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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), a side agreement to the 1994 North American Free Trade Agreement (NAFTA). Since then, U.S. provisions have evolved from commitments not just to enforce a country's own domestic labor laws, but also to adopt and enforce core principles of the International Labor Organization (ILO). As requested by Congress through trade promotion authority (TPA), recent U.S. FTAs also subject labor chapters to the same dispute settlement (DS) procedures as other obligations, although with minor modifications. Some Members of Congress view strong labor provisions in U.S. FTAs as an important issue and have raised concerns over FTA partner compliance with commitments and the U.S. record of enforcement. These issues were part of the debate in the renegotiation of NAFTA as the U.S.-Mexico-Canada Agreement (USMCA), which entered into force in 2020.

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 and in the eligibility criteria of unilateral trade preferences programs.

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

The U.S. has brought complaints over FTA partners' compliance with labor commitments under **five FTAs listed below**. Among these agreements, provisions subject to DS procedures and remedies may differ:

- **NAALC** provisions were subject to dispute settlement procedures separate from those applicable to the main NAFTA. NAALC aimed to settle labor complaints primarily via dialogue and consultations. If consultations were unable to resolve a complaint, certain issues could be referred to other mechanisms. The full spectrum of dispute procedures, including an arbitral panel and limited monetary penalties, applied to limited set of allegations/obligations involving: 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, were limited to ministerial consultations. USMCA procedures supersede NAALC for any future disputes involving North American partners (see below).
- **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." Parties may impose monetary penalties in limited circumstances. 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** labor chapters reflect provisions required by the "May 10th Agreement," a 2007 bipartisan deal between congressional leadership and the George W. 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 a 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." Colombia agreed in a separate bilateral labor action plan to meet certain commitments prior to FTA ratification.

Many observers expect additional labor complaints under USMCA. It revised NAFTA to include a dedicated labor chapter and reflects negotiating objectives in the latest version of TPA (enacted in 2015). USMCA imposed additional substantive commitments that go beyond the Peru and Colombia FTAs and created a new enforcement mechanism for labor violations at facilities (see below).

Summary of U.S. Labor Disputes

The Office of Trade and Labor Affairs (OTLA) within the U.S. Department of Labor's Bureau of International Labor Affairs 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. Per OTLA, a 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 does a review and issues a public report with its findings and

recommendations to the FTA partner. 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 accepted and issued reviews for 13 (**Table 1**). Canada and Mexico also have processed complaints against the United States. Among U.S. FTAs with labor chapters, OTLA has issued seven reviews involving six countries. The Guatemala dispute led to 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. U.S. Labor Submissions Reviewed by OTLA

Country	Filed	Petitions	Status
Mexico	1994-2015	13	* 12 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.

Notes: For Mexico, one DOL report covered two submissions.

Guatemala Labor Dispute

In 2008, the AFL-CIO and six Guatemalan labor unions filed a complaint under CAFTA-DR 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. USTR and DOL initiated consultations in 2010, amid concerns Guatemala had "not undertaken effective steps to correct systemic failures" in labor law enforcement, and then in 2011, requested establishment of an arbitral panel. Panel proceedings were 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

Some Members of Congress and labor groups have scrutinized enforcement of labor provisions as "slow and cumbersome," and relying "on the political will of governments." They call for more monitoring and oversight of labor practices of U.S. FTA partners. Other countries and labor groups also have expressed concerns regarding some U.S. practices and lack of adherence to labor commitments, such as Mexican concerns over U.S. protections for migrant workers. 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, and the most effective approaches to improve compliance are widely debated. In a 2014 review, the GAO 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 9% of funding went to trade-related labor issues in FY2018; this compared to a 20% share in FY2017.

U.S. Track Record of Enforcement

Some U.S. stakeholders contest the outcome of the dispute with Guatemala, and some maintain FTA dispute provisions require reform. Broadly, 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. Others view the first labor dispute as an important precedent and evidence that trade-related labor issues are taken seriously by the U.S. government.

Evolving Labor Chapters and Enforcement in FTAs

Given that USMCA establishes new labor provisions and enforcement mechanisms, some question whether it will serve as a new U.S. FTA template. Strong labor provisions were a key factor for securing Democratic congressional support, amid calls for improvements to Mexican labor practices and enforcement. Key features include an annex that commits Mexico to enact legislative action in regard to its labor laws on collective bargaining. The labor chapter also includes new text clarifying language that related to the U.S. loss against Guatemala. Notably, USMCA shifts the burden of proof by creating a rebuttable presumption that an alleged violation of labor commitments affects trade and investment, unless demonstrated otherwise. Changes to overall USMCA DS provisions also aim to prevent panel blocking in dispute cases. Further, a new "rapid response" mechanism provides for an independent panel to investigate alleged denial of certain labor rights at "covered facilities," with the potential to block imports. Some observers expect these changes to spur new complaints, but questions remain on the mechanism's implementation. DOL has reportedly received a few petitions filed under the USMCA labor chapter; further action has not occurred to date.

For more information, see CRS In Focus IF10046, *Worker Rights Provisions in Free Trade Agreements (FTAs)*; CRS In Focus IF11308, *USMCA: Labor Provisions*; and CRS In Focus IF10645, *Dispute Settlement in the WTO and U.S. Trade Agreements*.

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