work with the contact point in Guatemala in order to evaluate progress in addressing the issues raised in this report and on the implementation of any further steps that may be taken in response to the recommendations contained in this report. Furthermore, the OTLA—in consultation with the Office of the United States Trade Representative and the U.S. Department of State—will reassess the situation within the next six months following publication of this report and determine whether further action is warranted, including Cooperative Labor Consultations pursuant to Article 16.6.1 of the CAFTA-DR.

¹² *Ayuda de memoria, reactivación de la Comisión de Trabajo Multi Institucional para las Relaciones Laborales en Guatemala, Acuerdo Gubernativo No. 430-2003, November 6, 2008.*

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LIST OF ACRONYMS

AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
CAFTA-DR	Dominican Republic-Central America-United States Free Trade Agreement
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEADEL	<i>Centro de Estudios y Apoyo para el Desarrollo Local</i> (“Center for Studies and Support for Local Development”)
CFA	Committee on Freedom of Association (International Labor Organization)
CICIG	<i>Comisión Internacional Contra la Impunidad en Guatemala</i> (“International Commission against Impunity in Guatemala”)
CUSG	<i>Confederación de Unidad Sindical de Guatemala</i> (“Trade Union Confederation of Guatemala”)
EPQ	<i>Empresa Portuaria Quetzal</i> (“Port Quetzal Company”)
FESTRAS	<i>Federación Sindical de Trabajadores de la Alimentación, Agro-Industria, y Similares de Guatemala</i> (“Federation of Food, Agro-Industry, and Similar Industries Workers of Guatemala”)
IGSS	<i>Instituto Guatemalteco de Seguridad Social</i> (“Guatemalan Social Security Institute”)
ILO	International Labor Organization
INPROCSA	<i>Internacional de Productos Congelados, S.A.</i> (“International Frozen Products”)
ITF	International Transport Workers’ Federation
ITUC	International Trade Union Confederation
OTLA	Office of Trade and Labor Affairs (U.S. Department of Labor)
SITRABI	<i>Sindicato de Trabajadores Bananeros de Izabal</i> (“Union of Izabal Banana Workers”)
SITRAFRIBO	<i>Sindicato de Trabajadores de la Empresa Fribo</i> (“Union of Fribo Company Workers”)
SITRAINPROCSA	<i>Sindicato de Trabajadores de la Empresa Internacional de Productos Congelados, Sociedad Anónima</i> (“Union of International Frozen Products Workers”)
STEPQ	<i>Sindicato de Trabajadores de la Empresa Portuaria Quetzal</i> (“Union of Port Quetzal Company Workers”)
UNSI TRAGUA	<i>Unión Sindical de Trabajadores de Guatemala</i> (“Trade Union of Workers of Guatemala”)
USDOL	United States Department of Labor
VESTEX	<i>Asociación de la Industria del Vestuario y Textiles</i> (“Apparel and Textile Industry Association of Guatemala”)

I. Introduction

On April 23, 2008, the Office of Trade and Labor Affairs (OTLA) received a public submission under Chapter 16 (the Labor Chapter) of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) from the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and six Guatemalan labor unions: the Union of Port Quetzal Company Workers (STEPQ); the Union of Izabal Banana Workers (SITRABI); the Union of International Frozen Products Workers (SITRAINPROCSA); the Coalition of Avandia Workers; the Union of Fribo Company Workers (SITRAFRIBO); and the Federation of Food and Similar Industries Workers of Guatemala (FESTRAS). The submission alleged the Government of Guatemala's failure to enforce labor laws in five separate cases.

Guatemala ratified the CAFTA-DR on March 10, 2005, and the agreement entered into force for Guatemala on July 1, 2006. Under the Labor Chapter, the CAFTA-DR Parties reaffirm their obligations as members of the International Labor Organization (ILO)¹³ and their commitments under the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (ILO Declaration). Upon entry into force, a Party commits to "not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction..."¹⁴ Labor laws are defined as a Party's statutes or regulations that relate directly to the five specified internationally recognized labor rights.¹⁵

The Labor Chapter states that each Party shall establish an office within its labor ministry to serve as a contact point with the other Parties and with the public. In the case of the United States, the U.S. Department of Labor's OTLA was designated as this contact point in a *Federal Register* notice on December 21, 2006.¹⁶ Under the Labor Chapter, each Party's contact point shall provide for the submission, receipt, and consideration of communications from persons of a Party on matters related to the provisions of the Chapter, as well as review such communications in accordance with domestic procedures.¹⁷

The same *Federal Register* notice informed the public of the Procedural Guidelines that the OTLA would follow for the receipt and review of public submissions. According to the definitions contained in the Procedural Guidelines (Section B), a "submission" means "a communication from the public containing specific allegations, accompanied by relevant supporting information, that another Party has failed to meet its commitments or obligations arising under a labor chapter."

The Procedural Guidelines also state that the OTLA shall consider six factors, to the extent that they are relevant, in determining whether to accept a submission for review. These are as follows: (a) whether the submission raises issues relevant to any matter arising under a labor chapter; (b) whether a

¹³ Guatemala joined the ILO in 1919 and was a member until 1938. Guatemala rejoined the ILO in 1945 and has been an ILO member since that time. *Source*: www.ilo.org

¹⁴ CAFTA-DR, 16.2.1(a).

¹⁵ CAFTA-DR, 16.8.

¹⁶ 71 Fed. Reg. 76691 (Dec. 21, 2006).

¹⁷ CAFTA-DR, 16.4.3.

review would further the objectives of a labor chapter; (c) whether the submission clearly identifies the person filing the submission, is signed and dated, and is sufficiently specific to determine the nature of the request and permit an appropriate review; (d) whether the statements contained in the submission, if substantiated, would constitute a failure of the other Party to comply with its obligations or commitments under a labor chapter; (e) whether the statements contained in the submission or available information demonstrate that appropriate relief has been sought under the domestic laws of the other Party, or that the matter or a related matter is pending before an international body; and (f) whether the submission is substantially similar to a recent submission and significant, new information has been furnished that would differentiate the submission from the one previously filed.

On June 12, 2008, the OTLA accepted U.S. Submission 2008-01 (Guatemala), stating it met the criteria for acceptance, and published its decision in a *Federal Register* notice on June 18, 2008.¹⁸

The objectives of the review have been to gather information to assist the OTLA to better understand and publicly report on the issues raised by the submission. Under its Procedural Guidelines, the OTLA shall issue a public report within 180 days of the acceptance of a submission for review unless circumstances as determined by the OTLA require an extension of time. The report shall include a summary of proceedings and any findings and recommendations. The Guidelines further state that the OTLA may make a recommendation at any time to the Secretary of Labor as to whether the United States should request consultations with another Party pursuant to Article 16.6.1 of the CAFTA-DR. Under the Guidelines, as relevant and appropriate, the OTLA shall include any such recommendation in the report prepared in response to a submission.¹⁹

The period of review for U.S. Submission 2008-01 (Guatemala) was from June 12, 2008 to December 12, 2008. Throughout the review process, the OTLA has consulted with the U.S. Department of State and the Office of the U.S. Trade Representative. In addition, the OTLA submitted questions to the point of contact at the Ministry of Labor of Guatemala and to the submitters. The OTLA has reviewed extensive documentation provided by the submitters and by the Government of Guatemala.²⁰ Additionally, the OTLA conducted two visits to Guatemala in order to interview relevant stakeholders and to gather additional information on the issues raised in the submission. From July 20 through 25, 2008, two representatives from the OTLA and the Labor Officer assigned to the U.S. Embassy in Guatemala met with workers, union leaders, employers, government officials, and other organizations in Guatemala relevant to the submission. A follow-up visit was conducted October 27 through 31, 2008, for additional meetings and visits with the relevant parties.²¹ The Deputy Under Secretary for the International Labor Affairs Bureau led a video conference with representatives of the Government of Guatemala on November 14, 2008. The Guatemalan participants were led by the Vice Minister of Labor and included representatives from the Ministry of Labor, the Ministry of Foreign Relations, the Ministry of the Economy, the Ministry of Justice, and the Ministry of Public

¹⁸ 73 Fed. Reg. 34793 (June 18, 2008).

¹⁹ 71 Fed. Reg. 76691 (Dec. 21, 2006).

²⁰ A list of documents reviewed will be made available on the OTLA Web site:
<http://www.dol.gov/ilab/programs/otla/index.htm>

²¹ A list of meetings related to the submission will be made available on the OTLA Web site:
<http://www.dol.gov/ilab/programs/otla/index.htm>

Security. U.S. government participants included officials from the U.S. Department of Labor, the Office of the United States Trade Representative, and the U.S. Department of State. The OTLA has also reviewed relevant materials from the International Labor Organization (ILO) supervisory mechanisms, including cases filed with the ILO Committee on Freedom of Association (CFA) and observations made by the Committee of Experts on the Application of Conventions and Recommendations (CEACR).

II. Summary of U.S. Submission 2008-01 (Guatemala)

U.S. Submission 2008-01 alleges first that the Government of Guatemala has violated Article 16.1.1 of the CAFTA-DR Labor Chapter in which the Parties reaffirm their obligations as members of the ILO and their commitments under the ILO Declaration, and agree to strive to ensure that the Declaration's principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law.²²

Second, the submission alleges that the Government of Guatemala has violated Article 16.2.1(a) which 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 [the CAFTA-DR]."

Third, the submission alleges that the Government of Guatemala has violated Article 16.3.1, which states, "Each 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."

The submission outlines five separate cases in which Guatemala allegedly failed to enforce its domestic labor laws with regard to freedom of association, the right to organize and bargain collectively, and acceptable conditions of work. As detailed in the submission, the issues related to freedom of association and the right to collective bargaining include: impunity for threats and violence against trade union leaders and members, creating a climate in which trade union rights cannot be freely exercised;²³ unlawful dismissals of union leaders and a subsequent failure to

²² CAFTA-DR Article 16.8 defines "labor laws" as a Party's statutes or regulations, or provisions thereof, which 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
- (e) acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health.

For purposes of this report, the OTLA has addressed the allegations without deciding whether the allegations, if true, would qualify as failures to enforce "labor laws" as defined in Article 16.8. Because the OTLA report does not recommend consultations pursuant to Article 16.6.1 of the CAFTA-DR, the scope of Article 16.8 does not need to be construed at this time.

²³ The submission refers to the ILO Committee on Freedom of Association's discussion of the impact of violence against trade unionists on the exercise of freedom of association, *see*, Complaint against the Government of Guatemala by the International Trade Union Confederation (ITUC), the International Transport Workers' Federation

reinstate workers in violation of court orders, as well as other forms of anti-union retaliation; failure to protect workers' associational and other rights in cases where ownership interests have changed in an enterprise; and failure to enforce provisions of Guatemalan labor law requiring employers to negotiate in good faith with recognized unions. The submission's allegations related to acceptable conditions of work include failure to enforce correct legal severance payments and failure to enforce domestic legal provisions requiring employer contributions to the *Instituto Guatemalteco de Seguridad Social* (IGSS – Guatemalan Social Security Institute).

The submitters allege that the five cases in the submission demonstrate a failure on the part of Guatemala to comply with specific obligations in the CAFTA-DR and, accordingly, have recommended that the United States request consultations under Article 16.6 of the agreement to address the matters raised in the submission.

III. Office of Trade and Labor Affairs Review of U.S. Submission 2008-01 (Guatemala)

For each of the five cases raised in the submission, the OTLA report provides further details on the allegations contained in the submission, presents additional information received through the review process (including actions taken by the Government of Guatemala), and the OTLA's specific findings in each case. The OTLA's consolidated recommendations are presented in a separate section at the end of the report.

A. STEPQ (Union of Port Quetzal Company Workers)

The submission alleges that, in the STEPQ case, the Government of Guatemala failed to effectively enforce its domestic labor laws in the areas of freedom of association and the right to bargain collectively. Specific claims include: failure to ensure that the employer negotiate a collective bargaining agreement in good faith with the recognized union as required by Labor Code Article 51;²⁴ failure to enforce court-ordered reinstatement following the unlawful dismissal of nine union members in violation of Labor Code Articles 379-380; and failure to sufficiently investigate or prosecute crimes associated with threats and physical violence against the STEPQ leadership and members, most notably the murder of STEPQ Secretary General Pedro Zamora.

The issues in the STEPQ case arose in the context of a labor dispute between the STEPQ—an affiliate of the International Transport Workers' Federation (ITF)—and the Empresa Portuaria Quetzal (EPQ), the para-statal entity managing the Quetzal port under the direction of Guatemala's Ministry of Communications, Infrastructure, and Housing.

(ITF), and the Trade Union of Workers of Guatemala (UNSI TRAGUA), ILO Committee of Freedom of Association Report No. 348, Case No. 2540, (November 15, 2007).

