

**AFL-CIO Critique of Public Report by the
Office of Trade and Labor Affairs (OTLA)
On First CAFTA Labor Complaint
U.S. Submission 2008-01 (Guatemala)**

Summary Critique

On April 23, 2008, six Guatemalan unions and the AFL-CIO filed the first submission under Chapter 16 of the Central America Free Trade Agreement (CAFTA), alleging serious violations of the labor provisions of the agreement – up to and including targeted assassinations of union leaders involved in labor disputes. On Friday, January 16, 2009, at 4:45, the OTLA issued its report on the submission. In each of the five cases detailed in the submission, the OTLA sustained both the facts and legal arguments, in whole or in large part, of the petitioners. Indeed, in some cases, the report contained additional factual findings even more damning than those alleged in the submission. For example, the report provides additional details regarding several, repeated failures by the government to act, including: a) failure of labor inspectors to conduct inspections over employers' objections (12 times); b) repeated failure of inspectors to use police power to access facilities when companies refused entry; c) failure of the Labor Ministry to impose or enforce fines for impeding inspections or other violations of the law; and d) repeated failure of courts to enforce orders, where failure to comply with an order constitutes a criminal violation (11 times), among others. The OTLA found that in no case had the labor violations been remedied in accordance with the law of Guatemala.

Despite these findings and conclusions, the OTLA determined that it would not recommend taking this submission to the first step in the dispute resolution process, which entails nothing more than consultations with the government regarding the proven violations detailed in the submission. In support of its decision, the OTLA pointed to the government's "demonstrated willingness to discuss," "providing information," and "facilitating meetings." OTLA also pointed to a few last-minute measures all undertaken in roughly the last two months.¹ In no case have these measures resulted in justice for the petitioners, nor does it address underlying structural problems within the government.

In the end, OTLA gave the government of Guatemala six months to act on a set of inadequate recommendations. After that time, OTLA may consider whether to conduct cooperative consultations. The decision, as explained below, represents a failure to adequately enforce the already weak labor rights provisions included in the CAFTA-DR. Without additional action, this decision by the OTLA is unlikely to yield concrete improvements in labor law enforcement or effective action to end the violence and threats experienced by Guatemalan trade unionists attempting to exercise their fundamental human rights to freedom of association and collective bargaining.

¹ The report was originally due on or about December 9, 2008. It appears that the release of the report may have been delayed in order to buy time for the government to undertake a few, last minute measures, such as issuing a letter to and holding with Avandia urging it to settle the case, holding a meeting with the employer and workers in the Fribo case, and, importantly, a last minute arrest (after 17 months of inaction) in the STEPQ case, so that OTLA would have something positive to report.

Critique of Findings and Conclusions in Specific Cases

STEPQ

The report sustains the facts and legal arguments of the petitioners; however, its findings nevertheless present some concerns:

- OTLA “acknowledges” the initial government finding that the murder was unrelated to union activity, even as OTLA admits that it was unable itself to discern a motive. Although petitioners do not expect OTLA to conduct its own investigation into the crime, OTLA provides no examination whatsoever of the government’s dubious claim that the murder of a high-profile union leader in the midst of a labor conflict was unrelated to his union activity. OTLA recognized that Mr. Zamora, the assassinated leader, had filed several complaints regarding the death threats he had received throughout the labor conflict and which the government had failed to act upon. Yet OTLA does not question the government’s failure to investigate any linkage between his union activity, the death threats and his eventual murder. At best, OTLA should have pressed the government to reassess its conclusion with respect to motive, given the circumstances of the case.

OTLA also notes that one person was arrested six days before the report was issued on one of two warrants that have been pending for over a year and a half. If this person is actually connected with the crime, this is good news. However, we recently received a report that the suspect was just released, though it is not clear whether his release was provisional (on bail) or whether he has been released without charge. Until full investigations identify all suspects, including material and intellectual authors, and they are arrested and prosecuted fully, impunity in this case will not end.

We are also deeply troubled that the government appears to have prejudged the motive without a serious investigation and that the murder is likely to be prosecuted as a common crime. In any case where a trade unionist is murdered, particularly during a labor conflict, the government should investigate any possible linkage with trade union activity. Only if, after a full investigation, prosecutors are unable to support a finding of anti-union animus, should the case be transferred to the appropriate office responsible for prosecuting common crimes.

- OTLA also acknowledges that while security (albeit inadequate) was at times provided, workers were often forced to pay for the costs of room and board for the security guards – an expense that put security out of reach of the workers. The OTLA, as mentioned below, makes no specific recommendation that the government provide adequate security when requested and with costs borne by the state.

