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## Worker Rights Provisions in Free Trade Agreements (FTAs)

### Overview

The issue of worker rights has become prominent in the negotiation of U.S. FTAs. Some stakeholders believe that worker rights provisions are necessary to protect U.S. labor from perceived unfair competition and to raise standards in other countries. Others believe that worker rights are more appropriately addressed at the International Labor Organization (ILO) or through cooperative efforts and capacity building on worker rights. Since 1988, Congress has included worker rights as a principal negotiating objective in Trade Promotion Authority (TPA) (previously known as fast-track) legislation. The United States has been in the forefront of using trade agreements to promote core internationally-recognized worker rights. Worker rights provisions in FTAs have evolved significantly since the North American Free Trade Agreement (NAFTA), moving from side agreements to integral chapters within FTA texts, along with cooperation and enforcement provisions.

### The International Labor Organization

The ILO is the primary multilateral organization responsible for promoting labor standards through international conventions and principles. A specialized agency of the United Nations, it has a tripartite structure composed of representatives from government, business and labor organizations. The ILO promotes labor rights through assessment of country standards and technical assistance, but it has no real enforcement authority. The World Trade Organization does not address worker rights.

#### What are the ILO conventions?

The ILO has adopted 194 multilateral conventions or protocols, eight of which are considered to be core labor standards. The 1998 Declaration on the Fundamental Principles and Rights at Work incorporates core labor principles, to be adhered to by all countries regardless of whether they are signatories to the underlying eight ILO conventions from which the principles are drawn. The United States has endorsed these principles and has in recent FTAs incorporated them as enforceable provisions. However, the United States has ratified only two of the relevant ILO conventions: abolition of forced labor and non-discrimination in employment.

#### Are any U.S. laws in conflict with ILO conventions?

The U.S. Tripartite Advisory Panel on International Labor Standards of the President's Committee on the ILO has found that U.S. law is at least partially inconsistent with five of the eight core conventions of the ILO: freedom of

association/right to organize; right to organize/collective bargaining; forced labor; minimum age; and equal remuneration. For example, U.S. laws on prison labor may conflict with the forced labor convention, and equal pay for equal work statutes may conflict with the equal remuneration convention.

#### The 1998 ILO Declaration Principles

- Freedom of association and the effective recognition to the right to collective bargaining;
- Elimination of all forms of forced or compulsory labor;
- Effective abolition of child labor and the minimum age of work; and
- Elimination of discrimination in respect of employment or occupation.

### Labor Provisions in U.S. FTAs

Worker rights provisions in U.S. trade agreements since NAFTA have evolved significantly. For example, they have evolved from limited enforceability of internationally-recognized worker rights to expanded enforcement of core ILO principles, among other provisions. These include provisions on labor cooperation and capacity building. Internationally-recognized worker rights were based on language in the Generalized System of Preferences authorization and largely tracks the 1998 Declaration (above), but also contains language on acceptable conditions with respect to minimum wages, hours of work, and occupational safety and health.

The first U.S. bilateral FTAs with Israel (1985) and Canada (1988) did not contain provisions on worker rights. The worker rights provisions in subsequent U.S. FTAs reflect the U.S. trade negotiating objectives of the respective trade promotion authority (TPA) statutes under which an agreement is negotiated. Each grant of TPA has set out principal trade negotiating objectives on a wide range of issues, including labor. These objectives have become more comprehensive and numerous over time.

**Side Agreements.** The North American Free Trade Agreement (NAFTA) originally was not negotiated with worker rights provisions—aside from preambular language—despite the elevation of labor as a principal negotiating objective in the 1988 fast-track authority.

However, President Clinton, fulfilling a campaign promise, negotiated side agreements on worker rights to an already completed NAFTA agreement. The North American Agreement on Labor Cooperation contained 11 “guiding principles” on worker rights in matters affecting trade, technical assistance, and capacity building provisions, and a separate dispute settlement arrangement. However, dispute settlement was available only for failure to enforce each country’s own laws with regard to three of these principles: child labor, minimum wage, and occupational safety and health.