²⁴ Government of Guatemala, Labor Code Article 51: "Todo patrono que emplee en su empresa o en determinado centro de producción, si la empresa, por la naturaleza de sus actividades tiene que disfrutar la ejecución de los trabajos en varas zonas del país, los servicios de más de la cuarta parte de sus trabajadores sindicalizados, está obligado a negociar con el respectivo sindicato, cuando éste lo solicite, un pacto colectivo."

1. Refusal to Negotiate a Collective Agreement and Unlawful Dismissals

In July 2006, the EPQ and the STEPQ began negotiations for a collective bargaining agreement. The submission states that the STEPQ objected to several management proposals that would have limited the union's right to be consulted on hiring and firing decisions and that linked any management concessions on benefits to the union's approval of a port modernization plan. According to the submission, the STEPQ was opposed to specifics of the port modernization plan (while not opposed to modernization of the port in general) and on September 8, after three unsuccessful negotiation sessions, the union began to hold "permanent assemblies," or group meetings between work shifts, where members would picket and discuss the state of contract negotiations. The STEPQ successfully petitioned a labor court for an injunction, issued on August 30, 2006,²⁵ prohibiting the EPQ from firing workers for the duration of the conflict without prior consent from a labor judge.

On October 9, 2006, the EPQ called in over 300 police officers to ensure that the port "continued to function." The following day, the EPQ fired nine active union members, claiming that the workers were conducting an illegal strike.²⁶ According to the submission, by January 2007, labor courts had issued two reinstatement orders for these workers, which were appealed to higher courts by the EPQ management. As of January 9, 2007, the President of the EPQ was still stating that the nine workers would not be reinstated and that the company would not cede on this issue.²⁷ On January 10, 2007, the trade union's Executive Committee attended a Congressional hearing, at which the Minister for Transport announced that the workers were to be reinstated.²⁸

From January 28 through February 2, 2007, a delegation from the International Transportation Workers' Federation (ITF) and the International Trade Union Confederation (ITUC) conducted an international mission to Guatemala. This was part of a larger international campaign related to Pedro Zamora's murder on January 15, 2007 (discussed below). The delegation met with STEPQ officials, government officials, and the Director of the EPQ. On February 9, 2007, the dismissed workers were reinstated.²⁹

On December 17, 2007, the STEPQ signed a new collective bargaining agreement with the EPQ.³⁰ The parties began renegotiating the agreement in October 2008 and, according to both parties, were able to progress through almost half of the articles within the first few weeks.³¹

²⁵ *Sala Cuarta de Trabajo de Mazatenango, Denuncia de Reinstalación 320-2006 OF 2 Dentro del Conflicto Colectivo 452-2006*, citing the resolution issued by the *Juzgado de Primera Instancia de Trabajo y Previsión Social de Departamento de Escuintla*, which prohibits the firing of workers without prior authorization of the judge, (January 11, 2007).

²⁶ Freddy Morales, "Ocupan Portuaria," *Negocios* (Guatemala), October 10, 2006.

²⁷ Rodolfo Neutze, email from to Alfredo Vita, January 9, 2007. (Provided to USDOL in Annex A of the submission)

²⁸ ILO Committee on Freedom of Association, Case No. 2540, Report 348, paragraph 796, (November 15, 2007).

²⁹ STEPQ executive committee, Arturo Granados Hernández, Oscar Giovanni González Dorado, Eulogio Obispo Monzón Mérida, Julio Cesar, interview with USDOL officials, July 21, 2008.

³⁰ STEPQ Secretary General, written communication to the Minister of Labor, Portuaria Quetzal, December 17, 2007.

³¹ STEPQ Secretary General and EPQ General Manager, interviews with USDOL officials, October 27-28, 2008.

Under the new administration of President Colom, the EPQ management has contracted a feasibility study for the port modernization, which is being conducted by Nathan Associates.³²

On January 15, 2008, Oscar José Alvarez Abularach began as the new General Manager of the EPQ. On January 24, 2008, a new Board of Directors began under the administration of President Colom. The Board includes the Vice Ministers of Defense, Finance, and Communication. Union leaders stated that the relationship with management had changed dramatically since the new administration began, and that they have worked together with the new management on several new projects.³³

2. Violence Against Trade Unionists

On January 15, 2007, the Secretary General of the STEPQ, Pedro Zamora, was shot and killed while riding in his car with his children. The submission states that Pedro Zamora felt threatened throughout his tenure as Secretary General of the STEPQ,³⁴ was regularly followed during his commute to and from work, and received death threats, which he immediately reported to the Human Rights Ombudsman. On February 13, 2006, Pedro Zamora filed a complaint regarding his safety with the Human Rights Defender's office. On April 17, 2006, the Ministry of Justice's (*Ministerio Público*) office in Puerto de San Jose, Escuintla, received the complaint from the Human Rights Defender's office regarding the Pedro Zamora case. On May 8, the prosecutor requested a meeting with Pedro Zamora on May 16, to verify his complaint and provide testimony, but Zamora did not attend the meeting.³⁵ On May 19, 2006, Lázaro Noé Reyes, who stated he was the STEPQ's Secretary, informed the prosecutor that the STEPQ Executive Committee had come to an agreement with EPQ management, and that the union did not have any interest in continuing with the complaint.³⁶ The submission notes that threats against Pedro Zamora continued. In one example from November 2006, Pedro Zamora was approached by gunmen in a vehicle, who pointed their weapons at him before firing them into the air as they drove by.

In addition to Zamora's appeals to the Human Rights Ombudsman, the threats against the STEPQ leadership were brought to the attention of the Government of Guatemala on other occasions. On October 16, 2006, the Solidarity Center³⁷ wrote letters to President Berger, to the Minister of Communication, Infrastructure, and Housing Manuel Eduardo Castillo Arroyo, and to the Minister of Labor, Rodolfo Colmenares, specifically requesting measures be taken to guarantee the security and physical integrity of STEPQ union leaders. The Government of Guatemala did not provide the requested protective measures.

³² Oscar José Alvarez Abularach, Empresa Portuaria Quetzal, General Manager, interview with USDOL officials, July 23, 2008.

³³ STEPQ Secretary General, interview with USDOL officials, October 27, 2008.

³⁴ Pedro Zamora was elected as the STEPQ Secretary General in 2005, and assumed office in January 2006. As Secretary General, Zamora served as the union representative on the Board of Directors of the Port Authority.

³⁵ ILO CFA Report 348 (November 15, 2007); Government of Guatemala email communication, Special Prosecutor's Unit for Crimes against Trade Unionists and Journalists, November 18, 2008.

³⁶ Ibid.

³⁷ The Solidarity Center is a non-profit organization established in 1997 by the AFL-CIO to "provide education, training, research, legal, organizing, and material support to workers to help workers build strong and effective trade unions." (from Solidarity Center web site, www.solidaritycenter.org)

Following Zamora's murder, the Executive Committee of the union received threats³⁸ and filed a complaint at the local Human Rights Ombudsman's office, which facilitated police protection during Zamora's funeral on January 17, 2007.³⁹ The Public Security Ministry also provided protection for Lázaro Noé Reyes, the former Secretary and Secretary General of the STEPQ, following the murder of Pedro Zamora.⁴⁰ In addition to providing security for the union officials during the funeral of Pedro Zamora, the Government of Guatemala has provided patrol protection around the STEPQ offices and the homes of the union executive committee.⁴¹

While members of the Executive Committee of the union were offered protection, they were asked to pay for the guard's room and board. STEPQ officers were also offered—and declined—one bullet proof vest for protection for the entire Executive Committee;⁴² however, the Ministry of Public Security is legally obligated to provide for the per diem and salary of those providing protection to individuals who have been authorized to receive protection.⁴³ Due to low salaries and very limited budgets, other parties have confirmed that those to be protected are often asked to cover the lodging, meals, and other related costs. Lázaro Noé Reyes, who receives protection, pays for these costs out-of-pocket.⁴⁴

The submission alleges that the Guatemalan authorities have failed to conduct a serious investigation into the murder of Pedro Zamora. The submitters cite police delays in arriving and inspecting the crime scene, as well as failures to properly handle evidence in the case. The vehicle in which Pedro Zamora was killed was originally maintained out on the street in front of the police station.⁴⁵ STEPQ leaders stated during an interview that the vehicle has been returned to the EPQ and is in use.⁴⁶ According to officials at the Justice Department who are assigned to this case, the vehicle was documented and photographed to maintain the evidence.⁴⁷ The submitters also allege conflict rather than effective coordination among the different government authorities handling the case.

On July 25, 2007, the Government of Guatemala issued two arrest warrants for the murder of Pedro Zamora.⁴⁸ In October 2008, the OTLA learned that the previous attorney responsible for

³⁸ See, ILO Committee on Freedom of Association, Case No. 2540, Report 348, paragraph 797, describing reports of death threats on January 18, 2007, in which STEPQ executive committee received anonymous calls with electronically distorted voices threatening that their colleagues and friends would be killed within nine days.

³⁹ *Procuraduría de los Derechos Humanos, Auxiliatura Departamento de Escuintla, Memo de investigación*, November 17, 2007.

⁴⁰ STEPQ executive committee, interview with USDOL officials, July 23, 2008.

⁴¹ STEPQ representative, email communication to USDOL, October 27, 2008.

⁴² STEPQ executive committee, interview with USDOL officials, July 23, 2008; email, STEPQ, October 27, 2008.

⁴³ Alma Luz Guerrero, Advisor to the Minister of Public Security (Gobernación), meeting of the *Instancia de Análisis de Ataques a Defensores de Derechos Humanos*, October 28, 2008.

⁴⁴ STEPQ executive committee, interview with USDOL officials, July 23, 2008; STEPQ representative, email to USDOL, October 27, 2008.

⁴⁵ STEPQ executive committee, interview with USDOL officials, October 27, 2008; U.S. Department of State Labor Officer Lucy Chang, in a site visit, verified that the vehicle was on the street in front of the police office.

⁴⁶ STEPQ executive committee, interview with USDOL official, October 27, 2008.

⁴⁷ Noé Barquín, Chief, Special Prosecutor's Unit for Crimes against Trade Unionists and Journalists, interview with USDOL officials, October 29, 2008.

⁴⁸ ILO CFA, Report 348 (November, 15, 2007), para. 811. "The Committee also notes that the action taken by the Office of the Attorney-General has allowed for an identification of the potential suspects in the murder of trade

the case at the Special Prosecutor's Unit for Crimes against Unionists and Journalists had been reassigned, and a new attorney has been assigned to the case.⁴⁹ As of January 10, 2009, the Guatemalan government reports that it has arrested one of the two suspects.⁵⁰

3. OTLA Findings in the STEPQ Case

All of the facts alleged in the submission regarding the Government of Guatemala's failure to effectively enforce domestic labor law in the STEPQ case occurred after the CAFTA-DR entered into force for Guatemala on July 1, 2006.

Refusal to Negotiate a Collective Agreement and Unlawful Dismissals

The OTLA finds that the EPQ's refusal to negotiate with the legally recognized union appears to be in violation of Article 51 of the Guatemalan Labor Code. Furthermore, the firing of nine STEPQ members on October 10, 2006—in direct contravention of the labor court's injunction—and refusal to reinstate these workers appears to be inconsistent with Labor Code Articles 379 and 380. The workers were eventually reinstated on February 9, 2007, only after an international delegation visited in response to the murder. In addition, it was reported that at the height of the labor conflict at STEPQ, the EPQ called in over 300 police officers to “keep the port functioning,” and fired the union leaders in violation of the court injunction the next day.⁵¹

Violence Against Trade Unionists

The OTLA finds that in response to threats of violence against STEPQ leadership, Pedro Zamora—and international organizations acting on his behalf—made numerous requests for protection to the Guatemalan government. Protection was never provided and Mr. Zamora—a high profile union leader in a serious labor conflict, one who had stated on record that he felt his life was threatened due to his union activities—was subsequently murdered. While this report is unable to conclude with any certainty the motives or reasons for Pedro Zamora's murder (and acknowledges that the Government of Guatemala's initial findings indicate the murder was not directly a result of his union activities), when a union leader is violently attacked with total impunity, the crime's impact can reach beyond the individual and cast a shadow of fear upon others, weakening the right of association and collective bargaining.

The OTLA also finds that the Guatemalan government has conducted an investigation and issued two arrest warrants seventeen months ago. Recently, it reported that it had carried out one arrest, but it has not yet carried out the second. This raises concerns about adequate government protection of freedom of association through the effective prosecution of crimes against union members.

union official, Pedro Zamora, and that the judicial authority has issued the corresponding arrest warrants in order to initiate the pertinent procedure.”

⁴⁹ Noé Barquín, Chief, Special Prosecutor's Unit for Crimes against Trade Unionists and Journalists, interview with USDOL officials, October 29, 2008.

⁵⁰ Alma Luz Guerrero, Advisor to the Minister of Public Security (Gobernación), email to USDOL, January 12, 2009.

⁵¹ Freddy Morales, “Ocupan Portuaria,” *Negocios* (Guatemala), October 10, 2006, quoting Port Manager Eduardo Garrido.

