

BEFORE THE UNITED STATES  
TRADE REPRESENTATIVE

PETITION TO REMOVE **GUATEMALA**  
FROM THE LIST OF BENEFICIARY DEVELOPING COUNTRIES  
UNDER THE GENERALIZED SYSTEM OF PREFERENCES ("GSP")  
AND FROM THE LIST OF BENEFICIARY COUNTRIES UNDER THE  
CARIBBEAN BASIN ECONOMIC RECOVERY ACT ("CBI")

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Sept 2004  
with 2004  
Anex + Wtz

SUBMITTED BY:  
THE WASHINGTON OFFICE ON LATIN AMERICA (WOLA) &  
U.S./LABOR EDUCATION IN THE AMERICAS PROJECT (USLEAP)  
JUNE 15, 2005

ALSO 2005

2004 from Collyer

## 1. Introduction and Summary

On December 13, 2004, the Washington Office on Latin America (WOLA) and U.S./Labor in the Americas Project (US/LEAP) petitioned for a review of Guatemala's beneficiary status under the Generalized System of Preferences (GSP), citing the numerous broken promises of the Berger Administration made in response to the 2003 GSP petition. The petition reported that long-promised labor code reforms had not materialized, that the Ministry of Labor's budget had not been increased, that the government had failed to make progress against impunity even as violence against workers continued, and that the government continued to fail to adequately enforce existing labor laws or provide adequate remedies to workers unlawfully dismissed. The petition also reported that the Constitutional Court had stricken key provisions of the 2001 labor code reforms, including language empowering the Ministry of Labor to levy administrative fines against employers that violated the labor code.

It is now over six months later, and the USTR has failed to act on the 2004 petition. Similarly, the government of Guatemala has failed to act on a single one of the issues raised therein. There has been:

- No progress on labor law reform
- No progress against impunity
- No progress in restoring the ability of the Labor Ministry to levy sanctions against employers who violate the law
- No visible increase in the Labor Ministry's commitment to enforce existing labor laws

On May 9, 2005, USTR solicited 2005 GSP country practice petitions. WOLA and US/LEAP file the instant 2005 GSP petition, updating and incorporating our 2004 petition (attached hereto as "Annex A"). Petitioners once again urge USTR to take a hard look at Guatemala and consider whether a country that has for decades allowed the rights of its workers to be violated, or violated those rights itself, should remain a beneficiary of preferential trade treatment. For all of the reasons set forth in this document and the previous one, it is clear that Guatemala should not.

## 2. Guatemala's Labor Law Does Not Meet International Standards

A. *Labor Laws Fall Short Of ILO Standards.* As firmly established by the International Labor Organization (ILO), Guatemalan labor law simply fails to meet international labor standards. These shortcomings have been elaborated numerous times by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR), the U.S. State Department, local and international trade unions, and the petitioners. In 2004, petitioners listed on pp. 2-3 of the petition some of

the ways in which the labor code falls short of international standards. None of those laws were amended in the six months.

B. *The Ministry Of Labor Is Powerless To Sanction Labor Law Violators:* Although Guatemala did approve labor reforms in April 2001 (Decree 18-2001), these reforms did not take into account many of the ILO's observations. Moreover, key aspects of those reforms were challenged and deemed unconstitutional by the Constitutional Court of Guatemala in August 2004. Specifically, the ruling overturns the power of the Ministry of Labor to impose administrative fines against labor-rights violators. As yet, there is no pending legislation before the Guatemalan Congress to restore sanctioning authority to the Ministry of Labor. As such, employers may continue to violate labor laws knowing that they do not face administrative sanction. Conversely, workers are aware that they have little efficacious legal redress should their rights be violated.

C. *Promised Reforms Have Failed to Materialize:* In response to criticisms raised in the 2002 and 2003 GSP petitions, the government of Guatemala submitted a lengthy document to the USTR outlining an ambitious Labor Code reform on issues ranging from child labor, sexual harassment, domestic labor, and reinstatement. Despite repeated promises to do so, the labor-code reform package has yet to be enacted and instead languishes before the Tripartite Commission.

