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Overview of Labor Enforcement Issues in Free Trade Agreements

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Summary

Since 1993, the Administration has negotiated and Congress has approved 13 free trade agreements (FTAs) with labor provisions, and is considering additional FTAs. Based on similarity of language, these FTAs can be sorted into four groups, or "models," which have evolved to contain successively greater levels of enforceability. This report first identifies the enforceable labor provisions in each model. Second, it identifies two types of labor enforcement issues: (1) those that relate to the FTA provisions themselves, including their definitions and their enforceability, and (2) those that relate to executive branch responsibilities, such as resource availability and determining dispute settlement case priorities. This report does not address other labor issues in the various free trade agreements, including cooperative consultation and capacity-building provisions.

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Background

The inclusion of enforceable labor provisions—that is, those subject to dispute resolution procedures—in various trade agreement authorities and related reciprocal trade agreements has evolved over time.[1] At first, U.S. trade policy focused on lowering tariffs on goods. It was later extended to various types of nontariff barriers.

Labor principles and standards are not subject to World Trade Organization (WTO) rules and disciplines. The International Labor Organization (ILO), an arm of the United Nations founded in 1919, is the multilateral organization with responsibility for labor issues. For nearly 90 years, the ILO has been working to create, through adoption at its annual International Labor Conferences of Member countries, *Conventions*, which set international standards.

The ILO has adopted at least 183 Conventions, eight of which define four "core labor" principles. This occurred when first, a U.N. Social Summit in Copenhagen, Denmark, in 1995 declared that four categories of principles and rights at work are fundamental: (1) freedom of association and collective bargaining; (2) the elimination of forced labor; (3) the elimination of child labor; and (4) the elimination of discrimination in respect of employment and occupation.[2] The ILO then responded by pulling these together as the 1998 *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*. The *Declaration* commits all ILO Member States, whether or not they have ratified the specific conventions, to respect the labor principles in these four key areas. *The Follow-Up*, among other things, calls for reports by developing countries that have not ratified one or more of the core Conventions, on the status of their implementation of the various rights.[3]

The United States had unilaterally promoted the development of "internationally recognized worker rights," principles similar to those in the *ILO Declaration,* through its trade preference laws for developing countries. These trade preference laws cover five main programs: the *Generalized System of Preferences* (GSP), 1975; the *Caribbean Basin Initiative* (CBI), 1983; the *Andean Trade Preference Act* (ATPA), 1991; the *African Growth and Opportunity Act* (AGOA), 2000; and *the Haiti Opportunity through Partnership Act* (HOPE), 2006. These laws all require that as a condition of obtaining and maintaining program eligibility, beneficiary countries must take steps to afford their workers "*internationally recognized worker rights*." These rights are listed in *Trade Act of 1974,* as amended (Section 507), as similar to ILO core labor principles listed above, except the U.S. list substitutes for the fourth principle listed above: "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."[4]

In 1996, backed by the United States and other developed countries, the then-124-member WTO debated whether to form a committee to look into the relationship between trade and labor standards. Developing countries, in the majority, argued that the issue had no place in the WTO framework; was little more than a smokescreen for protectionism; and was a bid by industrial

[1] Trade promotion authority refers to presidential authority to enter into trade agreements that Congress considers under expedited procedures (most recently in Title XXI of the *Trade Act of 2002*, P.L. 107-210). For more information, see CRS Report RL33743, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*.

[2] United Nations World Summit for Social Development, Copenhagen. March 6-12. 1995.

[3] *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up: About the Declaration*. From the ILO website, at http://www.ilo.org.

[4] See Trade Act of 1974 (P.L. 93-618 as amended), Sec. 507 (4)(E).

nations to undermine the comparative advantage of lower-wage trading partners.[5] Ultimately they prevailed. The Singapore Ministerial Declaration, reporting on what they decided, stated that the ILO (rather than the WTO) would be the "competent body to set and deal with ... internationally recognized core labor standards."[6] The ILO has no enforcement tools, but rather promotes labor standards through consensus, moral suasion, and technical assistance.

Inclusion of labor provisions in bilateral U.S. trade agreements has evolved. The first two U.S. FTAs with Israel, 1985, and Canada, 1988, did not include labor provisions. This pattern began to change after 1993, when a number of factors came into play. First, the United States began to undertake FTA negotiations with lesser-developed countries. Second, it became increasingly accepted that labor issues were related to trade and trade policy. Third, consensus broadened that globalization had both costs and benefits. The benefits tend to be broadly dispersed and include relatively higher economic growth and productivity and greater access to lower-priced goods. The costs tend to be concentrated in import-competing sectors where there may be downward pressure on wages and job displacement. In developing countries, pressures to become a low-cost producer can lead to diminished working conditions and diminished worker rights. Fourth, business groups have increasingly been willing to make some concessions to labor groups in order to promote trade agreements and pave the way for greater trade with and investment in developing countries.

