

The International Law Gaze: The Protection of Labour Rights in Free Trade Agreements: Mission Impossible?

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The inclusion of the protection of labour rights in free trade agreements (FTA) and the use of inter-State dispute settlement have been regarded as a paramount expression of the regard of the international trade regime for workers' rights. The inclusion also responds to a concern: low enforcement of labour legislation in some countries means lower costs for their exporters, which makes them more competitive in international markets. These are the reasons behind the inclusion of provisions aimed at improving such enforcement in FTAs. New Zealand is or will be a party to some of them, such as the New Zealand – Korea Free Trade Agreement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). This is why the panel report adjudicating the first international dispute in this realm, between the United States and Guatemala, under the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR) is of interest to us. (Final Report of the Panel, “In the Matter of Guatemala – Issues Related to the Obligation Under Article 16.2.1(a) of the Dominican Republic – Central America – United States Free Trade Agreement”, 14 June 2017. (*U.S v Guatemala*).

Is the inclusion of trade & labour provisions (T&LP) a positive development for workers? Yes. Is it enough for them? *U.S v Guatemala* illustrates that it is not. The text of the CAFTA-DR T&LP and similar provisions in other FTAs might make it difficult to find a violation whose remedy is a better enforcement of the legislation by the exporting country. Is this surprising? Certainly not. There is a political and economic power imbalance between exporters and labour unions in many parts of the world that favours the former in trade negotiations. The text of T&LPs reflect this asymmetry. There is also the issue of sovereignty: how much States enforce their legislation is a matter for them to decide. T&LPs limit this freedom of action, but the limitation is not significant as *U.S V Guatemala* illustrates. Guatemala prevailed in the dispute at the end: no violation of CAFTA-DR was proven. (at [594]).

The Provision In Question

United States claimed that Guatemala had violated Article 16.2.1(a) of the Agreement, which sets forth: “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.” (It is worth noting that CPTTP Article 19.5.1 includes this text too).

Labor laws are defined in CAFTA-DR Article 16.8 as: “[A] Party’s statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights: a. the right of association; b. the right to organize and bargain collectively; c. a prohibition on the use of any form of forced or compulsory labor; d. a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and e. acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. ... Statutes and regulations means: for Costa Rica, the Dominican Republic, El Salvador, Guatemala, ... laws of the legislative body or regulations promulgated pursuant to an act of its legislative body that are enforceable by action of the executive body ...” (at [278]).

The United States claimed that Guatemala was in violation of this precept by “ [R]epeatedly failing to compel compliance with court orders to reinstate and compensate workers unlawfully dismissed in the context of union organizing activities and conciliation proceedings, and to impose sanctions for such unlawful dismissals; and ... [R]epeatedly failing to conduct proper inspections in response to bona fide complaints of employers’ violations of laws related to acceptable conditions of work or not conducting inspections properly so as to determine whether an employer has violated Guatemalan labor laws or failing to impose penalties upon discovering violations.” (at [219]).

The dispute went through the negotiations stage without success and the last phase was the establishment of an arbitral panel to settle the dispute, pursuant to CAFTA-DR Chapter 20. Before embarking on an analysis of the panel’s decision, a few words on some institutional dimensions of the adjudication of CAFTA-DR T&L controversies.

Some Challenges of CAFTA-DR Trade & Labour Disputes

Panels’ Weak Powers to Control the Process

The parties are virtually the only masters of the evidence. Specifically, the rules of operation of panels under CAFTA-DR do not provide for panels’ powers to seek information or technical advice, without the parties’ consent. (at [228]). Only documents can be submitted as evidence and there is no provision in the *Rules of Procedure for Chapter Twenty of the Dominican Republic – Central America – United States Free Trade Agreement* (the Rules) for examination of witness at hearings (at [229]).

The *U.S v Guatemala* dispute illustrates a feature that will likely be present in future T&L controversies. Workers making declarations about ignored labor complaints cooperate with the complainant State only on the basis of anonymity to avoid any retaliation. As a result of the United States' decision in this area, the anonymity in this dispute covered not only the public but also Guatemala and even the Panel itself. (at [231] & [254]).

The Panel then expanded on additional difficulties it faced to adjudicate the controversy: “[T]he panel feels compelled to note the difficulty of the task in view of the parameters set by the Rules. ... [They] contemplate that in the ordinary case, each written submission and accompanying documents will be submitted within a relatively brief period (in each case, less than a month) following submission of the previous written submission). These limitations have made it extremely challenging for the Panel to carry out its mandate where the evidence proffered in support of the complaining Party’s claims consists primarily of many pages of anonymous declarations and other redacted documents.” (at [232]).