B. SITRABI (Union of Izabal Banana Workers)

In the SITRABI case, the submission alleges that the Government of Guatemala has failed to enforce domestic labor laws in the area of freedom of association. Specific claims include failure to effectively investigate and prosecute threats and violence against union members, citing the ILO's Committee on Freedom of Association that a climate of violence and uncertainty prohibits freedom of association.

The SITRABI union represents banana workers, including workers for the Bandegua Company, which produces for Del Monte. SITRABI has been working with the Solidarity Center on new organizing efforts to revitalize the union, which suffered from previous violent attacks.⁵²

1. Violence Against Trade Unionists

According to the submission, in late 2006, SITRABI commenced lawful, peaceful marches and rallies aimed at pressuring the employer, Bandegua, to respect the terms of an existing collective bargaining agreement.⁵³ The submission claims that these activities and demands led to a wave of anti-union violence that the Government of Guatemala has failed to prevent or prosecute. On November 26, 2006, a union vehicle was shot at following a meeting with union members at the Chickasaw plantation.⁵⁴ Days afterwards, the submission states, union leaders received threatening phone calls telling them to cease their activities. Despite lodging complaints with the Special Prosecutor's Unit, the submission alleges that no serious investigation has been conducted.

The following year, in July 2007, a military unit visited SITRABI headquarters and interviewed leaders of the union. Union leaders indicated that they felt threatened by this encounter and believed it was related to their activities in Izabal and recent organizing activities on the south coast. The submission states that a complaint was filed with the Justice Ministry and the Ministry of Defense.⁵⁵

On September 23, 2007, Marco Tulio Ramirez, a SITRABI union leader and younger brother of SITRABI's Secretary General, was killed on the Bandegua company plantation. On September 26, the union informed the Special Prosecutor's Unit, which refused to investigate on the basis of

⁵² According to SITRABI representatives, on October 13, 1999, approximately 300 armed men kidnapped members of the SITRABI Executive Committee, held them in their offices, and forced them to resign their union positions. One year later, 23 people were condemned and sent to prison. However, they paid small bonds and were freed. Seven members of the committee went into exile in the United States. SITRABI Secretary General, background document provided during interview with USDOL official, October 27, 2008.

⁵³ SITRABI accused Bandegua of violating the terms of the collective bargaining agreement in the calculation of wages for overtime and productivity payments.

⁵⁴ Justice Ministry (*Agencia 3, Unidad de Delitos en Contra de Periodista y Sindicalistas, Fiscalia de Seccion de Derecho Humanos* MP001/2007/6731/257, Feb. 23, 2007).

⁵⁵ Mario Castañeda, former Chief, Special Prosecutor's Unit for Crimes against Unionists and Journalists, interview with USDOL officials, July 21, 2008; SITRABI executive committee, interview with USDOL officials, July 23, 2008.

its determination that the crime was not related to union activities.⁵⁶ On September 27, the submission notes that the union filed a complaint with the local Public Prosecutor.

In addition, the submission alleges that on December 31, a leader of the Trade Union Confederation of Guatemala (CUSG) who has been supporting efforts to investigate the Ramirez murder and is on the committee with Bandegua to address security concerns at the plantation, was shot at in his home. On January 1, 2008, he received numerous suspicious phone calls.

The Special Prosecutor's Unit for Crimes against Unionists and Journalists has criteria for accepting a case which is based on whether the crime was due to union-related activities. Currently, the unit has two lawyers, six assistant lawyers, one official, a driver and an investigator.⁵⁷ With limited staff, they rely heavily on the regional Justice Ministry's (*Ministerio Público*) local offices when they receive complaints from the provinces. They also want to allow "all possible causes" to be investigated and "not assume that the crime was a result of the victim's union affiliation."⁵⁸ At the time the Special Prosecutor's Unit spoke with the local Justice Ministry's office, they already had a theory regarding the motive for the murder that did not attribute the crime to Mr. Ramirez's union activities.⁵⁹ The previous Chief at the Special Prosecutor's Unit for Crimes against Unionists and Journalists, who made the decision to not accept this case, has been reassigned.

Soon after Ramirez's murder, the Public Security Ministry sent mobile units to patrol the farm area. In September 2008, these patrols were discontinued. The Government of Guatemala states that it has reinstated the patrols, as of November 6, 2008.⁶⁰ However, the union and the Bandegua management state that the patrols have not returned.⁶¹ Bandegua states that while no guards, military troops, or police have been assigned to Bandegua as the government has stated, police have patrolled on specific dates, due to Bandegua's requests to the local authorities.⁶²

In addition, the previous Minister of Public Security suggested that a police sub-station could be established on Bandegua property, with a permanent force of five that are rotated on a weekly basis. The management of Bandegua prepared the housing, but the new minister has not sent any staff to the site.⁶³ Both the union and management have requested a meeting with the new minister but have not yet been able to establish a meeting with the minister or vice minister.⁶⁴

⁵⁶ Mario Castañeda, former Chief, Special Prosecutor's Unit for Crimes against Unionists and Journalists, interview with USDOL officials, July 21, 2008; SITRABI executive committee members, interview with USDOL officials, July 21, 2008.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Guillermo Gándara, Director of International Affairs, Planning and Cooperation, Ministry of Labor, email to USDOL, November 11, 2008.

⁶¹ Rob Wayss, Solidarity Center, citing conversation with Cesar Guerra of SITRABI, email to USDOL, November 18, 2008.

⁶² Marco A. García, General Manager, Bandegua, S.A., email to USDOL, November 19, 2008.

⁶³ Marco A. García, General Manager, Bandegua, S.A., interview with USDOL official, October 28, 2008.

⁶⁴ Lic. Elvys Marquez Reyes, Labor Relations Manager, Bandegua and Noé Ramírez Portela, Secretary General of SITRABI, letter to Minister of Government, Francisco Jiménez, September 19, 2008.

Since the time of the murder of Marco Tulio Ramirez, there have been additional murders on the Bandegua grounds, including the deaths of two security guards, one of whom was on duty on the Bandegua property at the time of the Ramirez murder.⁶⁵ Additionally, other members of the SITRABI Executive Committee report that they continue to be followed by trucks with tinted windows upon leaving the Bandegua property. They have received additional threats and are worried for their safety.⁶⁶

The original labor management working group (*Mesa Laboral*), convened after Ramirez's death with management and union representation to discuss security issues on the farm, met on October 3, 2008, to discuss additional security measures.⁶⁷ Bandegua has recently taken steps to implement some of the proposals emanating from these discussions. They have improved the lighting, installed security cameras and fortified the doors at the main entrances, and have contracted four additional security staff on motorcycles to patrol the farm properties. They have also prepared accommodations for the public security forces, but, as noted above, apparently these forces have not been sent.⁶⁸

2. OTLA Findings in the SITRABI Case

All of the alleged facts in the submission regarding failure to fully investigate or prosecute violence against trade unionists occurred after the CAFTA-DR entered into force for Guatemala on July 1, 2006.

The OTLA is unable to state with any certainty the motives or reasons for Marco Tulio Ramirez's murder. However, the OTLA does note that SITRABI's September 2007 request for an investigation—following previous complaints regarding a violent attack on its members within the last year—did not trigger an investigation by the Special Prosecutor. Instead, the Special Prosecutor's Unit relied on an investigation that had been conducted—at that point, in only three days—to declare Marco Tulio Ramirez's murder was not related to his union activities and, therefore, not within the office's jurisdiction. Despite the previous history in the 1990s and the more recent cases of attacks against SITRABI members,⁶⁹ the Special Prosecutor's Unit did

⁶⁵ SITRABI executive committee, interview with USDOL officials, July 23, 2008.

⁶⁶ SITRABI Secretary General, background document provided during interview with USDOL official, October 27, 2008.

⁶⁷ Elvys Marquez, meeting minutes email communication to Marco Garcia, Oct. 3, 2008 (sent to USDOL Oct. 28, 2008).

⁶⁸ Noé Ramírez Portela, Secretary General of SITRABI, interview with USDOL officials, October 27, 2008. Elvys Marquez, meeting minutes email communication to Marco Garcia, October 3, 2008.

⁶⁹ On November 26, 2006, César Humberto Guerra López, a member of the executive committee, was attacked while driving his car. Three men hit his windshield and shot at him three times. The union filed a complaint with the Justice Ministry (*Agencia 3, Unidad de Delitos en Contra de Periodista y Sindicalistas, Fiscalía de Seccion de Derecho Humanos* MP001/2007/6731/257, Feb. 23, 2007). On September 28, 2007, men with AK47s roamed the Yuma, Aztec, and Maya farms of Del Monte. On October 4, 2007, a Toyota Hilux was circling in front of the executive committee members' homes on the Aztec farm. On October 6, 2007, on the Chickasaw farm, armed men on motorcycles drove around in front of executive committee members' homes, shooting off their weapons. Noé Antonio Ramirez Portela, brother of the deceased in this case, has been followed by numerous vehicles, and vehicles have been parked for extended periods of time near his home, with no one getting out of the car. These have been denounced at the Ministry of Justice (Ministerio Público) in Morales, Izabal, MP283/2007/1008. Source: Background document provided by SITRABI Secretary General during interview with USDOL official, October 27, 2008.

not appear to have an automatic way to link this complaint from SITRABI to prior complaints received in their unit from the same union and did not appear to be familiar with the other attacks.⁷⁰

With regard to the military unit's visit to SITRABI headquarters in July 2007, during which SITRABI leaders were interviewed, the OTLA review team listened to a recording of the interview and confirmed with various sources that visits to civil society organizations are part of a current campaign to fight crime, and that Ministry of Defense representatives have been visiting civil society organizations as part of that effort. One source stated that a health clinic and a cooperative were also visited in Morales that day. The reaction from SITRABI, based on its history, is understandable.

C. Coalition of Avandia Workers

In the Avandia case, the submission alleges that the Government of Guatemala failed to enforce domestic labor laws relating to freedom of association. Specific claims include: failure to enforce court-ordered reinstatement following the unlawful dismissal of union members; failure to fully investigate and prosecute threats against union members; and other acts of anti-union discrimination.

The issues in the Avandia case arose during the unionization efforts of workers at the Avandia factory in Guatemala City. Starting in January 2006, Avandia agreed to participate in a pilot project with the Solidarity Center in order to improve knowledge of and compliance with the domestic labor standards. The submission alleges that workers who attempted to organize became targets of retaliatory efforts by Avandia management, which the Government of Guatemala has failed to address.

1. Unlawful Dismissals of Avandia Workers

On October 27, 2006, six Avandia workers filed a complaint with the Ministry of Labor alleging that they, along with 24 other workers, had been fired on October 24. The Ministry of Labor's report on the case indicates that on October 14, a group of workers attempted, but was unable to meet with their employer to discuss various issues (vacation, overtime, etc), and that workers who subsequently met to discuss the formation of a union were intimidated by the employer in an effort to prevent the formation of the union.⁷¹

Following this first round of dismissals, a second group of workers decided to form an ad-hoc committee, the precursor to a union, and filed the appropriate papers with the Ministry of Labor to form the committee. They were officially recognized by the Sixth Judge on Labor and Social Prevention in the First Economic Zone on November 13, 2006.⁷² Under Article 379 of the Guatemalan Labor Code, this official recognition legally prohibits the company from firing the

⁷⁰ Mario Castañeda, former Chief, Special Prosecutor's Unit for Crimes against Unionists and Journalists, interview with USDOL officials, July 21, 2008.

⁷¹ Avandia workers' petition to the Inspector General of Labor, October 27, 2006.

⁷² *Juzgado Sexto de Trabajo y Previsión Social de la Primera Zona Económica, Juicio Colectivo en Prevención No. 20/2006*, November 13, 2006.

workers without prior authorization from a labor judge.⁷³ On November 14, these workers were fired, and they promptly filed a complaint with the Ministry of Labor.⁷⁴

On August 6, 2007, two of the workers dismissed on November 14, Karen Elizabeth Chacon and Maria Cristina Perez Osorio, were reinstated per court order. They allege that they did not receive their legally due back pay from the date of their dismissal. The workers also claimed to have been given jobs in a different section than where they had been previously working and allege that this was in violation of the court order.⁷⁵

As of August 29, 2007, after workers filed the appropriate papers with the Ministry of Labor to try to form—for the third time—an ad-hoc committee, the Third Judge of Labor and Social Prevention officially recognized the committee.⁷⁶ Again, under Article 379, from the date of recognition onward, these employees were not supposed to be fired without prior court approval. That afternoon, the company fired this group of workers.⁷⁷ The group of fired workers included the recently reinstated Karen Chacon.

On September 4, 2007, a Labor Ministry report included statements from both sides regarding the circumstances surrounding the firing of the workers. While the workers stated that they were fired in retaliation for their organizing efforts, the employer stated they were fired due to lack of work. When the workers presented the court order stating they could not be fired without prior court approval, they requested their reinstatement. When Ministry of Labor inspectors tried to conciliate a solution, the employer claimed he had not been informed of the court order and, therefore, would not rescind the termination of their contracts. The employer did not sign the inspector's report.⁷⁸

On October 10, a labor inspector visited Avandia with Maria Cristina Perez Osorio who had been fired, the second time, on September 18. The employer stated he had received a notice regarding the protective injunction, but that he had not received any documents regarding it.⁷⁹ This claim contradicts the earlier Labor Ministry report, which documents the sharing of the court order with Avandia.

