

GUATEMALA – ISSUES RELATING TO THE OBLIGATIONS UNDER ARTICLE 16.2.1(A) OF THE CAFTA-DR

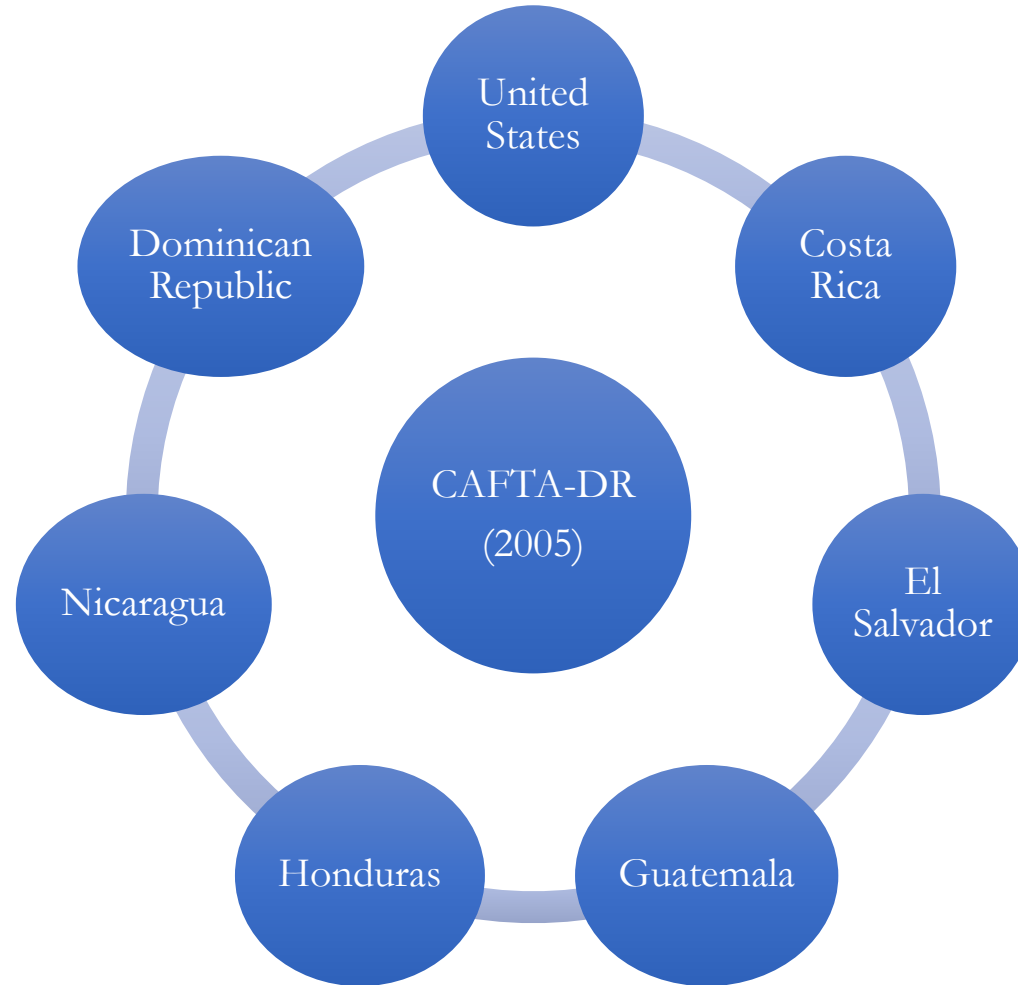
PANEL REPORT



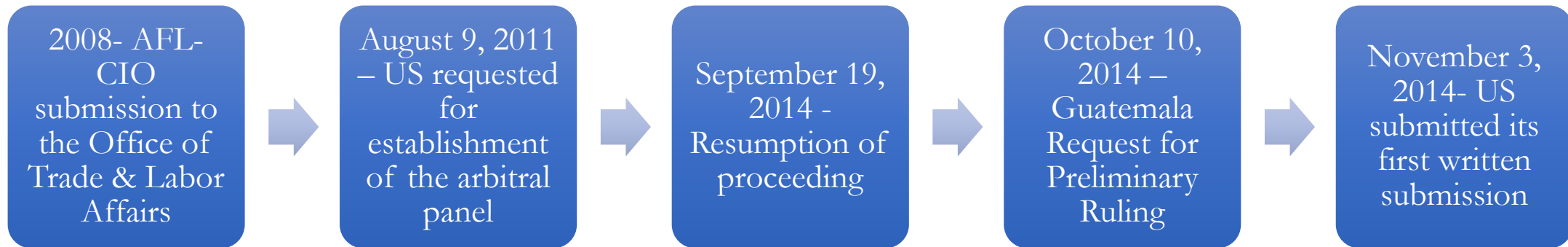
Sparsha Janardhan

Research Fellow, Centre for Trade and Investment Law

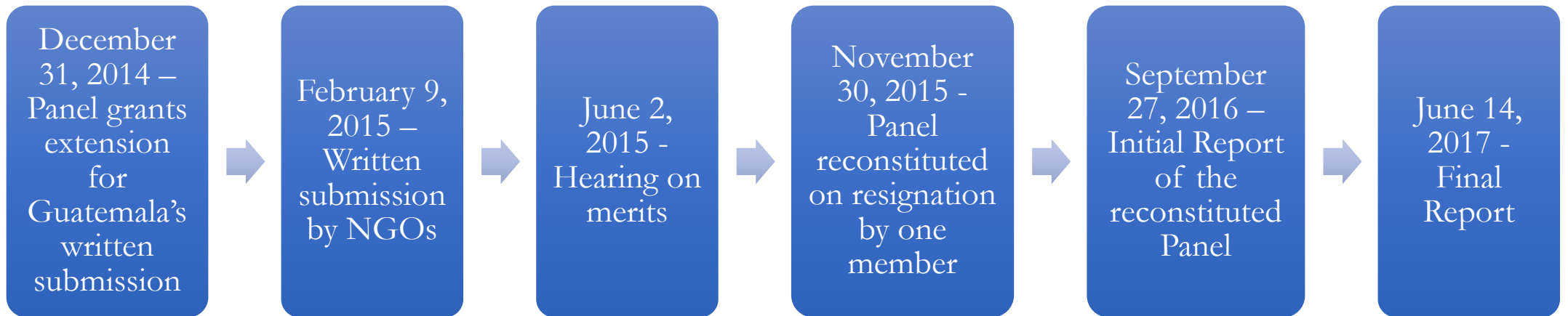
Background



Procedural History (1/2)



Procedural History (2/2)



Relevant provision and claims

- Article 16.2.1 (a) of the CAFTA-DR:

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

- US allegation (written and oral submissions):
 - By failing to secure compliance with court orders regarding workers wrongfully dismissed for union activities
 - Failing to properly conduct investigations and imposing penalties in case of violations
 - Failing to register unions

Jurisdiction

Parties Arguments

- Article 20.6.1 of CAFTA-DR:

Panel request shall set out the reasons for the request, including identification of the measure or other matter at issue and an indication of the legal basis for the complaint

- Guatemala: Panel request was drafted in extremely broad and vague terms → suffered prejudice
- US: contrasted between the requirements under Art 20.6.1 and Article 6.2 DSU → argued that Guatemala had an obligation to ‘seasonably and promptly’ bring it to the attention of the US (*US-FSC AB Report, para 166 – good faith*)

Jurisdiction

Panel's Analysis (1/2)

- Considered AB and Panel Report, where appropriate [*EC-Civil Aircraft AB Report—identification of specific measure is central to determining matter covered*]
- Panel examined the text of the request [letter] → distinct concept of ‘measure or other matter at issue’ (refers to conduct of a Party) and ‘legal basis for the complaint’ (CAFTA-DR obligation)