Labor Enforcement in U.S. Free Trade Agreements

Since 1993, the United States has negotiated 13 FTAs that include 19 countries.[7] [8] These are, chronologically, the North American Free Trade Agreement (NAFTA) with Mexico and Canada; bilateral agreements with Jordan, Chile, Singapore, Australia, Morocco, Bahrain, and Oman; a regional agreement known as CAFTA-DR, with the Dominican Republic and the five Central American Countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua); and bilateral FTAs with Peru, Colombia, Panama, and South Korea. The last four agreements reflect a bipartisan compromise on labor language as delineated in the "Bipartisan Trade Deal" (popularly known as the "May 10th Agreement,") jointly agreed to between the leadership in Congress and the Administration on May 10, 2007. This agreement calls for, among other things, several additional labor provisions in FTAs including: (1) a fully enforceable commitment that FTA countries will adopt, maintain, and enforce in their laws and practice, the basic international labor standards as stated in the 1998 *ILO Declaration;* and (2) the use of identical enforcement provisions for labor and the other provisions in the agreements. Labor and enforcement provisions in these various trade agreements can be categorized into four different models.

Model 1: NAFTA

For *NAFTA*, labor provisions are included in the *North American Agreement on Labor Cooperation (NAALC)*, a side agreement, rather than in the main agreement. Under NAALC, countries agree to enforce their own labor laws and standards. However, under NAALC, the only

[5] World Trade Organization, *Singapore Ministerial Declaration*, adopted December 13, 1996, Sec. 4, Core Labour Standards.

[6] See WTO press brief on Trade and Labour Standards, http://www.wto.org/english/thewto_e/minist_e/min96_e/labstand.htm.

[7] The U.S.-Israel Free Trade Agreement, which went into effect in 1985, did not contain any labor provisions.

[8] For information on trade promotion authority under which these FTAs were negotiated and approved by Congress, see CRS Report RL33743, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, by Ian F. Fergusson.

provision enforceable with sanctions is a Party's "persistent pattern of failure ... to effectively enforce its occupational safety and health, child labor or minimum wage technical standards," where that failure is trade-related and covered by mutually recognized labor laws (Article 29). By comparison, all provisions relating to commercial operations are enforceable under the *NAFTA*. Furthermore, the labor side agreement has different enforcement procedures than does the main agreement, and places limits on monetary enforcement assessments, with suspension of benefits for noncompliance.

Model 2: Jordan

In the *U.S.-Jordan Free Trade Agreement*, labor provisions and commercial provisions share the same dispute resolution procedures. Among labor provisions, each Party agrees to "not fail to effectively enforce its labor laws ... in a manner affecting trade" (Article 6.4). Under the *Jordan* agreement, labor laws are defined as U.S. *internationally recognized worker rights*. All labor provisions and commercial provisions are equally enforceable. If the dispute is not resolved under procedures specified, the affected Party shall be entitled to take "any appropriate and commensurate measure" (Article 17.2(b)). However, in an exchange of letters between the USTR Robert Zoellick and Jordanian Ambassador Marwan Muasher before Congress considered the implementing legislation in 2001, the governments reportedly agreed to resolve any potential disputes without resorting to trade sanctions.[9]

Model 3: Seven FTAs

Seven trade agreements with 12 different countries (Chile, Singapore, Australia, Morocco, Bahrain, Oman, and the six CAFTA-DR countries) include only one enforceable labor provision: each country "shall not fail to effectively enforce its labor laws ... in a manner affecting trade between the Parties." The agreements define *labor laws* as "a Party's statutes or regulations ... that are directly related to" the list of U.S. *internationally recognized worker rights*. All provisions in these agreements relating to commercial operations are enforceable. The seven trade agreements share many of the same procedures for labor and commercial disputes. Procedures for labor disputes place limits on monetary penalties, whereas those for commercial disputes do not. Suspension of benefits is a "last recourse" option for both types of disputes.