**Jordan.** The U.S. FTA with Jordan (2001) contained labor provisions that went beyond NAFTA and were incorporated into the agreement itself. These provisions also became a template for future FTAs and the negotiating objectives on labor in the 2002 TPA authorization. The provisions were fully enforceable under the dispute settlement provisions of the agreement. However, prior to congressional approval, the two parties exchanged letters committing each to resolve disputes in all chapters without recourse to dispute settlement.

**Trade Promotion Authority of 2002.** Under the TPA of 2002, seven FTAs were negotiated by the George W. Bush administration. Like Jordan, the provisions were incorporated into the agreement itself. These agreements also went beyond the Jordan FTA in terms of scope, but they included only one enforceable provision: a party shall not fail to effectively enforce its labor laws “in a manner affecting trade between the parties.” “Labor laws” were defined as the U.S. list of internationally-recognized worker rights as contained in the GSP statute. Procedures for labor disputes placed limits on monetary penalties, whereas those for commercial disputes did not. Suspension of benefits was a last recourse option for both types of disputes. These FTAs also included a number of other provisions that are not enforceable under the FTA’s dispute settlement procedures. These included: (a) commitments not to derogate from one’s own labor laws as an encouragement for trade; and (b) extensive provisions for cooperation and capacity building, and the creation of a labor affairs council.

**May 10, 2007 Agreement.** Following the transfer of control of the House after the 2006 elections, members of the majority sought changes in the labor, environmental, intellectual property rights, investment, government procurement provisions of the four pending FTAs at the time: Columbia, Panama, Peru, South Korea. A bipartisan agreement between the Bush administration and the House leadership, building on the 2002 TPA negotiating objectives, was reached on May 10, 2007. Concerning worker rights, the agreement called for countries to:

- Adopt the same dispute settlement mechanisms and penalties as other chapters in the FTA;
- Maintain in their laws and practices the principles stated in the ILO Declaration;
- Prohibit the diminution of labor standards to attract trade and investment; and

- Limit prosecutorial and enforcement discretion, i.e., countries cannot defend the failure to enforce their labor laws based on resource limitations or enforcement priorities.

The May 10<sup>th</sup> provisions are reflected in the Bipartisan Comprehensive Trade Promotion Authority renewal legislation (H.R. 3830/S. 1900) that was introduced in both chambers of Congress on January 9, 2014. These provisions reportedly form the basis of the U.S. proposal for the labor chapter of the proposed Trans-Pacific Partnership (TPP).

**Other Country Approaches.** Labor provisions appear in the sustainable development chapters of European Union trade and economic partnership agreements, although they tend to be more consultative than enforceable. Canadian FTAs have used side-letters on labor cooperation, which do not provide for dispute settlement resolution. Among ASEAN-FTAs countries, only its FTA with Australia contains worker rights provisions.

## Issues for Congress

In considering future TPA legislation or future trade agreement negotiations, Congress may wish to examine the use and application of worker rights provisions in FTAs. This debate could include inquiry into:

- The effectiveness of FTAs, as well as the ILO, as a vehicle for improving worker rights in other countries;
- The relationship between the 1998 ILO Declaration and related ILO conventions;
- The consideration of the May 10<sup>th</sup> agreement provisions as a floor or ceiling in future U.S. trade negotiating objectives;
- The ability of the United States to achieve negotiating objectives on worker rights among widely divergent countries in regional FTAs, such as the TPP;
- The effectiveness of the Labor Affairs Councils in FTAs to provide technical assistance and trade capacity building programs, and to resolve or prevent disputes without recourse to dispute settlement;
- The role of U.S. business community in promoting U.S. labor practices abroad; and/or
- The extent to which the dispute settlement provisions have been applied to worker rights issues.

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