### 3. Violence and Impunity Continue

No progress has been made on any of the key murder cases that were presented in the 2004 GSP petition. Meanwhile, reports of violence against workers continued through 2005, including against unionized workers at the NB factory (see below). The union has repeatedly called, albeit unsuccessfully, for protection and intervention by Guatemalan authorities. Moreover, the State Department Annual Human Rights Report for 2004 (published in 2005) confirms that violence and impunity are persistent problems in the country. The report notes a 1/3 increase in the number of reported cases filed with the government's special unit handling violent crimes against unionists. They also note that the unit secured only one conviction in all of 2004, from a case load of over 200 cases.

### 4. Cases Demonstrate the Failure of Guatemala to Enforce its Laws

Guatemala's failure to enforce its Labor Code is routinely confirmed by the U.S. State Department's Human Rights Annual Report. In relevant part, the 2004 report, essentially identical to the 2003 report, states:

The law prohibits retribution for forming unions and for participating in trade union activities; in particular, the Labor Code prohibits employers from firing workers for union organizing and protects them from being fired for 60 days following notification to the Labor Ministry that a union is being formed. Thereafter, they can be fired for cause, unless they are members of the union's executive committee. However, enforcement of these provisions was weak. Many employers routinely sought to

V=7

1 case

FOIA

← Death

FOIA

circumvent Labor Code provisions to resist unionization or simply ignored both the provisions themselves and judicial orders to enforce them. An ineffective legal system and inadequate penalties for violations hindered enforcement of the right to form unions and participate in trade union activities in the past.

In previous years, the State Department report provided the total amount collected as fines by the Ministry of Labor. The 2003 report claimed that the Ministry "imposed a total of 4,009 fines, amounting to \$1.6 million (12.3 million quetzals); however, the number of fines actually paid was 535, amounting to \$194 thousand (1.5 million quetzals)." The 2004 report does not mention the number of fines collected in 2004, perhaps because the Ministry has been powerless to levy fines since August 2004. Curiously, the 2004 report does not even mention the August 2004 Constitutional Court ruling which took that power away from the Ministry.

cases  
+3

Below, petitioners provide updates on the case summaries provided in the 2004 GSP petition, as well as add ~~three new cases~~. These cases represent only a handful of the total violations of labor rights in Guatemala and amply demonstrate the government's inability or unwillingness to enforce its Labor Code. Petitioners also expect to receive additional, relevant cases and hope to submit those to the USTR on a continuing basis so as to fully inform USTR's decision on this matter.

#### *Updated Cases*

② A. **Secretaría de Bienestar Social de la Presidencia de la República  
(Presidential Secretariat for Social Welfare)**

Regarding this case, the State Department accurately reported:

[I]n June, the Secretariat of Social Welfare fired 22 individuals the day after they submitted a list of members of a fledgling union. Though the Secretariat cited budget constraints and poor work as the reason for the dismissals, it hired replacements who received the same pay and benefits. A court ordered the reinstatement of the workers, but the Secretariat appealed the decision. Judicial orders are not binding until appeals are settled, which can take years. The Secretariat rehired two of the individuals after they resigned their union membership. The case was pending at year's end.

③ B. **Horticultura de Salamá.**

No change from December 2004 GSP petition

④ C. **Embotelladora Mariposa, S.A. (EMSA)**

As reported in the previous petition, the workers met with President Berger to demand that he enforce their trade union rights by implementing the court judgments ordering their reinstatement. Instead, President Berger urged them to accept the company's severance offer and suggested that he could help them obtain visas to the United States if they agreed to do so. He also complained that their presence in the Central Park and their international campaign was damaging Guatemala's image. The case was finally resolved when the workers did in fact settle upon the severance payments rather than the reinstatement owed under the law.