Responding to Guatemala’s due process concern on redacted evidence, the Panel expressed that “the probative value of anonymous statements will depend upon the presence of sufficient indicia of reliability, such as the availability of corroboration, verifiability in reliable independent sources, contemporaneity ... It will also often depends upon whether the evidence contains particulars as to time, place, identity of individuals or the contents of statements that suggest clear recollection and afford an opportunity to investigate evidence in response ...” (at [246]).

The issue of anonymity is critical in this type of disputes. Without it, workers might partially or totally limit the evidence they can provide to complainant States. However, the United States went far in the scope of anonymity, in the Panel’s view. For this reason, and to achieve the protection of anonymity of workers while at the same time facilitating the operation of potential future panels, it made some suggestions in this domain. It was important for the adjudication of T&L disputes to allow panels to review the unredacted documents submitted by complainant States to compare them to the redacted documents. The Panel suggested either: (i) *in camera* review of the documentation to verify name correspondences with observers from parties participating in the review, coupled with prohibition of photocopying and note-taking (at [261]); or (ii) the designation of a third party by the disputants to confirm the correspondences between documents and declarants. (at [262]).

The general impression that *U.S v Guatemala* leaves is that CAFTA-DR Panels not only deal with a restrictive T&LP, as will be seen below, but also that there are institutional limitations in place that seem to make the performance of their adjudicative function particularly difficult.

Not Adverse Inference Against Guatemala

As was mentioned the United States redacted the documents to prevent the identification of the workers whose rights had been violated and not enforced by Guatemala's labor courts. Sometimes Guatemala did not produce any evidence regarding the said workers to refute the United States' claims. (at [316]). The Panel stated that given that the United States had not indicated that this evidence was not available, the Panel could not draw any adverse inference against Guatemala: it was entitled by Rule 65 of the Rules to indicate that the United States had not proven its case. (at [316]). No doubt, this finding might create incentives for complainant States not to embrace the large scope of workers' anonymity demanded by the United States in *U.S. v Guatemala* since it negatively affects complainants' chances of making a *prima facie* case of violation.

The Role of Non-Governmental Organizations (NGOs)

There is a role for NGOs in T&L controversies under CAFTA-DR. The role is, though, limited by Rule 62 of the Rules and Panels must consider only those aspects of the NGOs' submissions that address topics of fact and law that are explicitly relevant to the legal or factual issues in question. In *U.S. v Guatemala* an industry association and several trade union federations intervened but beyond the scope allowed by the Rule. They offered a broader political, social and economic perspective of the dispute. The Panel found this aspect of the submissions informative, but they were not useful for the purpose of the adjudication of the controversy. (at [108] & [234]).

There was, though, an important dimension that trade unions mentioned, which was endorsed by the Panel: the interpretation of the applicable CAFTA-DR provisions in light of principles of the International Labour Organization (ILO), and on the basis of Article 31 of the Vienna Convention on the Law of Treaties. (at [108]). In effect, at least on one occasion the Panel made use of ILO provisions for the said purpose, given that both parties were members of the Organization. (at [427]).

There is then room for the use of ILO norms in the interpretation of T&LP. Rule 62 and others of similar nature in other FTAs seem not to prevent NGOs from suggesting ways in which such use should be carried out.

The Panel's Legal Analysis

The Panel started its analysis by asking the question: "Which laws are encompassed by the obligation to not fail to effectively enforce 'labor laws'?" The Panel answered that they were laws that were capable of being enforced by action of the executive body and met the other requirements of CAFTA-DR Article 16.8. (at [116]). The Panel proceeded with a second question: "does the obligation pertain to laws susceptible to enforcement by judicial action, and not just to laws that are enforced by executive action?" (at [107]).

Guatemala argued that the obligation to "not fail to effectively enforce its labor laws" referred only to executive actions and did not allude to Guatemala's Public Ministry and labor courts. They were not covered by the said obligation. (at [110]). The Panel disagreed. Article 16.2.1(a) does not impose any limitation on the actions or omissions that can be deemed contrary to the said obligation. (at [116]). The Panel reinforced this conclusion on the object and purpose of the treaty: to protect, enhance, and enforce basic workers' rights, among others. (at [120]).