SITRABI

The report sustains the facts and legal arguments of the petitioners; however, its findings nevertheless present some concerns:

- OTLA does nothing more than note the failure of the Special Prosecutor to open an investigation into Mr. Ramirez's murder, based on a hasty determination by the local justice ministry that the murder was a common crime. There is no examination in the report of the adequacy of that investigation or basis for that determination.
- The report notes that the government has failed to send promised security personnel to the Bandegua plantation, in response to ongoing threats and violence. However, OTLA makes no recommendation to the government regarding the need to improve its security services to ensure the timely protection to threatened trade unionists. This is especially critical given that SITRABI union leaders have received several new death threats since the submission was filed.

AVANDIA

The report sustains the facts and legal arguments of the petitioners; however, its findings nevertheless present some concerns:

- The report notes in passing the existence of blacklisting but makes little effort to explore those claims or to make any specific recommendation to the government with regard to the blacklisting of the fired union activists.

SITRAFRIBO

The report sustains the facts and legal arguments of the petitioners in large part; however, its findings nevertheless present some concerns:²

- Although OTLA recognizes that the IGSS system provides employee health care for both employment and non-employment related health care needs, and is supported by employer contributions based on a payroll tax, OTLA states that it is unclear whether the failure of the employer to pay into this legally-mandated health benefit scheme constitutes a violation of acceptable conditions of work. OTLA's equivocation on this matter is troubling.
- Although the report notes that the change in legal ownership of the company from Fribo to Modas Dae Hang took place as a union was being recognized, and is therefore suspect, the report simply notes that the government has not yet acted

² OTLA was unable to ascertain the applicability of the law to the instant case with regard to the issue of successorship.

because the law is unclear as to the obligations of successor companies (assuming Modas is a successor). There is no information in the report as to what the government intends to do about this. Obviously, it is within the jurisdiction of the courts to interpret the law, using the tools of statutory construction to ascertain the meaning of the law and to apply it in this case. The government could also pass a clearer law, or issue regulations or guidelines that make the intent of the law clear. OTLA provides no insight as to why this has not yet happened, or what plans the government has to address this problem in this case and in future cases. Finally, OTLA makes no concrete recommendations to the government as to how to rectify this problem.

SITRAINPROCSA

The report sustains the facts and legal arguments of the petitioners in large part; however, its findings nevertheless present some concerns:³

- Although the two union leaders were illegally fired before the entry into force of the CAFTA, the ongoing failure of the courts to enforce its orders and secure reinstatement of the workers took place, and continues to take place, after CAFTA entered into force. It is not clear from the report whether OTLA considers their cases to be actionable, although OTLA's findings support the conclusion that they were fired illegally.
- Equally puzzling, OTLA says that it is unclear whether legally afforded labor rights are renounceable, and then immediately cites Guatemalan labor law stating that indeed such rights are not renounceable.
- Although OTLA recognizes that the IGSS system provides employee health care for both employment and non-employment related health care needs, and is supported by employer contributions based on a payroll tax, OTLA states that it is unclear as to whether the failure of the employer to pay into this legally-mandated health benefit scheme constitutes a violation of acceptable conditions of work. OTLA's equivocation on this matter is troubling.
- As in Fribo, OTLA again punts on the issue as to whether Alimentos Sumar is a successor of Fribo. There is no indication in the report that the government is doing anything to resolve this question in this case.

³ OTLA was unable to ascertain the applicability of the law to the instant case with regard to the issue of successorship.

Critique of Conclusion and Recommendations

Conclusion

The conclusion correctly reports that the government has repeatedly failed to enforce its own laws. The conclusion correctly reports that the government has repeatedly failed to enforce its own labor laws. However, at several junctures, OTLA refrains from drawing conclusions despite the overwhelming evidence that it has compiled. For example, after detailing more than a dozen specific instances in which government inspectors were denied access to facilities and payroll data by employers, the report concludes only that its review “raises questions relating to whether labor inspections . . . are being conducted effectively under the law.” It should be noted in the OTLA report that labor inspections are not being conducted effectively, in that government inspectors are routinely denied access to the facilities under investigation.