⑤ **D. Las Delicias**

No change from December 2004 GSP petition

⑥ **E Sun Jai**

No change from December 2004 GSP petition

⑦ **F. Modas Paraiso**

No change from December 2004 GSP petition

⑧ **G. Nobland (NB)**

Nobland announced on June 10, 2005 that it would close its NB factory in Guatemala, citing continuing economic losses. The closure of the only maquila in Guatemala with a sustained union organizing effort demonstrates once again the failure of the government to protect the basic rights of workers in the face of employer opposition -- even in a sector that has received significant international attention. Following 15 years of organizing efforts in Guatemala, there are now only two maquilas with unions -- and none have been successfully established in the past two years. This is just the latest case study illustrating the noxious combination of employer opposition, government collusion, violence, impunity, bribery, and the failure and unwillingness to enforce the law, which together keep the maquila sector "union free" and deprive workers of their right to organize and bargain collectively.

On the morning of June 10, two workers entered the factory and found that management had begun to lock it up and pack up the equipment, with the protection of private security guards. One worker rushed to a public phone inside the factory to call union executive committee members, but the phone line had been cut. Security did not let her go outside to use another phone. It was only after approaching the company doctor that she was able to get a phone and contact the union. When three members of the union executive committee arrived, the guards did not allow them to enter. Two of them, Vidalia Garcia and Rosa Lopez, managed to force their way in but one of them, Noemi Melchor, was forced outside by a company guard. A physical altercation ensued and Mrs. Garcia was struck in the face by the guard. The fight ended when Mrs. Garcia yelled over to a union

Assault  
②

organizer to contact the international labor allies and inform them about what was happening inside the factory.

For three hours, the executive committee members waited inside the factory to speak to management but the executive committee was never granted a meeting. Meanwhile, the labor inspector sent to investigate the situation inexplicably remained outside the factory, claiming that the company guards had refused his entry. The law provides that an inspector has the right to enter the factory and, if access was denied, he has the right to get support from the police to access the factory. The inspector made no effort to seek such help.

At the announcement, management informed the workers that they were to lose their jobs and receive only a fraction of the severance benefits (20%) owed them under law. Each worker was then asked to sign documents, one of which was a breakdown of their severance pay, another was a resignation form, and the last an unidentified form. The personnel manager then told them that they had to sign the severance form immediately because the factory was declaring bankruptcy and that the creditors would soon drain Nobland of its assets. In the ensuing panic, many of the workers signed the documents, even though they have a legal right to full severance. Indeed, had the labor inspector been allowed in the factory, he would have explained this to them. In one case, a man who had worked there for years and was owed at least Q15,000 accepted Q4,000.

The union believes, however, that Nobland did not go out of business but instead transferred production to non-union maquilas. According to the union, NB started to move production material, such as cloth and thread, out of the factory on the 2nd of June. The Secretary General of NB followed one of the trucks to another NB facility. The union believes that there are two additional factories owned by NB, namely Inju (in Zone 7) and Moras Fashion in Villa Nueva. The workers at these two factories have been working overtime, until 9 and 10 pm, to finish the work that they believe has been shifted from the original factory.

It is important to note that the union, anticipating such an announcement, contacted the Ministry of Labor at least one week before management's announcement. Indeed, they talked to the very same labor inspector who later visited the factory. They were told that the Ministry would try to reach an agreement with the company to ensure the full payment of their severance. This of course never happened, and Nobland proceeded to close.

+ 1 case

A. SITINCA (Sindicato de Trabajadores de Industria de Café, S.A.).

In January 2004, the union succeeded in affiliating three of six in-house security guards (in addition to the plant workers it had already organized) at Industria de Café, S.A.<sup>1</sup> Shortly after the three guards affiliated to the union, Mr. Eduardo García, the personnel manager, ordered all six of the directly employed security guards to be stripped of their company-issued firearms. He told them that unionized security guards could not be permitted to have firearms.

The union then called the General Inspector of Labor of the Guatemalan Ministry of Labor, which sent a labor inspector to the plant on February 2, 2004, and again on February 10. The labor inspector ordered management to provide firearms to the security guards, noting that the coffee-processing plant is located in a dangerous area, that the security guards work the graveyard shift when conditions are far more dangerous, and that the security guards who work for VISEGUA (a contracted security firm; see note below) carry firearms. The company was given five business days to comply with the inspector's order, but never did.