To rule on the United States's claims, the Panel identified three relevant requirements based on the text of CAFTA-DR Article 16.2.1(a).

Requirement No 1. Not Fail to Effectively Enforce

The United States argued that the obligation under Article 16.2.1(a) entitled CAFTA-DR Parties to attain full compliance with labor laws. (at [128]). The Panel found this approach to impose an unreasonable burden and determined that the use of the word "effectively" meant that enforcement incorporated a certain degree of discretion and that there were different levels of enforcement. (at [130]). The panel found that the expression "not fail to effectively enforce" included the following elements: (i) effective enforcement must produce results: employers' compliance with labor laws; (ii) when enforcement authorities find an employer who is not complying they will take action; (iii) there will be effective enforcement when employers expect they will be compelled by enforcement entities to comply with labor laws. Moreover, the Panel made a qualification: isolated events of non-compliance do not mean that enforcement is ineffective. (at [134] – [137]).

Requirement No 2: Sustained or Recurring Course of Action or Inaction

The Panel inferred several elements from this text, and gave particular emphasis to the word "course". This requirement sets the bar for complainant Parties very high. Indeed, the Panel was clear in

indicating that proving a sustained or recurring action or inaction was not enough for complainant States. There had to be sustained or recurring *course* of action. (at [432]). The result: to find a violation is harder for them. In effect, the words “sustained or recurring course of action or inaction” meant that enforcement institutions must carry out “(i) a repeated behaviour which displays sufficient similarity, or (ii) prolonged behaviour in which there is a sufficient consistency in sustained acts or omissions as to constitute a line of connected behaviour” (at [148]). The Panel expressed that without this line of connected behaviour, there would be only a sustained and recurring actions or omissions. (at [148]). This was not enough to prove a violation of Article 16.2.1(a). Nonetheless, the Panel rejected Guatemala’s contention that a course of action implied intentionality. (at [151]).

In terms of how to prove a “course of action or inaction”, the Panel indicated what complaining parties have to and do not have to do. Complainant parties needed to prove that the failures to enforce were sufficient similar and occurred with sufficient proximity in place and time to illustrate that there was a connected conduct and not isolated actions or omissions. (at [433]). Additional elements of the connection to be proven would be: (i) bias against the enforcement related to certain industries or certain workers’ rights (at [437]); (ii) evidence of certain institutional directions that creates lack of enforcement as an unintended consequence; or customs or practices that often lead to this result (at [437]); and (iii) that the past events of actions or inactions prompting lack of enforcement allow observers to have a reasonable expectation “that such failures are likely to recur in similar situations in the future with greater frequency than ... isolated failures would.” (at [439]). Finally, the Panel pointed out that complaining parties did not have to prove that the failure to enforce was systemic or pervasive (at [435]).

Requirement No 3. “In A Manner Affecting Trade Between the Parties”

This requirement puts the bar for complainant Parties even higher. The Panel subdivided this aspect in two dimensions:

“In a Manner Affecting Trade”

Relying on the law of the World Trade Organization (WTO), the United States argued that failure to enforce labor laws that impacted the conditions of competition between domestic and imported products affected trade between the parties. There was no need to prove actual trade effect. (at [154] & [161]). It was then a very flexible view of this requirement. Guatemala, on the contrary, posited that the complainant State had to prove the trade effect and that it was caused by the course of action or inaction of the respondent State. (at [162]). Guatemala’s put forward a narrow and strict interpretation.

The Panel rejected both approaches (at [168] – [180] & [182] – [189]). Instead, it determined that the requirement was met if the failure to effectively enforce labor laws “confers some competitive advantage on an employer or employers engaged in trade between the Parties”. (at [190]). The Panel elaborated on how to determine when a competitive advantage existed: (i) not every failure to effectively enforce labor laws creates the said advantage. Although the failure might reduce costs, such effect could be small and temporary to achieve the level of a competitive advantage. (at [193]); (ii) employers’ records were not necessary to prove the advantage, which could be inferred on the basis of the likely consequences of the failure to enforce (at [194]); (iii) Panels did not have to quantify the exact extent of the competitive advantage; and (iv) no proof of intentionality by the respondent State was required. (at [197]). The Panel then concluded that the inquiry in this regard “focused principally on (1) whether the enterprise or enterprises in question export to CAFTA-DR Parties in competitive markets or compete with imports from CAFTA-DR Parties; (2) identifying the effects of a failure to enforce; and (3) whether these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises.” (at [196]).

