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# Labor Enforcement Issues in U.S. FTAs

## Background

Labor provisions in free trade agreements (FTAs)—both in the U.S. and globally—were first included in the North American Agreement on Labor Cooperation (NAALC), the side agreement to the 1994 North American Free Trade Agreement (NAFTA). Since then provisions have evolved from commitments not just to enforce a country's own domestic labor laws, but also to adopt and enforce core labor principles of the International Labor Organization (ILO). As mandated by Congress through trade promotion authority (TPA), recent U.S. FTAs also subject labor chapters to the same dispute settlement procedures as all other obligations. Some Members view strong worker rights provisions in U.S. FTAs as an important issue and they have raised concerns over FTA partner compliance with labor commitments and the U.S. record of enforcement. These issues were a part of the debate over the Trans-Pacific Partnership (TPP) and in the NAFTA renegotiation, completed in September 2018 as the U.S.-Mexico-Canada Agreement (USMCA).

Labor standards are not part of World Trade Organization (WTO) rules; in 1996, members reaffirmed the ILO as the competent body to deal with labor issues, while denouncing the "use of labor standards for protectionist purposes." Limited progress at the WTO led several countries to include labor commitments in FTAs. The United States and others also include worker rights as eligibility criteria for developing countries to receive unilateral trade preferences.

U.S. FTAs have set precedents both in terms of the scope and enforceability of labor provisions. An ILO report found as of 2016, 77 out of 267 FTAs globally included labor provisions, compared to 21 in 2005. Unlike U.S. practice, the majority of agreements do not subject labor provisions to dispute settlement. Most provide a framework for dialogue, capacity building, and monitoring, rather than link violations to economic consequences, such as trade sanctions. In cases where dispute settlement is applicable, such mechanisms have been rarely invoked; countries largely aim to solve disputes via cooperative consultations.

## Enforcement Mechanisms in U.S. FTAs

Complaints over U.S. FTA partners' compliance with labor commitments have been brought under five FTAs. Among these agreements, the provisions subject to dispute resolution, procedures, and remedies may differ:

- **NAALC** contains 11 "principles" on worker rights, subject to separate dispute settlement procedures from the main NAFTA text. NAALC aims to settle complaints regarding labor enforcement primarily via dialogue and consultations, through the national administrative offices and at the ministerial level. If consultations are unable to resolve a complaint, certain issues can be referred to other mechanisms. The full spectrum of dispute procedures, including an arbitral panel and limited monetary penalties, applies to allegations involving three of the 11 principles: a "persistent pattern of failure" to enforce "occupational safety and health, child labor or minimum wage technical labor standards," where the matter is trade-related and covered by mutually recognized labor laws. Other issues, such as freedom of association and the right to organize are limited to ministerial consultations.
- **Dominican Republic-Central America FTA (CAFTA-DR) and U.S.-Bahrain FTA** labor chapters include one provision subject to enforcement—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." Procedures related to labor disputes may include limits on monetary penalties. Creation of a labor cooperation mechanism, in addition to a capacity building mechanism and labor affairs council in the case of CAFTA-DR, were intended to oversee review and implementation of the labor obligations. CAFTA-DR was the first U.S. FTA to include measures in support of labor capacity building.
- **U.S.-Peru, U.S.-Colombia FTA and USMCA** labor chapters reflect provisions required by the "May 10th Agreement," a 2007 bipartisan deal between congressional leadership and the Bush Administration. The agreement called for: (1) an additional enforceable commitment that FTA parties adopt and maintain core labor principles of the 1998 ILO Declaration; and (2) the same dispute settlement procedures and remedies, including recourse to trade sanctions, for FTA labor provisions as applied to other obligations. A party alleging violation of the provision on ILO commitments must demonstrate that failure to adopt or maintain ILO principles has been "in a manner affecting trade or investment." The USMCA, which revised the NAALC, also reflects updated negotiating objectives on labor within TPA-2015. For Colombia, a labor action plan was also negotiated with commitments that were required to be met prior to FTA ratification.

## Summary of U.S. Labor Disputes

The Office of Trade and Labor Affairs (OTLA) within the U.S. Department of Labor (DOL) receives and reviews complaints (termed "submissions") of alleged violations of FTA labor commitments. The DOL consults and coordinates with the U.S. Trade Representative (USTR) and State Department on labor enforcement issues. Per OTLA, allegations in a labor submission must "raise issues relevant to the labor provisions in the NAALC or FTA and illustrate a country's failure to comply with its obligations." If the submission is accepted, OTLA undertakes a review and

issues a public report on its findings, with recommendations to the FTA partner to address concerns. OTLA may also recommend further actions, including that the U.S. request bilateral consultations—if these are unsuccessful, dispute settlement may be invoked in certain cases.