⁷³ Government of Guatemala, Labor Code Article 379: “Desde el momento en que se entregue el pliego de peticiones al juez respectivo, se entenderá planteado el conflicto para el solo efecto de que ninguna de las partes pueda tomar la menor represalia contra la otra, ni impedirle el ejercicio de sus derechos. El que infrinja esta disposición será sancionado con multa igual al equivalente de diez a cincuenta salarios mínimos mensuales vigentes para las actividades no agrícolas. Además deberá reparar inmediatamente el daño causado por los trabajadores, y hacer efectivo el pago de los salarios y demás prestaciones dejadas de percibir durante el despido, sin que esto lo exonere de la responsabilidad penal en que hay podido incurrir.”

⁷⁴ *Adjudicación Número R1-3449-2006*, inspectors Marco Tulio Montufar Escobar and David Francisco Guerra Valladares, November 16, 2006. This *adjudicación* also reflected the workers' testimony that they had been held against their will for over nine hours the previous day.

⁷⁵ Avandia workers' petition filed with the *Jueza Cuarto de Trabajo y Previsión Social de la Primera Zona Economica*, August 7, 2007.

⁷⁶ *Juzgado Tercero de Trabajo y Previsión Social, No. Conflicto Colectivo de Carácter Económico Social en Prevención 25-2007*, (Memorial Registro No. 4122-07) August 29, 2007.

⁷⁷ *Procurador de los Derechos Humanos*, file opened on August 31, 2007.

⁷⁸ *Adjudicación R1-3130-2007*, inspectors Pedro Boror Lopez and Ricardo Alfonso Chinchia Escobedo, September 4, 2007.

⁷⁹ *Adjudicación R1-3282-2007*, inspector Romeo Alejandro Ordoñez Castellanos, with ex-Avandia employee requesting reinstatement.

On October 15, 2007, the Third Labor Court Judge ordered the reinstatement of and back pay for Maria del Rosario Martinez Diaz, Jose Robinson Giovanni Coronado, Adelina Olivia Mejia Urizar, Marvin Rócael Florian Bamaca, Zulma Yeseny Linares Regalado, Karen Elizabeth Chacon, and Maria Cristina Perez Osorio and fined Avandia 10 minimum monthly salaries for each worker fired.⁸⁰

On March 10, 2008, Moises Oswaldo Herrera Vargas, the Third Labor Court Judge, ordered the reinstatement of Karen Elizabeth Chacon, who was illegally fired due to her union organizing status and was fired while pregnant.⁸¹ The court fined Avandia the equivalent of 10 minimum monthly salaries.

On March 4, 2008, the Court of Appeals imposed a 500 Quetzal fine (approximately \$65)⁸² for non-compliance with court orders for the reinstatement of Karen Chacon.⁸³

On October 2, 2008 the Third Labor Court Judge ordered Avandia to comply with the resolution dated the previous year, November 7, 2007. The notice stated that if Avandia does not comply, the court will “proceed according to the law.”⁸⁴

In an interview with the OTLA, the owners of Avandia stated that they are incurring significant losses monthly, due to the enormous economic challenges faced by the apparel manufacturing sector in Guatemala. The owners claimed that they have had problems with the workers and unions, are awaiting the judge’s order, and will resolve the dispute legally. They said that they were not aware of the union and had fired the group of workers beforehand.⁸⁵

On November 26, 2008, the Vice Minister of Labor sent a letter to the legal representative of Avandia, requesting a meeting on December 3.⁸⁶ Avandia’s Director of Human Resources and legal representative attended the meeting, and they established a date for a future meeting with the workers.⁸⁷ The workers were unable to attend, stating they had not received sufficient advance notification. A future meeting to discuss the workers reinstatement was established for December 18, 2008.⁸⁸

⁸⁰ *Juzgado Tercero de Trabajo y Previsión Social, Incidente de Reinstalación No. 3234-2007, Tercero dentro Colectivo 25-2007*, October 15, 2007.

⁸¹ *Juzgado Tercero de Trabajo y Previsión Social, Incidente de Reinstalación No. 3378-2007, Colectivo 3109-2007, Memorial No. 748, Of. Y Not. Primero*, March 10, 2008.

⁸² Approximation for USD values for Quetzales have been calculated at a rate of 7.6833 Quetzales per USD (as listed in CIA World Factbook 2007).

⁸³ *Sala Primera de la Corte de Apelaciones de Trabajo y Previsión Social, Juicio No. 3109-2007*, March 4, 2008.

⁸⁴ *Juzgado Tercero de Trabajo y Previsión Social, Conflicto Colectivo No. 3109-2007*, October 2, 2008.

⁸⁵ Don Hon Li, Avandia owner, and Ruben E. Rosales, Legal Counsel, interview with USDOL officials, July 24, 2008.

⁸⁶ Mario Roberto Illescas Aguirre, Primer Viceministro de Trabajo y Previsión Social, letter to Legal Representative of Avandia, November 26, 2008.

⁸⁷ Guillermo Gándara, Director of International Affairs, Planning and Cooperation, Ministry of Labor, email to USDOL, December 3, 2008.

⁸⁸ Guillermo Gándara, Director of International Affairs, Planning and Cooperation, Ministry of Labor, phone conversation with USDOL official, December 15, 2008.

2. Threats Against Avandia Workers

In addition to the unlawful dismissals, the submission alleges that workers who have tried to form a union at Avandia have been threatened. According to the submission, these threats include statements by Avandia's human resource manager, who reportedly told some of the dismissed workers that they should be careful because workers who have tried to organize or exercise their rights at work have been known to be killed or simply disappear. Additionally, the submission notes that several workers received telephone death threats at their homes, with demands for payment accompanying the threats.

On December 27, 2006, the workers filed a complaint with the Special Prosecutor's Unit for Crimes against Unionists and Journalists, alleging that they were held against their will on November 14, threatened, and forced to sign dismissal notices and collect their severance pay.⁸⁹ The Special Prosecutor's Unit has since indicated that it received the complaint regarding the holding of the workers for the day without allowing them to leave and has prosecuted two individuals. A court ruled it was not a criminal offense, but rather a labor-related dispute. The Special Prosecutor's Unit has appealed the case, which was reportedly being reviewed by the Supreme Court of Justice.⁹⁰ On September 8, 2008, the Special Prosecutor's Unit for Crimes against Journalists and Unionists wrote to José Robinson Bioganni Coronado, who filed the original complaint, requesting a meeting on September 22, 2008, to discuss the complaint.⁹¹

In addition, the submission alleges that dismissed workers have been blacklisted. During interviews with USDOL officials, a worker from the first group of workers fired was hired by a factory, worked for one month and then was dismissed with no explanation, with no other workers being fired at that time. Another worker stated that she was hired at a factory, worked for half a day and then was fired, without explanation. Workers stated that when they were fired, they were told they would regret their efforts to organize, that they would be blacklisted, and that it would be impossible for them to find jobs in another factory.⁹²

3. Refusal of Labor Inspector Entry

On, February 19, 2006, a labor inspector attempted to visit the factory but was denied entry.⁹³ On November 15, 2006, labor inspectors were again not allowed entry.⁹⁴

Avandia management stated that they had been fined 7,000 Quetzales (approximately US \$911) for refusing to allow access to the labor inspectors. They stated that Avandia had allowed entry,

⁸⁹ *Procurador de los Derechos Humanos, Acta de Apertura*, denouncement made by workers who were all detained and fired August 29, except for one individual, who was fired August 30.

⁹⁰ Mario Castañeda, former Chief, Special Prosecutor's Unit for Crimes against Unionists and Journalists, interview with USDOL officials, July 21, 2008.

⁹¹ Jose Gerardo Martinez, *Auxiliar Fiscal, Ministerio Público*, written communication with Jose Robinson Giovanni Coronado regarding MP001/2007/96810, September 8, 2008.

⁹² Former workers, interview with USDOL officials, July 21, 2008.

⁹³ *Adjudicación Number R1-137-2007*, February 19, 2006. Inspector Marco Tulio Montufar Escobar went to verify payment issues.

⁹⁴ *Adjudicación Number R1-3449-2006*, inspectors Marco Tulio Montufar Escobar and David Francisco Guerra Valladares, November 16, 2006.

but had not been able to attend to the inspector at that moment.⁹⁵ The OTLA has been unable to confirm this with the Government of Guatemala.

4. OTLA Findings in the Avandia Case

All alleged facts in the submission regarding the labor violations in this case occurred after the CAFTA-DR entered into force for Guatemala on July 1, 2006.

Regarding refusals to allow labor inspectors to enter the workplace, according to documents received by OTLA, the Ministry of Labor inspectors were denied entry on two occasions in violation of Labor Code Article 281.⁹⁶ It is unclear if the government has held Avandia accountable for this violation. The management of Avandia claims they have received a fine of 7,000 Quetzales (approximately US \$911) after the Ministry of Labor forwarded the cases to the court system to issue sanctions for this violation.⁹⁷ The OTLA has not received information from the Government of Guatemala to confirm or dismiss Avandia's claim.

Regarding the unlawful dismissals, the Ministry of Labor has worked with Avandia to resolve a number of other disputes regarding holiday bonus pay, severance pay, illegal suspended leave, and other issues,⁹⁸ but the Government of Guatemala to date appears to have been unable to protect the rights of those workers who tried to exercise their legal right to form a union.

Article 379 of the Labor Code states that as of the moment the judge receives the petition (to form an ad hoc committee or union), neither workers nor employers may take retaliatory actions against the other.⁹⁹ The process to establish this legally afforded protection is clear; the workers followed this procedure; the Ministry of Labor processed the papers in a timely fashion; the court

⁹⁵ Jorge Meng Ramírez, Human Resources Manager. Avandia, interview with USDOL officials, October 28, 2008.

⁹⁶ Government of Guatemala, Labor Code Article 281: "Los inspectores de trabajo y los trabajadores sociales, que acrediten debidamente su identidad, son autoridades que tiene las obligaciones y facultades que se expresan a continuación: a) pueden visitar los lugares de trabajo cualesquiera que sea su naturaleza, en distintas horas del día y aun de la noche... b) pueden examinar libros de salarios, de planillas o constancias de pago, siempre que se refieran a realizaciones obrero-patronales. En el caso de los libros de contabilidad podrán revisarse previa autorización de tribunal competente de trabajo y previsión social; c) siempre que encuentren resistencia injustificada deben dar cuenta de lo sucedido al tribunal de trabajo y previsión social que corresponda, y en casos especiales, en los que su acción deba ser inmediata, puede requerir, bajo su responsabilidad, el auxilio de las autoridades o agentes de policía con el único fin de que no se les impida a no se les creen dificultades en el incumplimiento de sus deberes. En estos casos están obligados a levantar acta circunstanciada, que firmarán las autoridades o agentes que intervengan."

⁹⁷ Jorge Meng Ramírez, Human Resources Manager. Avandia, interview with USDOL officials, October 28, 2008.

⁹⁸ Labor Ministry cases R1-256-2008, R1-2056-2006, R1-4053-2007, and R1-634-2007.

⁹⁹ Government of Guatemala, Labor Code Article 379: "Desde el momento en que se entregue el pliego de peticiones al juez respectivo, se entenderá planteado el conflicto para el solo efecto de que ninguna de las partes pueda tomar la menor represalia contra la otra, ni impedirle el ejercicio de sus derechos. El que infrinja esta disposición será sancionado con multa igual al equivalente de diez a cincuenta salarios mínimos mensuales vigentes para las actividades no agrícolas. Además deberá reparar inmediatamente el daño causado por los trabajadores, y hacer efectivo el pago de los salarios y demás prestaciones dejadas de percibir durante el despido, sin que esto lo exonere de la responsabilidad penal en que hay podido incurrir. Si la conducta del patrono dura mas de siete días se incrementará en un cincuenta por ciento (50%) la multa incurrida. Si es trabajador, o si fuera colectivamente un sindicato, quien infrinja esta disposición, será sancionado con una multa equivalente de una a diez salarios mínimos mensuales."

issued its protective order. The employer illegally fired these workers, twice, and has yet to be penalized for this apparent violation of Guatemalan labor law.

To address these illegal firings, the courts have ordered the workers reinstated, but these apparently have also been ignored. Over a year ago, on August 9, 2007, Licda. Sandra Eugenia Mazariegos Herrera, the Fourth Labor Court Judge, *Juzgada Cuarto de Trabajo y Previsión Social*, ordered reinstatement of and back pay for Maria Cristina Perez Osorio and Karen Elizabeth Chacon and doubled the fine to 20 minimum salaries for non-compliance with the previous reinstatement order issued November 22, 2006. The judgment also stated that “if they persist in disobeying the order, this certifies that it be directed to a Justice of the Peace for Criminal prosecution against the person responsible for the crime of disobedience.”¹⁰⁰ These workers were reinstated, only to be fired again days later. It does not appear that any criminal action against the employers has been taken.