- El Salvador- Tariff Treatment for Goods Originating from Costa Rica CAFTA-DR/ARB/2014/CR-ES/18, para 4.45 – “*measure is identified with sufficient precision .. clarity of the scope of its rationae materiae jurisdiction*”

Jurisdiction

Panel's Analysis (2/2)

- Necessary to analyze the panel request as a whole + Guatemala's conduct of not seeking clarification from 2011 till 2014 is puzzling (attendant circumstances) —→ Noted that the US has identified three significant failures by Guatemala (no particular level of detail required)
- Third claim —→ 'alleged failure of Guatemala to register unions' – outside terms of reference – usage of word 'including' is not sufficient (*India-Patents, AB Report, para 90*)

Relationship between sub-paragraphs (a) and (b) of Article 16.2.1

- Para (b): Discretion to the Party – where a course of action or inaction reflects a reasonable exercise of such discretion or results from a bona fide decision regarding the allocation of resources
- Relevant to the allocation of burden of proof – limitation or exception to the obligation?
- Panel: read (b) as articulating a possible justification – though it does not use such a language – Burden of proof on Responding Party (Guatemala)

Temporal Issues

- Number of events occurred after request for establishment of arbitral panel
- US: evidence that may demonstrate the continuation of breaching conduct
- Panel: Relevant date → date of US request for panel but evidence may demonstrate continuing breach [*EC-Select Custom Matters – temporal limitation for terms of reference v. evidence*]

Interpretative Issues (1/2)

- See Art. 16.2.1(a) - in light of object and purpose of the Agreement
- **“Labor Laws”**
 - ✓ Guatemala: pertains to conduct of Party’s executive branch (Labor law- defined in Article 16.8, CAFTA-DR)
 - ✓ US: ‘enforceable by action of the executive body’ only determines whether a particular measure qualifies as a ‘labor law’
 - ✓ Panel: Ordinary meaning + context + object and purpose = not limited to conduct of executive body
- **“Not fail to effectively enforce”**
 - ✓ US: compel compliance with the law in a way that produces results
 - ✓ Guatemala: a Party may not neglect to compel observance of or compliance with its labor laws in a manner that accomplishes or executes
 - ✓ Panel: Negative obligation + word ‘effectively’ before ‘enforce’ connotes an element of discretion.
 - ✓ Effective enforcement → employer compliance with labor laws → enforcement authority detect and remedy non-compliance → individual instances do not ipso facto prove + sufficiently certain to achieve compliance + reasonably expect that employers will generally comply

Interpretative Issues (2/2)

- **“Sustained or recurring course of action or inaction”**
 - ✓ Parties referred to dictionary meaning and the co-related the terms
 - ✓ Panel: A repeated or prolonged behavior which displays sufficient similarity + line of connected behavior must be discernible
- **“In a manner affecting trade”**
 - ✓ US: WTO jurisprudence in Article III:4 “affecting internal sale....” and affecting trade in Article I:1 GATS → adversely affect conditions of competition + econometric analysis is not required by the text (impossible)
 - ✓ Guatemala: relationship of cause and effect + evidence (other lines of enquiry establishing change in prices of trade flows in particular goods or services)
 - ✓ Panel:
 - Objective of the Agreement: “to promote conditions of fair competition in the free trade area”
 - Labor law imposes admin cost on employers (record keeping, management resources, labor costs)- failure may provide potential competitive advantage
 - Examined WTO jurisprudence – but ‘affecting’ in WTO serves a different function (*US-FSC – serves to define the scope of application of Article III:4*) + here, it forms an essential part of the obligation itself/ how a particular conduct operates
 - Does not depend on weight or significance of the employer
 - Question of fact + does not necessarily result from every failure + basis of likely consequences of a failure + no requirement of proof of cost with particular degree of precision
 - Held → if it confers some competitive advantage on an employer engaged in trade

Evidentiary Issues

Probative value of redacted evidence

- Guatemala: not made in good faith + violates due process rights
- Preliminary Ruling: Guatemala had demonstrated that locating the evidence was burdensome but not impossible
- Reliability → availability of corroboration, verifiability in independent sources, proof of spontaneity etc.