“Between the Parties”

Guatemala suggested a very high threshold for the understanding of the “between the parties” words: the effect of the failure to enforce had to take place throughout all of CAFTA-DR Parties (at [198]). The Panel rejected this approach and expressed that the said words “refer to trade severally and individually between the CAFTA-DR Parties.” (at [203]).

The Panel determined that the foregoing requirements were cumulative, as the text of Article 16.2.1(a) clearly indicates. (at [502]). But there is more, respondent States still have a escape valve even if there is a lack of enforcement of labor laws that meets the requirements of the said provision: Article 16.2.1(b). It sets forth: “Each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.”

Enforcement Discretion: Limitation of the obligation to Enforce or Justification for its Violation?

The nature of Article 16.2.1(b) was the subject of debate in *U.S v Guatemala* with significant impact on the allocation of the burden of proof.

Guatemala held that in the event of a claim of violation of Article 16.2.1(a) the complainant Party had to prove under Article 16.2.1(b) that the exercise of discretion by the respondent Party had been unreasonable or that a decision on the allocation of resources had been improper. (at [205]). Article 16.2.1(b) was a limitation to the obligation in Article 16.2.1(a), and the complainant State had the burden of proof regarding both provisions. On the contrary, United States was of the view that the former precept was a defence in the event of a *prima facie* case of violation of the latter. It was, consequently, for the respondent State to prove the defence (at [206]).

The Panel sided with the U.S: Article 16.2.1(b) is a defence. Two reasons were offered by the Panel in support of this conclusion. First, the provision becomes operative only when there is a violation of Article 16.2.1(a). And second, the respondent Party has the evidence to prove the defence, based on its decision-making process. A foreign government does not participate in this process. (at [210] – [211]).

As can be seen Article 61.2.1(a) sets a high bar for complainant States and CAFTA-DR is even more generous with respondent States: they additionally have a powerful defence to justify a violation of the former provision.

The Panel's Decision on the Claims

Guatemala's Alleged Failure to Ensure Compliance with Courts' Orders

To develop this claim, the United States identified events in which eight Guatemalan employers had been found by labor courts to violate the right of association of workers who had attempted to form a union. The workers were dismissed and the court ordered the employers to reinstate the former. No compliance took place and the court did not increase the penalties, as required by Guatemala's labor law. (at [287]).

After evaluating the redacted evidence regarding each worker, the Panel concluded that Guatemala had failed to effectively enforce its labor laws regarding 74 workers related to the eight companies (at [428]).

Second Requirement: Sustained or Recurring Course of Action or Inaction

The United States claimed that the failures of Guatemala's courts to enforce orders to reinstate and compensate the dismissed workers met the threshold of a sustained or recurring course of action. Guatemala argued, on the contrary, the failure was related to certain companies but not others. (at [429]).

Although the Panel found that the proven failures to enforce had some elements of a course of action or inaction (at [442]), the Panel also stated that the number of failures was small given that they took place during a five-year period (at [443]). At the end, and for reasons of judicial economy, the Panel decided not to make a decision on the matter at this stage, but assumed that the failures constituted a sustained or recurring course of actions or inaction. (at [444]).

Third Requirement: In a Manner Affecting Trade between the Parties

The Panel proceeded to assess whether the failures to enforce labor laws that had assumed to be a course of action or inaction were also affecting trade between the Parties. The United States argued that the failure to enforce had led to the employers to evade the following costs related to the dismissed workers: wages and benefits, penalties, and the higher costs associated with the normal operation of a union in the form of higher wages. (at [446]).

The United States made claims regarding some employers in two types of industry: shipping companies, garment manufacturers, and regarding a single rubber company.

As to the shipping companies, the Panel stated that the United States had to prove not only the effect on them of the failure to enforce, but on the companies' clients exporting to CAFTA-DR Parties. To prove the latter effect, it was necessary to demonstrate that the shipping companies had transferred to their exporter clients the lower costs in the form of lower prices for the shipping services. These lower prices had to be of such magnitude that had created a competitive advantage for such exporters. (at [454]). The Panel decided that such advantage had not been proven by the United States. (at [455]).

As to the garment manufacturers, the Panel had concluded that court orders against three companies, Avandia, Fribo and Alianza, in relation to some workers had not being enforced. The Panel found

evidence that employers were exporters to the United States. (at [468]). Then the Panel proceeded to assess the effect of the lack of enforcement on these companies and whether they had got a competitive advantage as a result.