Article 379 of the Labor Code states the employer can be fined 10-50 times the minimum salary, (for non agricultural work the minimum wage is 45.80 Quetzales,¹⁰¹ or roughly US\$6) and back wages, for taking retaliatory actions despite the legal protection provided to the party.¹⁰² If the employer’s behavior continues for more than seven days, the fine is to increase by fifty percent. In the case of Avandia, there are, according to the documents the OTLA has reviewed, four separate court-ordered sanctions for the firing of protected workers, declining in severity and issued over many months. The first sanction imposed 20 minimum salaries in August 2007, approximately nine months, not seven days, after the initial court order. Fines of ten minimum salaries were applied in October 2007 and March 2008, and a fine of six minimum salaries, was applied in June 2008. At no point does it appear that the case transferred to a Justice of the Peace for criminal prosecution related to non-compliance with a court order, as recommended in the August 2007 Labor Court’s decision.

Avandia continues to operate and export its products.

D. SITRAFRIBO (Union of Fribo Company Workers)

In the SITRAFRIBO case, the submission highlights several areas where the Government of Guatemala allegedly failed to effectively enforce domestic labor laws. Specifically, the submission notes that: the Guatemalan government did not ensure that the employer negotiate a collective bargaining agreement in good faith with the recognized union as mandated under Labor Code Article 51; that it failed to prevent the illegal dismissal of union leaders, or ensure compliance with court orders to reinstate workers; that it did not correctly transfer the legal obligations of the previous owner of the factory to the new owners under Labor Code Article 23;¹⁰³ that it failed to ensure correct severance payments; and that it failed to effectively enforce the laws regarding payments to the IGSS.

¹⁰⁰ *Juzgado Cuarto de Trabajo y Previsión Social, Incidente de Reinstalación No. 35-3006*, August, 6, 2007. Unofficial OTLA translation of: “Si persisten en el desobedecer lo ordenado, se certificar a lo conducente a un juzgado de paz Penal en contra la persona que resulte responsable por el delito de desobediencia.”

¹⁰¹ Minimum wage information taken from: <http://www.leylaboral.com/guatemala/Introguatemala.aspx>

¹⁰² Government of Guatemala, Labor Code Article 379.

¹⁰³ Government of Guatemala, Labor Code Article 23: “La sustitución del patrono no afecta los contratos de trabajo existentes, en perjuicio del trabajador. El patrono sustituido queda solidariamente obligado con el nuevo patrono

The issues in the SITRAFRIBO case arose following allegations of labor law violations at the Fribo garment factory in El Tejar, Chimaltenango.

1. Unlawful Dismissals

Workers began to organize a union at Fribo in July 2007. On August 11, more than 40 workers, 36 of whom the submission alleges were in support of the union formation, were put on unpaid leave for 15 days.¹⁰⁴ On August 24, 2007, the Judge of Labor, Social Security, and Family officially recognized the ad hoc committee, the precursor to a union,¹⁰⁵ thus prohibiting Fribo from firing the workers without prior approval from a judge. After the court order, the workers tried to return to work after their leave, but they were never re-hired. The company alleged that the workers were dismissed due to ‘lack of work,’ but the union states that ‘help wanted’ signs were posted at the same time that the employers alleged ‘lack of work.’¹⁰⁶ In addition, the union states that management engaged in efforts to bribe workers not to join the union over the next few months.

According to the union, of the workers put on permanent vacation, 25 workers are still requesting reinstatement but have not been reinstated.¹⁰⁷ On March 25, 2008, the workers filed a complaint related to the illegal firings in violation of the court order.¹⁰⁸ In addition, the workers claim that other problems at the factory continue, such as problems with drinking water, no access to IGSS services, and incorrect payment for overtime.¹⁰⁹

The Ministry of Labor visited the Fribo factory several times and issued numerous adjudications against the company, including during the period of union organizing when the Ministry of Labor Inspector was denied entry to the factory.¹¹⁰ On October 18, 2007, the Fribo factory transferred ownership to Modas Dae Hang, which operates the factory, and, according to the submission, produces for the same suppliers. The company was recognized by the Government

por las obligaciones derivadas de los contratos o de las disposiciones legales, nacidas antes de la fecha de la sustitución y hasta por el término de seis meses. Concluido este plazo, la responsabilidad subsiste únicamente para el nuevo patrono. Por las acciones originadas de hechos u omisiones del nuevo patrono no responde, en ningún caso, el patrono sustituido.”

¹⁰⁴ *Adjudicación 118-2007*, inspector Rosa Lidia Sitan, September 20, 2007.

¹⁰⁵ *Juzgado de Primera Instancia de Trabajo y Previsión Social y de Familia, Cedula de Notificación de Conflicto Colectivo de Carácter Económico Social, No. 002-07*, August 24, 2007.

¹⁰⁶ The submitters provided the OTLA with ‘help wanted’ signs, though there is no indication of the period during which these were posted.

¹⁰⁷ Rob Wayss, Solidarity Center, email to USDOL, with FESTRAS response to USDOL questions, October 27, 2008.

¹⁰⁸ *Denuncia de Despido Ilegal Nuevo, Conflicto Colectivo Económico Social 002-007 OF. 1*, filed by 25 workers with the *Juzgado de Primera Instancia de Trabajo y Previsión Social y de Familia*, Sacatepequez, on March 26, 2008.

¹⁰⁹ José Gabriel Zelada Ortez, Director, CEADEL, email communication to USDOL, November 5, 2008.

¹¹⁰ *Adjudicación No. R1-1771-2007*, inspector Jami Oliverio Diaz Flores, June 7, 2007; *Adjudicación No. R1-2150-2007*, July 5, 2007; *Adjudicación No. 114*, inspectors Rosa Lidia Sitán Ajsinivac and Juan José Villatoro García, September 12, 2007; *Adjudicación No. 118*, inspector Rosa Lidia Sitán; September 20, 2007; *Adjudicación No. 119*, inspector Rosa Lidia Sitan Ajsinivac, September 20, 2007; *Adjudicación No. 122*, inspector Rosa Lidia Sitán Ajsinivac, September 20, 2007.

of Guatemala and issued a commercial license on November 8, 2007.¹¹¹ According to the submission, the union (SITRAFRIBO) alleges that the company was reincorporated for the purpose of avoiding legal obligations to reinstate Fribo workers and to evade potential sanction for failure to make required payments to the IGSS (discussed below).

On Wednesday, November 12, 2008, a U.S. Embassy representative traveled to the factory address listed for Modas Dae Hang¹¹² to verify that the factory was in operation under the name Modas Dae Hang and also to verify whether company representatives were available at the location. Modas Dae Hang's receptionist spoke with the Embassy representative and stated that the company's owner would be available to meet with an Embassy representative if given 24 hours advance notice. On Wednesday, November 19, an Embassy representative returned and spoke again with the receptionist, who insisted that the owner was unable to meet with Embassy representatives at that moment, would be traveling in the next few days with an unknown return date, and that no other company representatives were available. She also said that Modas Dae Hang has been operating since January 2008 with approximately 200 employees.¹¹³ She stated she was unfamiliar with Fribo and with the previous owners names listed in the *Registro Mercantil*. According to the receptionist, the owner instructed her to tell the Embassy that he did not know anything about Fribo.¹¹⁴

On November 26, 2008 the Vice Minister of Labor sent a letter to the legal representative of both Modas Dae Hang and Fribo, requesting a meeting on December 3.¹¹⁵ They did not attend the first meeting.¹¹⁶ The Ministry requested another meeting for December 15, 2008 and representatives from both companies participated. They set a date for a meeting on December 23, 2008 for the representative from Modas Dae Hang to meet with the representatives from FESTRAS and SITRAFRIBO.¹¹⁷

2. Incorrect Payments to the IGSS and Refusal of Labor Inspector Entry

The submission states that neither Fribo nor Modas Dae Hang has been making required payments into the IGSS system, which provides access to health care for workers, for both occupational injuries and general health care, based on their payment of a payroll tax. The submission also notes that the company owes significant payments to IGSS and that the Ministry of Labor has received numerous complaints and has dispatched inspectors who have been refused entry into the plant.¹¹⁸ In the meantime, the submission alleges workers were denied access to IGSS, for workplace injuries as well as for pre- and post-natal care. This report

¹¹¹ *Patente de Comercio de Sociedad Registro Mercantil de la Republica de Guatemala, Registro Mercantil General de la República*, Lic. Leonel Enrique Chinchilla Recinos, November 8, 2007.

¹¹² KM 36.5 Carretera Interamericana Santa Maria Cauque, Santiago Sacatepequez, Sacatepequez.

¹¹³ Modas Dae Hang is registered under Expediente No. 47778-2007, as of October 18, 2007 in its *Registro Mercantil* papers.

¹¹⁴ U.S. Embassy, Guatemala, email report to USDOL, November 19, 2008.

¹¹⁵ Mario Roberto Illescas Aguirre, Primer Viceministro de Trabajo y Previsión Social, letter to Legal Representative of Avandía, November 26, 2008.

¹¹⁶ Guillermo Gándara, Director of International Affairs, Planning and Cooperation, Ministry of Labor, email to USDOL, December 3, 2008.

¹¹⁷ *Adjudicación R1-4519-2008*, December 15, 2008.

¹¹⁸ The National Labor Committee, "Alert—Situation Worsens at Fribo Guatemala," October 2007. Available at: www.nlcnet.org/article.php?id=468.

explored the issues around non-payment to the IGSS to address the allegations in the submission. The OTLA does not have sufficient information at this point in time to determine whether these violations fall within the scope of labor laws, as defined in the Labor Chapter.

In addition to the difficulties encountered by Ministry of Labor inspectors attempting to enter the plant, cited above, IGSS inspectors also tried to visit the Fribo factory and review the necessary payroll documents eight times during March-July, 2007, with no success.¹¹⁹

Using information provided by the Ministry of Labor and the Apparel and Textile Industry Association of Guatemala (VESTEX), on July 25, 2007, the IGSS attempted to calculate the payroll costs, the basis for the payments to the IGSS system. On October 22, 2007, the Office of Tax/Fine Collection said it could not issue the document requesting payment until the payroll levels were confirmed. On November 4, 2008, this request was sent to the Office of IGSS in Chimaltenango to begin once again to verify the payroll amounts in order to calculate the amount owed.¹²⁰ An IGSS official explained that estimated calculations are often later discarded by the courts and thus avoided.¹²¹

The IGSS has concluded that the company is in arrears from May 2006 to the present. In addition, it is awaiting the IGSS in Chimaltenango to verify the salaries so that a new assessment can be issued to the company.¹²²

According to the Center for Studies and Support for Local Development (CEADEL)—a local NGO that provides services to workers—the workers at Modas Dae Hang who need medical attention do not access the IGSS services but go to private doctors or to the hospital for the general public, which is not covered by IGSS payments.¹²³

¹¹⁹ OTLA has documented the following efforts by IGSS inspectors: (1) On March 5, 2007, an IGSS inspector was denied entry; (2) On May 28, 2007, an IGSS inspector visited. However, the company failed to provide the necessary documents for the IGSS to review the payrolls; (3) On June 19, 2007, the IGSS visited. However, the staff said that no one was present who could answer their questions, and the company did not provide the necessary documents to review the payrolls. IGSS set a date to return for June 29, 2007; (4) On June 29, 2007, the IGSS visited. However, the company failed to provide the necessary documents to review the payrolls; (5) On July 2, 2007, inspectors from the Ministry of Labor and the IGSS visited the factory to conduct an official inspection and to verify worker documentation but were informed that the Legal Representative and General Manager were both out of the country. The inspectors set a return date of July 4, 2007; (6) On July 4, 2007, inspectors from the Ministry of Labor and IGSS visited again and were not allowed entry; (7) On July 11, 2007, the Ministry of Labor, external advisors, foreign investors, IGSS, and VESTEX met with Fribo to coordinate how to ensure the company would provide the needed payroll information. They met again and agreed that on July 16, 2007, at 9:00 a.m. they would allow access to the factory and payroll documents; and (8) On July 16, 2007, IGSS officials were allowed access but they were told that the paper requirements were too big and that the accountant was not there.

¹²⁰ Director of Inspection, Director of Tax/Fine Collection, and General Manager of IGSS, letter to OTLA, providing documentation on cases provided, November 5, 2008, page 12.

¹²¹ IGSS official, phone interview with USDOL official, November 26, 2008.

¹²² Director of Inspection, Director of Tax/Fine Collection, and General Manager of IGSS, letter to OTLA, providing documentation on cases provided, November 5, 2008, pages 11-12.

¹²³ José Gabriel Zelada Ortiz, Director, CEADEL, email correspondence to USDOL, November 5, 2008.