In the section on union violence, the report glibly details recent progress on labor relations, as though this in some way offsets or mitigates the violence and threats that Guatemalan workers continue to experience. While there may be collective bargaining agreements with STEPQ and SITRABI, these agreements came about only after the loss of life and international union campaigns. It is unclear whether current progress would have been made without such tragedy. Again, OTLA reports that the government does not believe that the murders are motivated by anti-union animus, without any evaluation of that claim. The report states in several places that, “Until the perpetrators have been convicted, there cannot be any certainty with respect to their motive.” In fact, the government’s current actions are unlikely to result in certainty with respect to motive – even if a conviction takes place. The pattern that has emerged and that is documented in our complaint and the OTLA report is one in which the government hastily denies any possibility of a union-related motive before actually conducting a thorough investigation. Without the establishment of a credible motive, it is even more difficult to identify and apprehend the intellectual author of the crime – rather than simply apprehend a gunman or other low-level hired assassin.

Recommendations

As to labor violence, the report recommends that the government “enforce outstanding arrest warrants in the murders of union members and conduct criminal proceedings” and “advance the investigation of pending cases of violence against trade unionists and issue/enforce arrest warrants as warranted.” OTLA also recommends that the government “strengthen the Special Prosecutor’s Unit for Crimes against Trade Unionists.” These are good but insufficient recommendations. For example, OTLA fails to make recommendations to: a) provide an appropriate level of security, commensurate with level of risk, to threatened trade unionists, the expense of which is borne by the government; b) send security personnel immediately to the Bandegua plantation, as previously agreed; c) instruct the special prosecutor’s office to accept and open investigations into all cases of crimes against trade unionists and transfer cases only if there has been made a showing that the weight of the evidence fails to support a finding

of anti-union animus.

As to inspections, OTLA makes the recommendation to “explore options” to ensure that the government can conduct inspections of work sites. This recommendation is seriously flawed. First, it does not require the government to actually do anything in order to complete the recommendation. The government could meet this recommendation simply by holding meetings that result in no concrete action. Further, the recommendation appears to be a step backwards, in that labor inspectors already have the ability to enlist the police to conduct inspection, and companies that prohibit the entry of inspectors can be fined. In sum, a recommendation would be to demand that the government enforce the law. If necessary, inspectors need to be instructed and empowered to use the tools available, and the courts need to sanction employers who fail to permit inspections. The government needs to demonstrate that it is serious about inspections, sending a clear message that failure to allow access will result in swift sanction.

As to corporate successorship, a key issue in the Fribo and Inproscia cases, OTLA recommends that the government “develop and issue guidelines to clarify the criteria for the applicability of Article 23 to ensure that its intent cannot be circumvented by new owners.” This recommendation could be improved. First, the OTLA should recommend that the law be applied. It is difficult to believe that there is no existing case law on point. OTLA should have explored whether courts have interpreted this provision, what guidance that jurisprudence provides, and if there is case law, determine why courts have so far failed to interpret and apply the law in these two cases. If indeed the law were so vague as to be wholly inapplicable, a proper recommendation would also have been to pass immediately new legislation or promulgate clarifying regulations *and* to apply them in these and all other similar cases. Moreover, as this a long-standing and serious problem, OTLA should also recommend that the government dedicate adequate personnel and resources to ensure that corporate forms are not manipulated, as they have been in the past, to evade their labor obligations.

As to illegal terminations, OTLA recommends that the government “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.” This appears to be a simple matter, as the law provides that workers cannot renounce rights provided for in the labor code. There is no need to develop guidelines. Simple enforcement of the law would go far in dispelling any public ambiguity on the matter.

Finally, as to the enforcement of provisions requiring payments to the IGSS, OTLA should first clearly acknowledge that non-payment into the IGSS system is a labor violation. One way to ensure that employers do not fail to pay into IGSS would be, for example, to make employers liable for any medical bills accrued due to having to go to a private hospital because access to the public system was prohibited for the employer’s non-payment to IGSS.

Consultations

Cooperative Labor Consultations are only the first step of a multi-step dispute resolution process. As the name suggests, consultations at this level are meant to allow the parties to “arrive at a mutually satisfactory resolution of the matter, taking into account opportunities for cooperation relating to the matter.” See Article 16.6. It is unclear, given the weight of the evidence and the lack of any actual progress on any of the cases, save for one arrest, why this step would not be recommended. Consultations are not a punishment, but rather a forum for close cooperation on the issues at hand. Indeed, the OTLA report appears to suggest cooperation with Guatemala without calling it as such and invoking Article 16.6. This, unfortunately, forestalls further action should Guatemala fail to resolve the matters in the complaint, either as to those cases or at a legal and institutional level. Failure to invoke consultations was a serious error. We urge OTLA to reconsider this action in order to send a clear message to the Guatemalan government that the egregious violations of its labor commitments under CAFTA-DR must be rectified immediately.