The analysis is critical for the proof of “trade effect” in future litigation. The Panel identified, in principle, the costs the employer saved as a result of the lack of enforcement of labor laws. The Panel mentioned the avoidance of costs related to paying back pay owed to those workers that had been wrongly dismissed and had not been reinstated, and to the fines imposed for such dismissal (at [471]). Then the Panel then looked for (i) evidence of the total amount owed to the workers; and (ii) of the significance of this amount in the overall costs of these employers. The United States had not submitted any and therefore the Panel concluded that failure to enforce these court orders had not conferred a competitive advantage to the firms. (at [471]).

The Panel turned to whether each firm had avoided unionization costs and required evidence regarding two facts: (i) the impact of the dismissal of the specific workers on the ability of other workers to unionize; and (ii) whether the relief in labor costs caused by the lack of union had sufficiently affected conditions of competition. (at [474]). No evidence was provided to the Panel by the United States. (at [476]).

Given the importance that wrongful dismissal of employees seeking unionization has on the overall unionization process, the Panel, rightly, expanded on the topic. It recognized that employers’ intimidation and impunity can prevent employees from exercising their rights to organize and bargain. The effect is possibly to lower the risk of organization of unions, and the creation of a competitive advantage (at [483]). The possibility may or may not exist, though. “Factual circumstances such as the number of workers dismissed, the timing of their dismissal, whether union leaders were dismissed, and the length of time that failure to enforce legal remedies persists may contribute to the likelihood of the failure to enforce necessarily leading to the hypothesized consequences. ...” (at [484]).

The Panel found evidence of some competitive advantage regarding Avandia since it had wrongfully dismissed, and had not reinstated, nine workers in 2006, who constituted the entire union executive committee. The dismissal removed the risk the employer faced of unionization or collective bargain. (at [487]). The Panel did not arrive at the same conclusion regarding Fribo, since the fifteen dismissed workers were not union leaders, some of them had been reinstated, and the company had ceased

operations in 2009. (at [488]). A similar conclusion was reached regarding Alianza and its dismissal of a single worker. (at [489]).

The Panel then turned to the failure to enforce labor laws in relation to Solesa, a major exporter of rubber. The United States' claims was unsuccessful since there was no evidence that Solesa exported to CAFTA-DR Parties. (at [493]).

The final conclusion regarding this first claim was that the United States had proven that Guatemala had not effectively enforce its labor laws and had created some competitive advantage regarding only one employer, Avandia. The Panel stated that this failure did not constitute a recurring course of action, and therefore there was no violation of Article 16.2.1(a) in relation to court-ordered reinstatement of workers dismissed for taking part in activities related to unionization and collective bargaining. (at [505] – [507]).

Obiter Dictums

The Panel saw itself as setting a path for others in the future and included some obiter dictums worth highlighting, which mitigate to a limited extent the rather strict criteria imposed by Article 16.2.1(a). The Panel expanded on how to prove a violation of this provision in a set of *obiter dictums*:

Dictum No 1: Every failure to enforce affects trade and the failures as a whole constitute a sustained or recurring course of action or inaction. (at [502]. This was the strategy followed by the United States. It is not the only one, said the Panel. There are two others less strict.

Dictum No 2: Some failures may affect trade and some failures might not. This situation is not fatal for the claim if it is proven that the failures to enforce that do affect trade constitute a sustained or recurring course of action or inaction. (at [502 footnote 369]).

Dictum No 3: No individual failure affects trade, but they constitute a sustained or recurring course of action or inaction that taken together affects trade. In the Panel's words: "if the failures making up a course of action or inaction occurred with sufficient frequency and notoriety among employers, they might incentivize employers to violate the law with an expectation of impunity, and the cumulative impact of such violations might be to reduce employers' costs so as to gain a competitive advantage and affect trade. (at [502]).

The dictums are important even if the present author is of the view that litigation on CAFTA-DR T&LP or similar provisions is not likely to happen.

Second Claim: Failure to Conduct proper Inspections and Failure to Impose Penalties

United States argued that seventy coffee farms had submitted more than 80 complaints with Guatemala's Ministry of Labor since 2006 concerning mistreatment, minimum wage, and health and safety conditions, all of them issues regulated by labor laws. The Ministry's response had been, among others, delays in inspections, no meeting the workers independently, and no inspection of work areas. (at [520]). Even though, inspectors found that minimum wages were not paid by some coffee farms, no action was carried by the Ministry to ensure compliance with applicable legislation. (at [521]). United States also submitted evidence regarding a complaint by an umbrella entity of farm worker unions called MSICG, about lack of minimum wages at 62 work places and requesting inspections. (at [523]).