3. OTLA Findings in the SITRAFRIBO Case

All of the facts alleged in the submission regarding the labor violations in the SITRAFRIBO case occurred after the CAFTA-DR entered into force for Guatemala on July 1, 2006.

According to Article 281 of the Labor Code,¹²⁴ the Ministry of Labor has the authority to carry out inspections. The facts relating to Fribo suggest that the Ministry of Labor has been unable to effectively carry out this function. According to the OTLA's review of documents, Fribo refused entry to a labor inspector five times.¹²⁵ The IGSS also has inspection authority and made numerous unsuccessful attempts to review the necessary payroll information at the factory. If there is resistance to an inspection by an employer, the IGSS "in special cases, where action should be immediate, they can summon, on their own authority, police agents or authority assistance, with the only goal being that they are not obstructed from complying with their duties."¹²⁶ The Ministry of Labor inspectors have similar authority.¹²⁷ The Ministry of Labor and the IGSS made various attempts to conduct its inspections at the Fribo factory, and the employer has repeatedly refused entry. Neither the previous nor current owner appears to have been held accountable for this repeated refusal to cooperate with government authorities.

As to the legal obligations of the current registered owner, Modas Dae Hang, it is unclear whether Article 23 of the Labor Code—which preserves elements of the employment relationship in cases of changes of ownership—has been applied in this case. The workers at the factory allege that nothing has changed except the name.

It is worth noting that the factory was transferred to another owner at the height of union registration efforts. The National Labor Committee began an international publicity campaign in June of 2007, and issued a press release in October on the union organizing effort.¹²⁸ On September 12, 2007, SITRAFRIBO filed union recognition papers with the Ministry of Labor, and on October 23, 2007, the Ministry of Labor recognized the union.¹²⁹

¹²⁴ Government of Guatemala, Labor Code Article 281: "Los inspectores de trabajo y los trabajadores sociales, que acrediten debidamente su identidad, son autoridades que tiene las obligaciones y facultades que se expresan a continuación: a. pueden visitar los lugares de trabajo cualquiera que sea su naturaleza, en distintas horas del día y aun de noche, si el trabajo se ejecuta durante ésta."

¹²⁵ Entry was refused three times to Rosa Lidia Sitan: *Adjudicacion 118/2007* of September 20, 2007 (visit on September 14, 2007); *Adjudicacion 119/2007* of September 20, 2007 (visit on September 17, 2007); and *Adjudicacion 122/2007* of September 24, 2007 (visit on September 20, 2007). Entry was refused two times to the Ministry of Labor/IGSS team headed by inspector Roca Cruz: *Adjudicacion R1-1771-2007* of June 7, 2007 and *Adjudicacion R1-2150-2007* of July 5, 2007.

¹²⁶ *Decreto 295 del Congreso, Artículo 50 de la Ley Orgánica del Instituto Guatemalteco de Seguridad Social*: "siempre que se encuentre resistencia injustificada deben dar cuenta de lo sucedido al tribunal de trabajo y previsión social que corresponda, y en casos especiales, en los que su acción deba ser inmediata, puedan requerir, bajo su responsabilidad, ex auxilio de las autoridades o agentes de policía, con el único fin de que no se les impida el cumplimiento de sus deberes."

¹²⁷ Government of Guatemala, Labor Code Article 281 (c) "Siempre que encuentren resistencia injustificada deben dar cuenta de lo sucedido al Tribunal de Trabajo y Previsión Social que corresponda, y en casos especiales, en los que su acción deba ser inmediata, pueden requerir, bajo su responsabilidad, el auxilio de las autoridades o agentes de policía, con el único fin de que no se les impida no se les creen dificultades en el incumplimiento de sus deberes".

¹²⁸ The National Labor Committee, "Alert – Situation Worsens at Fribo Guatemala", October 2007.

¹²⁹ According to the Ministry of Labor document granting Sitrafrifo "Personalidad Jurídico" on June 18, 2008, the union was first officially registered on October 23, 2007.

The *Registro Mercantil* papers list the new factory owners (Modas Dae Hang) as of November 8, 2007.¹³⁰ The Government of Guatemala has not determined whether Article 23 applies in this case, and because the criteria for its application remains unclear, the workers are unable to exercise their right to reinstatement under this measure.

The factory continues to operate and export its products.

E. SITRAINPROCSA (Union of International Frozen Products Workers)

In the SITRAINPROCSA case, the submission highlights several areas where the Government of Guatemala is alleged to have failed to enforce domestic labor laws. Specifically, it alleges that the Guatemalan government did not ensure that the employer negotiate a collective bargaining agreement in good faith, as required under Labor Code Article 51; that it failed to prevent the illegal dismissal of union leaders or to ensure compliance with court orders to reinstate workers; that it did not correctly transfer the legal obligations of the previous owner of the factory to the new owners under Labor Code Article 23; that it failed to ensure correct severance payments; and that it failed to effectively enforce the laws regarding payments to the IGSS.

The allegations in the SITRAINPROCSA case arose in the context of a labor dispute at the INPROCSA fruit and vegetable plant, located in El Tejar, Chimaltenango. As several of the allegations contained in the submission occurred prior to the CAFTA-DR's entry into force for Guatemala, the OTLA has focused its review on events occurring after July 1, 2006. Information on prior events is included for context.

1. Refusal to Negotiate a Collective Agreement, Unlawful Dismissals, and Failure to Pay Legal Severance

The union at this small fruit and vegetable company was formed in 2004. On May 12, 2005, the union sought to negotiate a collective agreement.¹³¹ Issues for negotiation included a request that INPROCSA pay the IGSS payments that were being deducted from workers' payrolls, and that workers be given legal holidays, not be forced to work overtime, and be paid for overtime. The workers sent a formal request, notifying the Ministry of Labor of its intent to bargain.¹³²

According to the submission, on June 27, the Ministry of Labor said it would send an inspector to oversee the negotiation and that the employer refused to negotiate. The submission states that at the end of May 2005, after the regular two week pause in work due to seasonal issues, the employer refused to rehire two union leaders, Vilma Gladis Autista Vasquez and Rosa Albertina Mazariegos Alonzo, citing a 'lack of work.' Nevertheless, the union claims that the company hired other new employees at the same time.

¹³⁰ *Registro Mercantil*, Expediente No. 47778-2007.

¹³¹ Letter to INPROCSA General Manager, citing *Acuerdo Número 36-2004*, May 12, 2005 with the petition for ad hoc committee recognition, submitted to the Judge Labor and Social Prevention and Family of Chimaltenango, from Ministry of Labor, April 30, 2004.

¹³² *Acta*, meeting minutes to discuss formation of the union, April 29, 2004, submitted to the Judge Labor and Social Prevention and Family of Chimaltenango, from Ministry of Labor, April 30, 2004.

The submission alleges that on August 10, 2005, the company permanently suspended the two union leaders and took other measures to intimidate the remaining union members. The company also continued to refuse to negotiate.

The submission alleges that in mid-2006, following several years of conflict between INPROCSA management and the SITRAINPROCSA union, another company, MarBran, began to take over production of the company and its employees. According to the submission, the union alleges that this change in ownership was undertaken so that INPROCSA could shift production to a non-union company. On February 18, 2007, INPROCSA fired 94 workers and stated that the plant was closing. An inspector from the Ministry of Labor visited the plant and suggested to the workers that they accept the severance payment offered, despite it being less than the legal amount due to them, because the company was closing.¹³³

According to the submission, several days after the dismissal of the 94 workers, yet another company, Alimentos Sumar, took over from MarBran. The submission alleges the transfer was to avoid the legal obligations and is in violation of Guatemalan Labor Code Article 23.

On March 1, 2007, an inspector from the Ministry of Labor visited INPROCSA, accompanied by workers with representatives from FESTRAS and the Solidarity Center, as well as a representative from the Human Rights Ombudsman, and the Mayor of El Tejar, Chimaltenango. Apparently, the company called the National Police who came but made no arrests or detentions.¹³⁴ Of the 94 workers fired on February 18, 2007, none are asking for reinstatement.¹³⁵

On April 24, 2008, the Constitutional Court overruled the labor inspector's declaration and the lower courts' decisions which validated the firings of two union leaders in 2005 due to lack of production materials. The Constitutional Court ruled that the firings were retaliatory, constituted discrimination against the workers' union activities, and were prohibited by law, violating Articles 211 and 223 of the Labor Code; ILO Conventions 87, 98, and 110; and Article 102 of the Constitution. The Constitutional Court ordered the lower courts to reissue their decisions accordingly.¹³⁶

On May 23, 2008, the Second Court of Appeals for Labor and Social Protection and the Family reissued its previous order based on the Constitutional Court ruling, and ordered back pay and reinstatement for the workers.¹³⁷

¹³³ The labor inspector validated this statement, and stated that it was due to the fact that the employer had stated it would be closing its doors. Interview with USDOL officials, July 21, 2008.

¹³⁴ Undated press release received from Solidarity Center with accompanying article: "Cierre de INPROCSA deja casi cien obreros en las calles" March 14, 2007.

¹³⁵ Rob Wayss, Solidarity Center, email communication to USDOL with FESTRAS attachment, October 27, 2008.

¹³⁶ *Corte de Constitucionalidad, República de Guatemala, C.A.* Expediente No. 3859-2007, issued April 24, 2008, p. 6: "pues es lógico que ninguna empresa resolvería sus problemas de producción suspendiendo a dos trabajadores por tal causa, pero es obvio que suspendiendo a la Secretaria General y a la Secretaria de Finanzas del Sindicato, la empleadora realizó un acto de clara discriminación sindical prohibido por la ley."

¹³⁷ *Sala Segunda de la Corte De Apelaciones de Trabajo y Previsión Social y de Familia, Proceso No. 25-2006 Oficial I*, Rosa Albertian Mazareigos Alonzo y Compañera contra International de Productos Congelado S.A., May 23, 2008.

On September 2, 2008, Vilma Gladis Autista Vasquez and Rosa Albertina Mazariegos Alonzo petitioned the Lower Court of Labor and Social Protection and the Family of the Department of Chimaltenango, providing the new address for INPROCSA and asking that the court decisions be carried out, that they be reinstated, and that if the order is not complied with, the state take measures to seize the property of the company for 500,000 Quetzales (US\$65,790) or the approximate amount owed to them in back pay.¹³⁸

On September 19, 2008, the *Ministro Ejecutor*, the staff of the court who carries out the court orders, visited INPROCSA accompanied by the workers and their lawyer, in order to effectuate the reinstatement order. They were received by a staff person, who stated that INPROCSA had been in a process of liquidation since February 2007, had no staff except for a driver and cleaning personnel, and that the legal representative was outside the country.¹³⁹

On October 1, 2008, the workers re-petitioned the Lower Court Judge of Labor and Social Protection and the Family of the Department of Chimaltenango, stating the Justice of the Peace of the Municipality of Santa Catrina Pinula, on September 19, 2008, verified the disobedience of INPROCSA to comply with the reinstatement order and provide back pay. They again requested that preventative measures (“*medidas precautorias*”) be taken, and that this claim be registered with the government agency responsible for the registration of companies and with the government agency responsible for the registration of the entrance and exit of individuals to Guatemala.¹⁴⁰

U.S. Embassy officials traveled to the Alimentos Sumar factory and met with three company representatives: Edgar Origel Arrache, Quality Assurance Manager; Henry Acajabon, Human Resources Manager; and Jesus Mora, Operations Services Manager. According to the company representatives, the owner was not available. These representatives emphasized that Alimentos Sumar is an independent company with absolutely no connection to INPROCSA, other than the fact that it is located in the same physical plant where INPROCSA had its operations. They claimed that the owners, workers, and management are completely different and distinct from those formerly at INPROCSA and that the company is in compliance with the labor laws.

They stated that Alimentos Sumar began operating in July 2006 and, at that time, the physical plant where the company is now located had been abandoned for some time. When Alimentos Sumar began its operations at this plant, INPROCSA had already closed. This conflicts with the Guatemalan government records. According to IGSS records, Alimentos Sumar was not registered as a business until May 1, 2007, and INPROCSA was still active with employees until February 2007. The Ministry of Labor also visited the INPROCSA factory on March 1, 2007, although they were denied entry.

¹³⁸ INPROCSA workers, *Incidente 2-2005 Of. 4*, petition received by the Lower Labor Judge of Labor and Social Protection and the Family of Chimaltenango, September 2, 2008.

¹³⁹ *Despacho* 673-2008 Of. 2do. *Ministro Ejecutor* Report.

¹⁴⁰ INPROCSA workers, *Incidente de Represalias: 2-2005. Ov IV y ot 1. Colectivo 62-2004*, petition received by the Lower Judge of Labor and Social Protection and the Family of Chimaltenango, October 1, 2008.

On November 26, 2008, the Vice Minister of Labor sent a letter to the legal representative of both INPROCOSA and Alimentos Sumar, requesting a meeting on December 3.¹⁴¹ The representatives from Alimentos Sumar attended the meeting and stated that they are completely disconnected from INPROCOSA, their only connection being that they are producing at the factory where INPROCOSA previously produced, and that they are in compliance with all labor legislation.¹⁴² The submission alleges that the factory produces frozen vegetables for export to the same international buyer.

