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Worker Rights Provisions in Free Trade Agreements (FTAs)

Overview

Worker rights have become a prominent issue in U.S. FTA negotiations. Some stakeholders believe worker rights provisions are necessary to protect U.S. workers from perceived unfair competition and to raise labor standards abroad. Others believe these rights are more appropriately addressed at the International Labor Organization (ILO) or through cooperative efforts and capacity building. Since 1988, Congress has included worker rights as a principal negotiating objective in Trade Promotion Authority (TPA) legislation. The United States has been in the forefront of using FTAs to promote core internationally-recognized worker rights. Labor provisions have evolved significantly since the North American Free Trade Agreement (NAFTA), moving from side agreements to integral chapters within FTA texts, with more provisions subject to enforcement mechanisms. The renegotiation of NAFTA, completed in September 2018, led to the new proposed U.S.-Mexico-Canada Agreement and a revised labor chapter.

International Labor Organization

Most FTAs with provisions on worker rights refer to commitments made in the ILO. The ILO is the primary multilateral organization responsible for promoting labor standards through international conventions and principles. A specialized agency of the United Nations, the ILO is composed of representatives from government, business and labor organizations. It promotes labor rights through assessment of country standards and technical assistance, but has no real enforcement authority. The World Trade Organization (WTO) does not address worker rights, as members were unable to reach consensus on the issue.

What are the ILO conventions?

The ILO has adopted 194 multilateral conventions or protocols; eight are considered to be "core labor standards." The 1998 *Declaration on the Fundamental Principles and Rights at Work* incorporates core principles from these eight conventions, to be adhered to by all countries whether or not they are signatories to the underlying conventions. The United States has endorsed these principles, incorporating them in recent FTAs as enforceable provisions. It has ratified only two of the relevant ILO conventions: elimination of forced labor and abolition of the worst forms of child labor. As a result, U.S. FTAs do not include commitments to enforce the conventions themselves.

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 core conventions: freedom of association; 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.

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 minimum age of work.
- Elimination of discrimination in respect of employment or occupation.

Labor Provisions in U.S. FTAs

Worker rights provisions in U.S. FTAs, first included in NAFTA in 1994, have evolved significantly, from requirements for parties to enforce their own labor laws, and to strive not to waive or derogate from its laws as an encouragement to trade, to commitments to adopt, maintain, and enforce laws that incorporate core ILO principles. Other provisions address labor cooperation and capacity building. "Internationally-recognized worker rights" were based on language in the U.S. Generalized System of Preferences (GSP) statute and largely track the ILO Declaration, but also refer to "acceptable conditions" regarding minimum wages, hours of work, and occupational safety and health. Recent U.S. FTAs reflect the negotiating objectives under TPA statutes. These objectives have become more comprehensive over time.

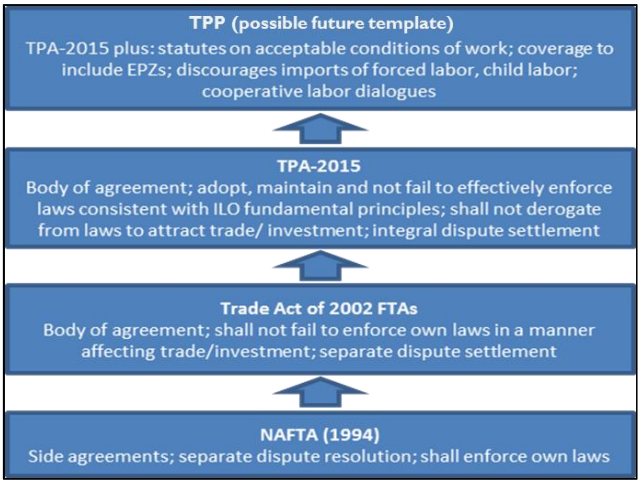
NAFTA. The original NAFTA text did not include labor provisions, causing considerable debate among stakeholders. After his election, President Clinton negotiated a side agreement to an already concluded, but not yet in effect, NAFTA, called the North American Agreement on Labor Cooperation. It contained 11 "guiding principles" on worker rights in matters affecting trade, technical assistance, and capacity building provisions, and a separate dispute settlement arrangement, along with a labor cooperation mechanism. The full spectrum of dispute procedures, including monetary penalties, applies to failure to enforce a country's laws regarding three principles: child labor, minimum wage, and occupational safety and health. Other issues, such as freedom of association and the right to organize are limited to ministerial consultations.