On April 26, 2004, Mr. García sent a memo to the security guards ordering them not to speak to police or journalists should "anything happen within the plant," adding that by doing so they could "complicate" matters further. At 1:30 AM on June 18, two unidentified men fired several shots at José Armando Palacios, the first of the directly-employed security guards to affiliate to the union (and who was one of the two guards to file the complaint with the General Inspector of Labor), from the plant's parking lot just as he was beginning his shift. As the bullets struck the main door of the plant, Palacios was able to throw himself to the ground to avoid being wounded or killed.

ASS + 1

According to the union, Mr. García accused Palacios of making the incident up (although the union later obtained a copy of the report from VISEGUA to Mr. García that corroborates Palacios's account). However, Mr. Palacios and the union did not immediately report the incident to the police because of Mr. García's April 26 order not to speak to police or journalists.

Later on, the union also obtained a copy of an undated memo sent by Mr. García to Colonel Efraín Aguirre, operations manager of VISEGUA, in which Mr. García stated:

We have two security guards who are totally damaging and we have serious suspicions about their participation in anomalous actions; the General Manager of the company has not wanted to deal with them in order to avoid some kind of union action, given that they are union

<sup>1</sup> In addition to the six directly employed security guards, the company also contracts for the services of security guards with an outside security firm, Vigilancia y Seguridad Empresarial de Guatemala (VISEGUA).

members. I am referring to [José] Armando Palacios and Factor Morente, who work this week on the shift that goes from 10:00 PM to 6:00 AM.

Mr. García went on to complain that VISEGUA's guards sleep on the job and have too cozy a relationship with the plant's directly-employed guards and made a thinly veiled threat to end VISEGUA's contract if the private security company does not improve its performance and cease fraternizing with the directly employed guards. Given the that the operations manager is an officer in the military, and the fact that Mr. García does not suggest any specific action be taken to deal with the two unionists, the union believes that the purpose of the memo was to suggest that the colonel deal with them himself. In the intervening year, Mr. Palacios received occasional threats and intimidation but did not report them. However, on April 16, 2005, while Mr. Palacios was buying corn for a small store his wife runs out of their home, two unidentified men forced their way into his home, grabbed his 18-year-old son and, with weapons pointed at him and Mr. Palacios's wife, demanded to know where Mr. Palacios was. They yelled that they were there to kill him for being a trade unionist. They then tied up the son, searched the house, and warned the family not to speak to the police or they would also be killed. Nevertheless, the family did call the police, and when Palacios got home the police were already there.

Mr. Palacios, his wife and their son filed reports with the Special Prosecutor's Office for Crimes against Journalists and Trade Unionists on April 19, 2005 (in her complaint, his wife notes that the police did not even bother to write up a report). They brought their nine-year-old daughter in to add her testimony to the report, on April 28, 2005. The Special Prosecutor's Office responded by requesting that the Public Ministry's Office of Attention to Victims provide the family with psychological counseling, and issued a formal request to the 12<sup>th</sup> Precinct of the National Civilian Police to provide additional security and personal bodyguards. According to Mr. Palacios, this support never materialized.<sup>2</sup>

On May 6, 2005, the company fired Mr. Palacios without cause. He has refused to accept severance and has filed for reinstatement in the labor courts. It should be understood, however, that nine members of the union who were fired without cause by the company in the first five months of 2001 (when the company was under legal injunction prohibiting firings without a judge's order, during a collective-bargaining conflict) have been waiting for years for the company to honor a series of reinstatement orders they have won in the courts. The company appealed the reinstatement orders all the way up to the Constitutional Court, which threw out the company's appeal on February 9, 2005, declaring that it was frivolous, and confirmed the reinstatements. Despite the Constitutional Court's ruling, however, the nine have still not been reinstated to their jobs.