2. Incorrect Payments to the IGSS

The submission alleges that workers in the present case learned that their payments to the IGSS were deducted from their wages for payment to IGSS, but not paid on their behalf. The IGSS system provides access to health care for workers for both occupational injuries and general health care. This was discovered when several workers tried to access the health care and pension services provided by the IGSS and were informed their payments had not been made, or had not been paid for the entire period they had worked for the company; therefore, the workers were denied benefits.¹⁴³ This report explored the issues around non-payment to the IGSS to address the allegations in the submission. The OTLA does not have sufficient information at this point in time to determine whether these violations fall within the scope of labor laws, as defined in the Labor Chapter.

There were various attempts at enforcement of INPROCOSA's payments to IGSS, which collects a payroll tax and, in return, provides health care and retirement benefits to those workers they have registered in the system. IGSS reviewed the INPROCOSA accounts on August 22, 2002; January 13, 2003; January 2, 2004; February 3, 2005; and October 26, 2007. Each of these revisions revealed incorrect payments from INPROCOSA. IGSS established agreements for payment and INPROCOSA paid, except for two outstanding bills worth 324,501 Quetzales (US \$42,234) and 41,969 Quetzales (US \$5,462), this last bill covering the period of March 27, 2006 through February 25, 2007.¹⁴⁴

In addition, according to the IGSS, Alimentos Sumar was registered as a business as of May 1, 2007. On February 28, 2008, an IGSS inspector reviewed the Alimentos Sumar accounts. The Office of Tax Collection is in the process of sending the payment notice for the period of October 1-December 31, 2007, for 120,002 Quetzales (US \$15,618) plus administrative costs and charges for late payments. The IGSS is in the process of notifying Alimentos Sumar.¹⁴⁵

¹⁴¹ Mario Roberto Illescas Aguirre, Primer Viceministro de Trabajo y Previsión Social, letter to Legal Representative of INPROCOSA and Alimentos Sumar, November 26, 2008.

¹⁴² Guillermo Gándara, Director of International Affairs, Planning and Cooperation, Ministry of Labor, email to USDOL, December 3, 2008.

¹⁴³ INPROCOSA workers, interview with USDOL officials, July 21, 2008.

¹⁴⁴ The documentation reviewed by the OTLA indicates that the bill of 41,967 Quetzales (approximately US \$5,462) was incurred in the period from March 27, 2006-February 25, 2007.

¹⁴⁵ Ibid.

3. OTLA Findings in the SITRAINPROCSA Case

Although two workers who have pursued their case in the courts were fired before the CAFTA-DR entered into force for Guatemala, the firing of 94 workers, the incidents related to accessing the IGSS, and the Constitutional Court ruling, occurred after the CAFTA-DR entered into force for Guatemala on July 1, 2006.

On April 24, 2008, the Constitutional Court ruled that the firing of two union leaders was retaliatory, constituted discrimination against the workers' union activities, and was prohibited by law, violating Articles 211 and 223 of the Labor Code; ILO Conventions 87, 98, and 110; and Article 102 of the Constitution.¹⁴⁶

The Constitutional Court ruling also calls into question the initial inspector's report and how the different branches of government coordinate. It does not appear that there is a system that would allow for the court decisions to be shared with the initiating executive agency, so that the agency can see how the inspection was dealt with, and to incorporate any relevant information into its case management systems.

In the case of INPROCSA, the Constitutional Court found 'lack of work' to be an illogical justification for firing union leaders, in violation of Guatemalan law and the Guatemalan Constitution. The Constitutional Court's opinion and an assessment from a legal expert in Guatemala indicate that there may not be a need to inspect to verify the cause of termination in a case such as this. The ruling suggests that when workers who are organizing and who are under a protective court injunction prohibiting their firing without the required pre-approval from a court are fired without court approval, it is an illegal firing *per se*. Regardless, the Ministry of Labor appears to have been unaware of the Constitutional Court's ruling¹⁴⁷ and its implication for future inspections.

Regarding the other 94 workers, it is unclear whether they have renounced or waived their right to reinstatement. Guatemalan law states that legally afforded labor rights, such as the right to reinstatement if illegally fired during an organizing campaign, are "not renounceable."¹⁴⁸

In the case of INPROCSA, it is unclear whether Article 23 of the Labor Code applies to the new owners of the company. Article 23 states that the new owner inherits the labor commitments of the previous owner.¹⁴⁹ It is unclear if this is a case of "employer substitution" under Guatemalan law which obligates the new owners of the factory to reinstate the workers.

¹⁴⁶ *Corte de Constitucionalidad, República de Guatemala, C.A. Expediente No. 3859-2007*, issued April 24, 2008, p. 6 "pues es lógico que ninguna empresa resolvería sus problemas de producción suspendiendo a dos trabajadores por tal causa, pero es obvio que suspendiendo a la Secretaría General y a la Secretaría de Finanzas del Sindicato, la empleadora realizó un acto de clara discriminación sindical prohibido por la ley."

¹⁴⁷ Guillermo Gándara, Director of International Affairs, Planning and Cooperation, Ministry of Labor, preliminary draft answers to USDOL questions to Government of Guatemala, October 25, 2008.

¹⁴⁸ Guatemalan Constitution, Article 106; Labor Code Article 12. *Sentencia de la Corte de Constitucionalidad de Guatemala sobre la Irrenunciabilidad de Derecho Laborales, Gaceta Jurisprudencial No 55 – Inconstitucionalidades en Caso Concreto EXPEDIENTE No. 760-99.*

¹⁴⁹ Government of Guatemala, Labor Code Article 23.

INPROCSA has been found in violation of the IGSS payment process numerous times and was able to renegotiate its payments on a regular basis. Two concerns arise from these facts. First, it does not appear that the employer has any incentive to keep its payments up to date, with no apparent penalty for non-payment. The IGSS officials confirmed that there is no increase in sanctions for repeated offenses.¹⁵⁰ Negotiated agreements for payment may be necessary to ensure that the employer is able to comply with the payments due. In this instance, it seems to have become the *modus operandi*, and it is unclear if INPROCSA faces any real penalty for its actions.

Second, and more importantly, it is unclear what this period of negotiating agreements means for the workers. Although the IGSS states that workers should have access to benefits the moment the company turns over the payrolls for the inspection,¹⁵¹ INPROCSA workers provided examples when they were unable to access services, despite having the payments deducted from their wages.¹⁵² It remains unclear whether workers can access the services of the IGSS while the “agreement” for payment is being negotiated, and it is unclear at this point in time if this happens.

IV. Conclusion

Throughout the review process, the Guatemalan government, under President Colom, has demonstrated a willingness to discuss with the U.S. government the issues raised in the submission. Guatemalan officials have met with U.S. government officials, provided requested information, and facilitated meetings with key government officials to address the allegations outlined in the submission. The OTLA notes that the Government of Guatemala has recently made efforts to address some of the issues raised in this report. The following is a summary of the findings the Guatemalan government might address in order to improve its enforcement of its labor laws.

Administrative Measures

According to Article 281 of the Labor Code, the Ministry of Labor has the authority to carry out inspections. It appears that in several instances detailed in this report, the Ministry of Labor was unable to effectively carry out this function. In three of the cases, labor inspectors were denied entrance a total of 12 times. Based on the documents in our possession, the OTLA determined

¹⁵⁰ IGSS official, phone interview with USDOL officials, November 26, 2008.

¹⁵¹ Ibid.

¹⁵² INPROCSA workers, interview with USDOL officials, July 21, 2008.

that Avandia refused entry to labor inspectors twice,¹⁵³ INPROCSA refused entry three times,¹⁵⁴ and Fribo refused entry seven times.¹⁵⁵

The IGSS inspection power also appears to be limited. In the Fribo case alone, the IGSS made six attempts to meet and review payroll information at the factory. After these numerous attempts, the IGSS, the Ministry of Labor, representatives from international buyers, and VESTEX met to try to secure Fribo's cooperation with the IGSS. After the meeting, Fribo still refused to turn over the needed documents to the IGSS, which is now beginning the process anew in order to verify the required payroll information. Soon after this meeting, the factory refused entry to a labor inspector, twice in the same month.

Both the Ministry of Labor and the IGSS inspectors "in special cases, where action should be immediate, can summon, on their own authority, police agents or authority assistance, with the only goal being that they are not obstructed from complying with their duties."¹⁵⁶ The OTLA received no evidence from the Guatemalan government that the police authorities were used to enforce an inspector's right of entry in any of the cases cited in the submission. In fact, at the INPROCSA factory, it was the employers who called the police.¹⁵⁷

The Ministry of Labor lacks the authority to directly sanction labor law violations. The Ministry of Labor, as a purely administrative agency, relies on the courts to enforce compliance. Article 274 of the Labor Code is interpreted to mean that the Ministry of Labor does "not have the jurisdiction to learn about matters already transferred [to] and resolved by the Judicial Branch."¹⁵⁸ It appears there is no information sharing between the Courts and the Ministry of

¹⁵³ *Adjudicación Número R1-3449-2006*, inspectors Marco Tulio Montufar Escobar and David Francisco Guerra Valladares, November 15, 2006; *Adjudicación Número R1-137-2007*, inspector Marco Tulio Montufar Escobar, February 19, 2007.

¹⁵⁴ *Ministerio de Trabajo y Previsión Social del Departamento de Chimaltenango, Adjudicación Número 45/2006*, January 4, 2007; *Ministerio de Trabajo y Previsión Social del Departamento de Chimaltenango, Adjudicación Número V-037-2007*, February 28, 2007; *Ministerio de Trabajo y Previsión Social del Departamento de Chimaltenango, Adjudicación Número V-215-2007*, October 16, 2007.

¹⁵⁵ *Ministerio de Trabajo y Previsión Social del Departamento de Sacatepequez, Adjudicación Número R1-1771-2007*, inspectors Jaime Oliverio Díaz Flores and Cesar Roberto Gatica Lemos, June 7, 2007; *Ministerio de Trabajo y Previsión Social del Departamento de Sacatepequez, Adjudicación Número R1-2150-2007*, inspectors Manuel Enrique Lopez Maldonado, Jesús Alberto Figueroa Peñate, Julio Ricardo Castellanos Paz and Silverio de Jesús Roca Cruz, July 2, 2007; *Ministerio de Trabajo y Previsión Social del Departamento de Sacatepequez, Adjudicación Número R1-2150-2007*, inspectors Maria Eugenia Guarico Reyes, Dora Beatriz Lemus García de Sanchez, and Silverio de Jesús Roca Cruz, July 5, 2007; *Ministerio de Trabajo y Previsión Social del Departamento de Sacatepequez, Adjudicación Número 114/2007*, inspectors Rosa Lidia Sitán Ajsinivac and Juan José Villatoro García, September 5, 2007; *Ministerio de Trabajo y Previsión Social del Departamento de Sacatepequez, Adjudicación Número 114/2007*, inspectors Rosa Lidia Sitán Ajsinivac and Juan José Villatoro García, September 12, 2007; *Ministerio de Trabajo y Previsión Social del Departamento de Sacatepequez, Adjudicación Número 118/2007*, *Adjudicación Número 119/2007*, and *Adjudicación Número 122/2007*, inspector Rosa Lidia Sitán Ajsinivac, September 20, 2007; *Ministerio de Trabajo y Previsión Social del Departamento de Sacatepequez, Adjudicación Número 122/2007*, inspector Rosa Lidia Sitán Ajsinivac, September 24, 2007.

¹⁵⁶ Government of Guatemala, *Decreto 295 del Congreso*, Article 50 of the *Ley Orgánica del Instituto Guatemalteco de Seguridad Social*; Labor Code Article 281(c)

¹⁵⁷ Undated press release received from Solidarity Center with accompanying article: "Cierre de INPROCSA deja casi cien obreros en las calles" March 14, 2007.

¹⁵⁸ Ministry of Labor, email correspondence to USDOL, November 19, 2008. The Ministry of Labor cited Government of Guatemala, Labor Code Article 274: "El Ministerio de Trabajo y Previsión Social tiene a su cargo la

Labor. This means that the Ministry of Labor cannot effectively track whether inspectors' findings have been upheld. For example, in the case of INPROCOSA, the Constitutional Court ruled that it was not "logical" that employers fired union organizers as a result of 'lack of work' or 'lack of materials', and overruled the labor inspector's findings. The Ministry of Labor was unaware of this court ruling.¹⁵⁹ Thus, their inspectors could continue to issue findings that the Constitutional Court has already found to be illogical.

The review of these cases raises questions relating to whether labor inspections as authorized under Labor Code Articles 278-282 are being conducted effectively under the law.