The United States relied on anonymous declarations that were vague regarding dates, the type of actions or inaction of the given inspector, and whether or not the declarant witnessed the inspection. (at [538] – [541]). For these reasons, the Panel rejected the claim in relation to the coffee farms. (at [555]).

The Panel did find that the Ministry of Labor had failed to follow up on actions carried out by Fribo which contravened labor laws in 2007. (at [574]). However, the Panel concluded that such failure was merely a "discrete instance of failure to effectively enforce the law." (at [591]). It was not a sustained course of action or inaction. (at [591]).

The Panel concluded that no violation of Article 16.2.1(a) of the CAFTA-DR had been proven. (at [594]). There was then no need to explore the content of the defence of Article 16.2.1(b).

In A Nutshell

The protection of labour rights in FTAs with provisions similar to CAFTA-DR Article 16.2.1(a), through inter-State litigation, is nearly a "mission impossible". The requirements of "sustained or recurring

course of action or inaction” and “the trade effect” combined make a finding that there is a violation of this and similar precepts very unlikely. Add to this that the respondent State still enjoys a powerful defence based on discretion to allocate resources, and hopes for success at the end of litigation virtually disappear.

The enforcement of labor rights is just trapped with requirements in FTAs with similar provisions and recourse to third party dispute settlement lacks teeth. Not to mention, that the structure of panels, at least in CAFTA-DR, is designed to limit their capacity to control their own process.

The Panel in *US v Guatemala* tried its best to overcome some of the limitations by making several *obiter dictums* but it could not go very far. And, in any case, one could not expect much in terms of activism from an *ad hoc* panel dealing for the first time with dispute of this character. The Panel, unlike the International Court of Justice on the binding nature of its provisional measures, or the WTO Appellate Body on WTO members’ obligation to submit evidence requested by WTO panels, lacked the institutional prestige or any past tradition on which to ground bolder moves aimed at curbing in some degree the restrictions placed upon it by the parties in CAFTA-DR. (see International Court of Justice, *LaGrand Case (Germany v. United States of America)*, [2001] I.C.J. Rep. 466 at [32], and WTO Appellate Body, *Canada—Measures Affecting the Export of Civilian Aircraft* (1999), WTO Doc. WT/DS70/AB/R at [187].

The extent of the protection of workers’ anonymity the United States sought in the proceedings was unnecessarily excessive and turned out to be a significant obstacle to prove the claims. Any future complainant State might reconsider this strategy and take any of the suggestions made by the Panel in *U.S. v Guatemala*.

What is the impact that *U.S v Guatemala* could have on New Zealand? As was said, CPTPP has a very similar provision and a very similar defence. It is, though, worth noting that the NZ – Malaysia FTA has a less stringent T&LP. Indeed, Article 2.4 of this FTA’s Agreement on Labour Cooperation (ALC) provides as follows: “Neither Party shall seek to encourage or gain trade or investment advantage by weakening or failing to enforce or administer its labour laws, regulations, policies and practices in a manner affecting trade between the Parties.” As can be seen, the “sustained *course* of action or inaction” requirement is not included.

Thus, New Zealand has currently at least two types of T&LPs in its FTAs. A topic to keep an eye on is which is the one that will be negotiated and eventually adopted in the upcoming negotiations with the European Union (EU) on an FTA. The EU has a similar provision to CPTPP in Article 23.4.3 of the EU – Canada Comprehensive Economic and Trade Agreement (CETA).

The fact that New Zealand has accepted this type of T&LP in CTPP, and that the EU has adopted it in CETA, leads to the initial assumption that the chances of its inclusion in the potential NZ – EU FTA are significant.

In sum, CAFTA-DR type of T&LPs are for practical purposes soft law, and the availability of third party dispute settlement mechanisms does not really change this categorization. Those States truly enforcing labor laws have little legal leverage in T&LPs to induce better compliance by non-enforcing Parties.

In his 1989 book, *A Turn in the South*, V.S. Naipaul quotes a statement made by a local African American politician on the legal changes of the sixties in United States aimed at eliminating segregation: “civil-rights legislation gave rights without money or acceptance”. The analogy is not too remote regarding workers in FTAs with T&LPs. There was a certain degree of illusion for the former five decades ago, there is a certain degree of illusion for the latter today