Jordan. The U.S.-Jordan FTA (2001) contained labor provisions that were incorporated into the agreement itself. These provisions also became a template for future FTAs and negotiating objectives in the 2002 TPA authorization. While the provisions are enforceable, both countries committed to resolve disputes outside of dispute settlement.

Trade Promotion Authority of 2002. Seven U.S. FTAs were negotiated under TPA-2002. These agreements went beyond the scope of the Jordan FTA, but included one

enforceable labor provision: a party shall not fail to effectively enforce its labor laws "in a manner affecting trade." "Labor laws" were defined as worker rights as in the GSP statute. Dispute procedures placed limits on monetary penalties, unlike those for commercial disputes. The FTAs also included: commitments not to derogate from labor laws to encourage trade; provisions for cooperation and capacity building; and creation of a labor affairs council.

Figure 1. Evolution of Labor Commitments



Source: CRS.

TPA-2015. TPA-2015, in effect through July 1, 2021, enhanced the negotiating objectives on labor, with guidance from a May 2007 bipartisan agreement, which laid out new congressional objectives for FTAs. TPA-2015 called for:

- including the same dispute settlement mechanisms and penalties for labor as for other FTA chapters;
- requiring the maintenance in laws and practice of principles stated in the ILO Declaration;
- prohibiting the diminution of labor standards to attract trade and investment; and
- limiting prosecutorial and enforcement discretion, as grounds for defending a failure to enforce labor laws.

Trans-Pacific Partnership (TPP). In January 2017, the United States withdrew from the proposed TPP, an FTA with 11 other countries in the Asia-Pacific. TPP included several new features on labor in addition to core provisions from TPA-2015. USTR indicated TPP could serve as a baseline for new trade negotiations. Provisions included:

- "adopt and maintain" statutes and regulations governing acceptable conditions of work;
- extension of the principle of non-derogation of rights to export processing zones;
- discouragement of imports produced by forced labor;
- establishment of a "cooperative labor dialogue" as an alternative to formal labor consultation.

Under TPP, the United States also negotiated bilateral labor consistency plans with Vietnam, Malaysia, and Brunei, requiring specific legal and institutional reforms to improve labor standards. The Obama Administration previously negotiated a labor action plan with Colombia in advance of congressional consideration of the U.S.-Colombia FTA, which some viewed as ground-breaking in terms of helping to raise standards; Colombia was required to complete numerous commitments in the plan before the FTA was approved by Congress. In early 2018, TPP countries signed a new deal without the United States; the original labor chapter remains intact, but not the U.S. side labor plans.

U.S.-Mexico-Canada Agreement (USMCA): In August 2017, talks began with Canada and Mexico to renegotiate and modernize NAFTA. The TPP reportedly served as the template for the U.S. proposed labor text. The proposed USMCA would revise labor provisions that reflect key components of TPP. It would also include new commitments related to violence against workers, migrant worker protections, and sex-based discrimination. An annex would commit Mexico to take specific legislative actions to ensure the effective recognition of the right to collective bargaining. In addition, separate from the labor chapter, the auto rules of origin have certain wage requirements for the first time in an FTA. Throughout the negotiations, there had been calls for additional obligations for Mexico to address persistent concerns over certain labor practices. Some stakeholders and Members of Congress call for strengthening enforcement mechanisms in particular.

Labor Disputes under U.S. FTAs

The Department of Labor (DOL) is responsible for reviewing complaints on alleged violations of enforceable labor commitments in U.S. FTAs. In the past decade, the DOL has issued reviews for seven complaints. One, involving Guatemala, has proceeded past consultations to formal dispute settlement. In December 2017, an arbitral panel ruled against the U.S. It found while Guatemala had failed to effectively enforce certain labor laws, the evidence did not prove it was both "sustained or recurring" *and* "in a manner affecting trade." U.S. stakeholders have contested the outcome. Other concerns include procedural delays in processing complaints and compliance issues more broadly.

Issues for Congress

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

- The effectiveness of FTAs as a vehicle for improving worker rights in other countries;
- The extent to which U.S. FTA partners are complying with labor obligations and whether dispute settlement provisions have been applied effectively;
- The effectiveness of labor councils in FTAs in providing technical assistance and trade capacity building; and
- The role of the business community in promoting U.S. labor practices abroad.

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