Judicial Measures

Throughout the review, the OTLA has noted several failures in the enforcement of court orders, most notably protective orders against retaliatory firing and reinstatement orders following unlawful dismissals of union members. It falls within a Guatemalan court's jurisdiction to execute its own orders.¹⁶⁰ If the employer does not comply with a court order, the court is to certify the case so it can proceed to a criminal court for prosecution of the employer for failure to comply with the order. Based on our document review, the OTLA has concluded that in four out of the five cases included in this submission, 11 court orders were not complied with.¹⁶¹ In the Avandia case, there were seven court orders not complied with;¹⁶² in the INPROCOSA case, there were two court orders not complied with;¹⁶³ in the Fribo case, there was one court order not

dirección, estudio y despacho de todos los asuntos relativos a trabajo y previsión social y debe vigilar por el desarrollo, mejoramiento y aplicación de todas las disposiciones legales referentes a estas materias, que no sean de competencia de los tribunales, principalmente las que tengan por objeto directo fijar y armonizar las relaciones entre patronos y trabajadores..." , then stated: "En consecuencia y de conformidad con la norma relacionada, el Ministerio de Trabajo y Previsión Social, por disposición legal, no tiene competencia para conocer asuntos ya tramitados y resueltos por el Organismo Judicial."

¹⁵⁹ Guillermo Gándara, Director of International Affairs, Planning and Cooperation, Ministry of Labor, preliminary response to USDOL questions, email communication to USDOL, October 25, 2008.

¹⁶⁰ Guatemalan Constitution, Article 203: "... Corresponde a los tribunales de justicia la potestad de juzgar y promover la ejecución de lo juzgado;" *Ley del Organismo Judicial*. (Article 156): "Debe ejecutar la sentencia el juez que la dictó en primera instancia;" Government of Guatemala, Labor Code Article 283: "Los conflictos relativos a Trabajo y Previsión Social están sometidos a la jurisdicción privativa de los Tribunales de Trabajo y Previsión Social, a quienes compete juzgar y ejecutar lo juzgado."

¹⁶¹ The OTLA document review included the study of court orders and notifications due to failure to respond to original orders.

¹⁶² *Juzgado Sexto de Trabajo y Previsión Social de la Primera Zona Económica, Juicio Colectivo en Prevención No. 20-2006*, November 13, 2006; *Juzgado Cuarto de Trabajo y Previsión Social de la Primera Zona Económica, Juicio: Incidente de Reinstalación 35-2006*, November 22, 2006; *Juzgado Cuarto de Trabajo y Previsión Social, Juicio: Incidente de Reinstalación 35-2006*, August 9, 2007; *Juzgado Tercero de Trabajo y Previsión Social, No. Conflicto Colectivo de Carácter Económico Social en Prevención 25-2007*, (Memorial Registro No. 4122-07) August 29, 2007; *Juzgado Tercero de Trabajo y Previsión Social, Incidente de Reinstalación No. 3234-2007*, October 15, 2007; *Juzgado Tercero de Trabajo y Previsión Social, Conflicto Colectivo No. 3109-2007*, November 7, 2007; *Juzgado Tercero de Trabajo y Previsión Social, Conflicto Colectivo No. 3109-2007*, October 2, 2008.

¹⁶³ The two cases referenced here include both the Constitutional Court ruling and the reissued ruling of the lower court. Until the ruling of the lower court is upheld, we consider INPROCOSA to be in violation of both courts' rulings. *Corte de Constitucionalidad, República de Guatemala, C.A. Expediente No. 3859-2007*, issued April 24, 2008 (Preventative Order); *Sala Segunda de la Corte De Apelaciones de Trabajo y Previsión Social y de Familia*, May 23, 2008. *Proceso No. 25-2006 Oficial 1*, Rosa Albertina Mazareigos Alonzo y Compañera contra Internacional de Productos Congelado S.A.

complied with;¹⁶⁴ and in the STEPQ case, there was one court order not complied with.¹⁶⁵ In all of these instances, the factories where the problems occurred continue to produce and export goods.

These findings suggest serious problems with respect to the enforcement of court orders, most notably protective orders against retaliatory firing and reinstatement orders following unlawful dismissals of union members.

Violence Against Trade Unionists

The recent progress on labor relations in two of the five cases demonstrates a few noteworthy issues. First, it illustrates that it is possible to have a union and management successfully negotiate a collective bargaining agreement in Guatemala. STEPQ and SITRABI have both been able to negotiate collective bargaining agreements with their respective employers and, at this moment in time, have no outstanding labor disputes at the worksites mentioned in the submission.

The challenges to achieving this cannot be overstated. In both instances, a climate of fear due to the intimidation and murder of union leaders exists. The OTLA recognizes that the murders in the STEPQ and SITRABI cases occurred within the context of a high level of violent crime in Guatemala, affecting not only the labor sector, but the country as a whole. The report acknowledges that initial Government of Guatemala investigations indicate that the homicides were not directly linked to the union leaders' activities. Until the perpetrators have been convicted, there cannot be any certainty with respect to their motive. Nonetheless, when a union leader is violently attacked with total impunity, the crime's impact can reach beyond the individual and cast a shadow of fear upon others, weakening the right of association and collective bargaining.

Inter-Agency Coordination

Limits on the Ministry of Labor's enforcement powers and the enormous challenges facing the Guatemalan judicial system appear to have created challenges for the enforcement of domestic labor laws. The OTLA believes that some of these problems could be addressed through improved inter-agency coordination, specifically coordination designed to address enforcement of court orders and access to the worksite by relevant executive agencies.

The recently reactivated Multi Institutional Commission on Labor Relations in Guatemala (Commission) may provide a forum to address the issues described in this report in a comprehensive and coordinated way. On November 6, 2008, the Ministry of Labor, the Ministry of Economy, the Ministry of Public Security (*Ministerio de Gobernación*), the Ministry of Justice (*Ministerio Público*), and the Ministry of Foreign Relations, met to reactivate this

¹⁶⁴ *Juzgado de Primera Instancia de Trabajo y Previsión Social y de Familia, Cedula de Notificación de Conflicto Colectivo de Carácter Económico Social, No. 002-07, August 24, 2007.*

¹⁶⁵ *Sala Cuarta de Trabajo de Mazatenango, Denuncia de Reinstalación 320-2006, Of. 2 dentro del Conflicto Colectivo 452-2006, January 11, 2007 citing August 30, 2006, Juzgado de Primera Instancia de Trabajo y Previsión Social del Departamento de Escuintla, Conflicto Colectivo 452-2006.*

Commission, established by a Presidential decree on August 13, 2003.¹⁶⁶ The Commission met again on November 26, 2008, and discussed the cases in the submission.¹⁶⁷ This is a critical first step to ensure that the Government of Guatemala moves forward to address the issues described in this report in a comprehensive and coordinated way.

The Ministry of Economy could play a critical role in a comprehensive response to certain issues highlighted in this report. Currently, the Ministry of Economy registers companies for tax exemptions and other benefits under Decree 28-98 and Decree 65-89.¹⁶⁸ The Office of Industrial Policy at the Ministry of Economy provides these benefits only after it has certified that the company is exporting its product, is employing workers according to the national labor laws, and has paid the social security tax. It currently has approximately 640 companies registered to receive these benefits.¹⁶⁹ The Ministry of Economy has used this ability to suspend (or threaten the suspension of) tax privileges in the past, but not for several years.¹⁷⁰

Technical Cooperation

Since 2005, the U.S. government has dedicated over \$70 million for labor related technical assistance programs in the CAFTA-DR countries.¹⁷¹ These programs have worked to provide training and equipment for the Ministries of Labor, as well as information and education to workers and employers regarding their rights and obligations under the labor laws. This submission may be used to help target future assistance and, wherever possible, to develop programs to address the problems and issues raised by the cases highlighted.

The U.S. Department of Labor has just launched a new program to provide legal services and training to workers, as well as information about their legal rights in Izabal, the area highlighted by the SITRABI case. In addition, a new U.S. Department of Labor program in El Salvador (which could provide important lessons for Guatemala) will work with the Salvadoran Social Security Institute and the Ministry of Labor to develop better programs to ensure that employers who collect the social security payments from workers transfer those payments to the Salvadoran Social Security Institute and do not embezzle them, leaving workers without insurance coverage.

¹⁶⁶ *Ayuda de memoria, reactivación de la Comisión de Trabajo Multi Institucional para las Relaciones Laborales en Guatemala, Acuerdo Gubernativo No. 430-2003*, November 6, 2008.

¹⁶⁷ Guillermo Gándara, Director of International Affairs, Planning and Cooperation, Ministry of Labor, email communication to USDOL, November 28, 2008.

¹⁶⁸ Ley de Fomento y Desarrollo de La Actividad Exportadora y de Maquila, Congreso de la República de Guatemala, Decreto 29-89; Ley de Zonas Francas, Congreso de la República de Guatemala, Decreto Numero 65-89.

¹⁶⁹ Telma Doris de León, Director of Department of Industrial Policy, Trade and Commercial Services, Ministry of Economy, interview with USDOL officials, October 31, 2008.

¹⁷⁰ In 2001, workers tried to form a union at two apparel manufacturing plants. Anti-union violence, encouraged by management, broke out in July 2001 after workers filed a petition at the Ministry of Labor to form a union. International attention focused on these cases, and the government intervened. The Ministry of Economy threatened to revoke import and export tax privileges to compel resolution of the labor dispute. On July 9, 2003, collective bargaining agreements in each plant, with each union, were signed. On July 10, the Ministry of Economy withdrew its threat to revoke the tax privileges. U.S. Department of State, Unclassified Cable, Guatemala 01813, July 15, 2003.

¹⁷¹ U.S. Department of Labor, News Release Number: 08-1749-NAT, (November 11, 2008).

The U.S. government is committed to finding collaborative solutions and to providing technical assistance in areas where funds and programs can help improve compliance with labor laws. However, the report again reiterates that a comprehensive response requires a sustained and continuous commitment from the Guatemalan government to use existing legal mechanisms to enforce its labor laws.

V. Recommendations

The Guatemalan Government has demonstrated its interest in resolving the issues outlined in this report and has taken some critical initial steps. In view of the positive engagement between the OTLA and the Government of Guatemala generated by this review, the OTLA suggests several additional concrete actions which the Guatemalan government could take to support its progress. The OTLA will continue to work with the Government of Guatemala to evaluate progress in addressing the issues raised in the report. Such actions could include the following steps:

A. Suggested Steps for the Effective Enforcement of Labor Laws

- Enforce outstanding arrest warrants in the murders of union members and conduct criminal proceedings.
- Advance the investigation of pending cases of violence against trade unionists and issue/enforce arrest warrants as warranted.
- Strengthen the Special Prosecutor's Unit for Crimes against Trade Unionists (e.g., hiring additional staff, and establishing an electronic case management system that would allow searches for crimes related to the same union in previous years).
- Explore options to ensure the Ministry of Labor's ability to conduct inspections of work sites.
- Enforce court orders for the reinstatement of unlawfully dismissed workers, including prosecution of employers who continue to ignore these orders.
- Develop and issue guidelines to clarify the criteria for the applicability of Article 23 (regarding changes in business ownership), to ensure that its intent cannot be circumvented by new owners.
- Enhanced inter-agency collaboration in the effective promotion and protection of labor rights, and processing of existing labor disputes, Such collaboration could include:
 - Development of coordination mechanisms between the Special Prosecutor's Unit and other relevant agencies in the cases of violence against trade unionists;
 - Review of previous experience linking export licenses or tax privileges to compliance with court orders, and exploration of other possible mechanisms to ensure compliance; and
 - Development and implementation of proposals to ensure entry by Ministry of Labor inspectors to work sites.

- Develop and publicly disseminate guidelines to clarify the right to reinstatement for an illegally fired worker who has accepted severance payment, and ensure that workers who have been illegally fired know this right.
- Promote an information-sharing process with the court system (and improve public dissemination of judicial actions) to ensure that the Ministry of Labor can access court decisions in order to more adequately review inspectors' performance and efficiency.
- Ensure effective enforcement of provisions requiring payments to the IGSS, and ensure that workers whose IGSS payments were deducted from their salaries have access to IGSS services as required by law.

B. Cooperative Labor Consultations Under Article 16.6.1 of the CAFTA-DR

According to the OTLA's Procedural Guidelines, its public report shall include any recommendations made to the Secretary of Labor as to whether the United States should request consultations with another Party pursuant to Article 16.6.1 of the CAFTA-DR, as relevant and appropriate.¹⁷²

In the present case, the OTLA does not recommend requesting consultations pursuant to Article 16.6.1 of the CAFTA-DR. The OTLA will continue its efforts to work with the contact point in Guatemala in order to evaluate progress in the in addressing the issues raised in this report and on the implementation of any further steps that may be taken in response to the recommendations contained in this report. Furthermore, the OTLA—in consultation with the Office of the United States Trade Representative and the U.S. Department of State—will reassess the situation within the next six months following publication of this report and determine whether further action is warranted, including Cooperative Labor Consultations pursuant to Article 16.6.1 of the CAFTA-DR.

¹⁷² 71 Fed. Reg. 76691 (Dec. 21, 2006).