Admissibility and probative value of ICSID Secretary General's Statement

- To conduct an independent review of un-redacted versions of the material
- Panel: has some probative value but concern with the US on this unilateral decision + could have asked the Panel to do this (in camera review) or appoint a third party (Art 20.12)

Admissibility and relevance of Certain Statistics and Reports

- US Rebuttals: Overall functioning of the Guatemalan labor law institutions
- Panel: Reports admissible and probative for the purpose for which they were submitted

Claim of failure to ensure compliance with court orders (1/2)

- Not securing compliance with court orders —————> Related to right of association and right to organize and bargain collectively
- Art 31.3(c) VCLT: any relevant rules of international law – all parties are members of the ILO (Declaration of Fundamental Principles and Rights at Work)
- GLC (Articles 10, 62(c), 209, 223, 379 and 380) is *labor law* under CAFTA-DR (Art 16.8)
- 74 workers at 8 sites —————> evidence supports that conclusion that the courts failed to effectively enforce the law + employers failed to reinstate and pay fines
- *Sustained or recurring course of action or inaction*: Provisional conclusion: enforcement failures proven constitute....
- Whether individual enforcement failures constitute a ‘course’ of action or inaction – line of behavior connected? – question of fact – against the applicable law – made observations both way and decided that they don’t have to resolve this question
- *In a manner affecting trade between the Parties*
 - US: benefit from inappropriately reduced labor costs + sectoral spillover effects
 - Guatemala: failed to establish trade effects + no evidence for modifications of conditions of competition + completely theoretical

Claim of failure to ensure compliance with court orders (2/2)

Shipping companies (ITM, NEPORSÁ, ODIVESA and RTM)

- US: affects trade by lowering costs for shipping companies and their clients + wages and fines + competitive advantage is a necessary consequence of failure to enforce
- Panel: no evidence of exporters obtaining a competitive advantage

Garment Manufacturers (Avandia and Fribo, Alianza)

- US: failure deprived workers of the ability to organize unions + relieved employers of labor costs
- Panel: lack of evidence that labor costs conferred competitive advantage
- Avandia: failure to enforce the law necessarily conferred some competitive advantage (dismissal of the entire union committee – discouraging other workers)
- Fribo and Alianza: evidence is insufficient (ceased operation in Aug 2009, some workers were reinstated)

Rubber exporter (Solesa)

- Panel: No evidence to infer Solesa is engaged in trade between CAFTA-DR parties – US contends spillover effects – no record of conferring competitive advantage

Claim of failure to conduct proper inspections and failure to impose penalties

- US allegations: (a) failing to conduct inspections in response to bona fide complaints; (b) not conducting inspections properly and (c) failing to impose penalty after finding violation
- US: intergovernmental reports suggest failure by Guatemala (UN and ILO)
- *Temporal issue*: most of US allegations concern events that did not occur until after August 9, 2011 → Panel did not consider them
 - Coffee farms: min wage, mistreatment, health and safety conditions - allegations regarding conduct of inspections remain uncorroborated – US has not established prima facie case
 - Apparel manufacturer (Koa Modas): inspector met only with management and employees chosen by them – not established prima facie case
 - Apparel manufacturer (Fribo): unpaid leave for union activities + no further action of labor inspectors after finding violation + health and safety violations— US has established that it failed to follow up on violations (since report was made but no action was taken)

Conclusion

- Provisions qualifying the obligation to not fail – ‘cumulative in nature’

- Finding:

The United States has proven that at eight worksites and with respect to 74 workers Guatemala failed to effectively enforce its labor laws by failing to secure compliance with court orders, but not that these instances constitute a course of inaction that was in a manner affecting trade (para 594, Panel Report)

Thank you