Under NAALC, OTLA received more than 20 submissions. It has accepted and issued reviews for 13, with one under review; all involved Mexico (**Table 1**). Among U.S. FTAs with labor chapters, the OTLA has issued seven reviews involving six countries. The Guatemala dispute involved the first formal consultations requested by the United States, although submissions under other U.S. FTAs have resulted in ministerial or informal consultations. It is also the only case to have proceeded through dispute settlement.

**Table 1. Labor submissions reviewed by OTLA**

| Country | Filed | Petitions | Status |
|---|---|---|---|
| Mexico | 1994-2015 | 13 | * 1 case under review; * 11 reports issued; 8 ministerial agreements |
| Guatemala | 2008 | 1 | * Panel decision in 2017 |
| Peru | 2010; 2015 | 2 | * Reports issued in 2012 and 2016 |
| Bahrain | 2011 | 1 | * Consultations in 2014 |
| Dominican Republic | 2011 | 1 | * Report issued in 2013 |
| Honduras | 2012 | 1 | * Monitoring and action plan adopted in 2015 |
| Colombia | 2016 | 1 | * Report issued and consultations with contact points held in 2017 |

**Source:** U.S. Department of Labor.

### Guatemala Labor Dispute

In April 2008, the AFL-CIO and six Guatemalan labor unions filed a complaint alleging that Guatemala failed to effectively enforce its labor laws with respect to freedom of association, rights to organize and bargain collectively, and acceptable conditions of work. The OTLA report in January 2009 raised several concerns and recommendations. The United States initiated consultations in 2010, amid concerns Guatemala had "not undertaken effective steps to correct systemic failures" in labor law enforcement. In August 2011, the United States requested establishment of an arbitral panel. It was suspended while the two sides negotiated an 18-point labor enforcement plan in April 2013. After Guatemala allegedly failed to implement the plan, the panel resumed in 2014 and issued its decision in June 2017. It found that, while Guatemala failed to enforce certain laws, the evidence did not prove it was "sustained or recurring" *and* "in a manner affecting trade," and thus did not violate FTA provisions.

## Issues for Congress

The enforcement of labor provisions has been scrutinized by some Members of Congress and labor groups as "slow and cumbersome," and relying "on the political will of governments." They call for greater monitoring and oversight of labor practices. Other analysts argue that the debate and scrutiny over labor provisions in FTAs, coupled with robust consultative mechanisms, have led to greater cooperation and helped countries to improve standards.

### U.S. FTA Partner Compliance

The effectiveness of FTAs in raising labor standards, the extent to which countries comply with labor provisions, and the most effective approaches to improve compliance are widely debated issues. In a 2014 review, the Government Accountability Office concluded that U.S. FTA partners had taken several steps to improve worker rights pursuant to FTA obligations; at the same time, concerns were raised over gaps in protections, attributed to lack of enforcement capacity and limited public awareness of petition processes. Other observers point to the success of FTAs in creating new avenues for cooperation on trade-related labor issues. More broadly, some question whether FTAs are appropriate or the most effective vehicles for addressing the cross-cutting issue of worker rights. Most experts agree technical assistance and capacity building are critical tools. Among U.S. agencies providing trade capacity building, an estimated 40% of funding went to labor issues in FY2016.

### U.S. Track Record of Enforcement

Some U.S. stakeholders contest the outcome of the dispute with Guatemala and question whether FTA dispute provisions require reforms. Critics view the number of petitions accepted for review, review delays, and only one case processed through dispute settlement, as shortcomings in U.S. practice. Other experts view the first labor dispute as an important precedent and evidence that trade-related labor issues are taken seriously by the U.S. government.

### Labor Chapters in U.S. FTAs

- **TPP: A New Template?** TPP was widely viewed as setting new precedents for U.S. FTA labor chapters. Notably, to address concerns over labor standards and enforcement, the United States had negotiated three bilateral labor plans, subject to greater monitoring and dispute settlement for the first time. While the United States is no longer a TPP party, USTR indicated TPP may serve as a baseline for proposals in future FTAs, including the NAFTA renegotiation or USMCA.
- **USMCA.** Strong labor provisions are seen as a key factor for securing Democratic congressional support for the proposed USMCA. Some Members called for major improvements to certain labor practices in Mexico, as well as stronger enforcement. USMCA incorporates a labor chapter into the main body of the agreement, which reflects key components of TPP and also covers new areas. The chapter includes footnotes clarifying some FTA language that related to the U.S. loss against Guatemala. It also has an annex committing Mexico to take legislative actions to protect the right to collective bargaining.
- **U.S.-Colombia FTA up Next?** U.S. and Colombian trade officials met recently to review implementation of the FTA, with a view to potentially "modernize" the agreement. Worker rights and unresolved issues from the OTLA report were discussed.

For more info, see CRS In Focus IF10046, *Worker Rights Provisions in Free Trade Agreements (FTAs)* and In Focus IF10645, *Dispute Settlement in U.S. Trade Agreements*.

**Cathleen D. Cimino-Isaacs**, Analyst in International Trade and Finance

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