<sup>2</sup> On June 9, 2005, he asked the Special Prosecutor's Office for police protection; he was told verbally (the Special Prosecutor's Office refused to acknowledge receipt of a written request) that that was impossible because the Public Ministry has no protection program for threatened trade unionists.

threat 1  
ASS = #2  
FW #2

Few yes



Case + 3

**B. National Mortgage Credit Bank Workers Union**  
(Sindicato de Trabajadores del Crédito Hipotecario Nacional).

Labor relations at this state-owned bank have been difficult for several years. Tension mounted during the administration of Guatemalan President Alfonso Portillo, when the union began to complain publicly that the bank was being subjected to systematic plundering by its president, José Armando Llort, appointed by Portillo. Llort later fled the country under charges of money laundering and theft of millions of dollars. The union also opposed the bank's merger with two other scandal-plagued banks, the Banco del Ejército, and the Banco del Nororiente. The union believes that these mergers allowed the Portillo administration to transfer losses resulting from the plunder of the Banco del Ejército and the Banco del Nororiente to the Crédito Hipotecario Nacional.

The bank has a long history of labor code violations. The most recent conflict began in 2001. The union filed a complaint with the labor courts charging that management was not complying with the terms of the collective bargaining agreement, and won an injunction from the Seventh Labor Court on November 23, 2001. Despite the terms of the injunction, which prohibited firings without the labor judge's order, Crédito Hipotecario management fired 170 workers, 85% of whom were union affiliates, on March 22, 2002. Managers effected the dismissals accompanied by a group of 26 private security guards, armed with shotguns, employing a vehicle which the union's investigation later revealed belonged to the Estado Mayor Presidencial (EMP), an elite army unit linked by many human rights groups to extrajudicial executions and other crimes. The managers also brought along over 20 lawyers and told the fired workers that they had to sign letters that effectively ended any future legal claim they might have against the bank or else receive no severance. TH + 4

The union filed a complaint against the bank for illegal firings with the Third Labor Court on April 6, 2002 and asked for an order of reinstatement for the first group of 55 workers. According to the labor code, the labor judge should have responded within 24 hours; however, the labor judge waited until June 12, 2002, 67 days later, to order their reinstatement. The bank did not comply with the reinstatement order, instead appealing it to the First Appeals Court. The court ruled that the bank's appeal and subsequent motions were frivolous, and confirmed the order of reinstatement, and ordered the bank to pay back wages to the fired workers.

On April 12, 2002, the union filed another complaint with the Third Labor Court, this time on behalf of a second group of seven workers who were among the 170 fired on March 22. In this case as well, the labor judge violated the law by waiting 64 days to order their reinstatement. Once again, the bank appealed the order and filed a number of frivolous motions, all of which were eventually rejected by the First Appeals Court, which confirmed the reinstatement order on December 11, 2002.

On March 5, 2003, a representative of the Third Labor Court accompanied the fired workers who had won reinstatement to their worksite in an attempt to execute the labor judge's order. Nevertheless, the bank's managers refused to comply with the judge's

order, violating Article 420 of the Penal Code. The union then asked the labor judge to double the fine imposed on the bank for disobedience, but the judge did not comply.

Between July 27 and 31, 2002, the bank's managers once again violated the injunction and fired a second group of 105 workers, 95% of whom were union members. The union filed a complaint with the Third Labor Court on August 2, 2002, asking for immediate reinstatement for the fired workers. This time the labor judge waited 57 days to order their reinstatement. On September 27, 2002, a representative of the Third Labor Court accompanied the fired workers to the bank in an attempt to execute the court's order, but the bank refused, and instead filed an appeal to the First Court of Appeals, which eventually dismissed the appeal and confirmed the reinstatement order.

On August 12, 2002, the union filed another complaint with the Sixth Labor Court, charging multiple violations of the collective bargaining agreement. The court accepted the complaint and placed the bank under a second injunction. Anticipating another wave of mass firings, the union requested and obtained a third injunction, this time from the First Labor Court, on January 29, 2003.

Despite multiple orders of reinstatement and multiple dismissals of the bank's legal appeals, the fired workers, most of them union affiliates, have been unable to win their jobs back. The bank has replaced the fired workers with temporary-contract workers. These temporary workers are technically free to join the union, but when they do so they are told by management that their contracts will not be renewed once their six-month period elapses. Moreover, the union's Secretary General, Luis Ernesto Morales Gálvez, filed a complaint with the Public Ministry on August 8, 2002, stating that he and six other union leaders were being harassed by unidentified men who had them under surveillance at their homes and between their homes and their worksite. There was no response to the complaint.

This long line of labor law violations continues to this day. On December 31, 2004, the bank fired 32 more employees, including two union leaders who enjoy immunity from dismissal under the legal provision known as "fuero sindical." Most recently, on April 22, 2005, the bank closed 29 branches and dismissed 70 workers, many of whom were union members. In both cases, the bank violated labor court injunctions prohibiting it from firing workers without a judge's order.

### C. **Sindicato Nacional de Trabajadores de Salud de Guatemala (SNTSG).**

SNTSG was formed approximately eight years ago as a national union with the intention to organize health-care workers industry-wide in both the public and private sectors. However, the union has faced insurmountable problems in organizing beyond the Ministry of Public Health and Social Assistance, largely due to the legal requirement added by the 2001 Labor Code reforms. The law requires that industry-wide unions organize more than 50% of their industry before they can be recognized as an industry-wide union -- a practical impossibility in Guatemala. Currently, SNTSP has

acoso  
Threat

C74

approximately 9,500 members, all of them directly employed by the Ministry of Public Health and Social Assistance.

The union successfully negotiated a collective bargaining agreement with the Public Health Ministry, which was signed on January 3, 2000. The terms of the agreement mandated annual renegotiation; nevertheless, the Public Health Ministry has refused to renegotiate the agreement. The terms of the agreement thus have not changed from those negotiated in January 2000. The union has been forced to take the Public Health Ministry to court to seek an order to bargain, but the case is still in the labor courts.

The Ministry has also refused to respect the terms of the agreement with regard to paid time off for members of the executive committee. The terms of the collective bargaining agreement grant paid time-off to nine members of the national-level union executive committee, four members of each "subsidiary", three members of each "sub-subsidiary", and two members of each "section" for the leadership functioning in work centers in the capital and in the rural zones. In addition, the agreement grants paid time-off to three members of the national-level Consultative Council. The article further stipulates that additional paid time-off can be given to members of "specific commissions" when necessary, as well as to rank-and-file affiliates who need such to attend national assemblies, etc.

The article in question does not impose limits on the use of paid time-off of the union leaders covered by the article. As such, it gives the power to determine how much time off its leadership will take to the union itself. The Public Health Ministry later asserted that the union's leaders could not take paid time-off beyond the minimum specified in the Labor Code (six days per month per union leader), despite the fact that the collective bargaining agreement supercedes the labor law in this regard. The Public Health Ministry asked for a ruling by the Labor Ministry's General Labor Inspection Office, which notified both parties on May 15, 2001 that the collective bargaining agreement clearly grants the union's leaders the right to unlimited paid time-off.

Three and a half years later, the Public Health Ministry sought and obtained another ruling from the Labor Ministry. On December 20, 2004, the Labor Ministry ruled that Article 20 of the collective bargaining agreement "must be interpreted in the sense that the paid time-off for union leader activity refers to the paid time-off regulated by the Labor Code, for which reason it must be for six days..." This new ruling in hand, the Public Health Ministry has taken legal action to have union leaders who have taken more than six days per month off fired.

## **5. Conclusion**

Guatemala should therefore be removed from the list of beneficiary developing countries under GSP and CBTPA until it :

1. Reinstates immediately the authority to sanction employers to the body constitutionally permitted to exercise such authority, and/or to amend the

constitution to allow the Labor Ministry to assess fines.

2. Enacts labor law reforms to address each of the legislative shortfalls noted in this petition.
3. Makes significant progress in the resolution of the specific cases cited in the petition and those to follow.
4. Makes significant progress in strengthening of labor law enforcement to permit effective exercise of freedom of association and collective bargaining
5. Adopts effective measures to eradicate child labor.
6. Makes significant progress against impunity.

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