Model 4: May 10th Agreement

Four FTAs

On May 10, 2007, the bipartisan leadership in Congress and the Administration agreed to a *Bipartisan Trade Deal* to include, among other things, provisions in pending FTAs: with Peru, Colombia, Panama, and South Korea. These are (1) a fully enforceable commitment that Parties to free trade agreements would adopt and maintain in their laws and practices the *ILO Declaration*; (2) a fully enforceable commitment prohibiting FTA countries from lowering their labor standards; (3) new limitations on "prosecutorial" and "enforcement" discretion (i.e., countries cannot defend failure to enforce laws related to the five basic core labor standards on the basis of resource limitations or decisions to prioritize other enforcement issues); and (4) the

[9] Governments: "would not expect or intend to apply the Agreement's dispute settlement enforcement procedures … in a manner that results in blocking trade." Jordan Free Trade Agreement Approved by Finance and Ways and Means, *Inside U.S. Trade*, July 27, 2001.

same dispute settlement mechanisms or penalties available for other FTA obligations (such as commercial interests).[10]

The four concepts were incorporated into all four agreements in virtually identical form. The language appears to limit item (1) in the May 10th Agreement, described above, by including two footnotes to the key provision: that each Party shall adopt and maintain in its statutes, regulations, and practices, the *rights* as stated in the *ILO Declaration and its Follow-Up*. The first footnote limits obligations of Parties to those specified in the *ILO Declaration* (i.e., without also including the *Follow-Up*). The second footnote requires that a party seeking to challenge violations must demonstrate that the failure to adopt or maintain ILO core labor principles has been "in a manner affecting *either* trade *or* investment between the two countries."[11] In Model 4 resolution of disputes may involve monetary assessments (with no dollar limits) and, if they are not paid, suspension of benefits until the non-conformity is eliminated. The most recent agreements were approved by Congress in the following implementing bills: with Peru, in 2007 (P.L. 110-138); with South Korea in 2011 (P.L. 112-41); with Panama in 2011 (P.L. 112-43); and with Colombia in 2012 (P.L. 112-42).

Proposed TPP

The Trans-Pacific Partnership Agreement (TPP), whose text was released by President Obama on November 5, 2015, includes 11 countries bordering on the Pacific Ocean. Six are already covered by previous FTAs: Australia, Canada, Chile, Mexico, Peru, and Singapore. The additional five are Brunei, Japan, Malaysia, New Zealand, and Vietnam. The TPP is based on the May 10 agreement, plus a few additional provisions designed to strengthen adherence to labor principles. Under these new provisions: (a) each country shall "adopt and maintain" statutes and regulations governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health; (b) Each party shall discourage "through initiatives it considers appropriate" the importation of goods produced in whole or in part by forced labor, including forced child labor; (c) Each party shall "endeavor to encourage" businesses to "voluntarily adopt" corporate social responsibility initiatives on labor issues "endorsed or… supported" by that party; and (d) Parties may use "corporate labor dialogue" to resolve labor issues expeditiously, to help them mutually agree on a course of action. Such actions may include "action plans" with "specific and verifiable steps," such as labor inspections, investigations, or compliance action with appropriate timeframes and independent outside verification. Previously, action plans were authorized only under dispute settlement procedures. This provision codifies an initiative to begin action plans earlier, undertaken with Colombia in advance of congressional consideration of the U.S.-Colombia FTA.

[10] Text: Congress Administration Trade Deal, *Inside U.S. Trade*, May 11, 2007; and *Trade Facts: Bipartisan Trade Deal*. Office of the USTR. Bipartisan Agreement on Trade Policy, May 2007.

[11] Labor chapter of each of the four FTAs, footnote 2.

Enforcement Issues

Based on the differences between labor and commercial FTA provisions articulated in the four models, policy issues can be divided into two categories: the differences in labor vs. commercial provisions themselves (issues 1-3 below); and the differences stemming from the agencies charged with that enforcement (issues 4 and 5 below).

1. Only Some Labor Provisions Are Enforceable

Under Models 2 and 4, all labor provisions in trade agreements are technically enforceable.[12] In Models 1 and 3, only certain labor provisions in trade agreements are enforceable. All commercial provisions in trade agreements are fully enforceable under all models. Under NAFTA, covered by Model 1, the labor side agreement, *NAALC*, as mentioned, includes one enforceable provision: a country must enforce a few of its labor standards—those relating to child labor, minimum wages, and occupational safety and health. A country is not required to enforce its laws relating to the most basic core labor rights—the right to organize and bargain collectively—issues which account for the majority of the labor submissions filed under the *NAALC*.[13] The FTAs covered by Model 3 also include only one enforceable labor provision, but it is broader in scope than that in the NAALC: countries must enforce *all* of their own laws relating to *internationally recognized worker rights* in a manner affecting trade between the Parties.

2. Different Enforcement Procedures for and Caps on Penalties for Labor Provisions

Model 1 has separate and dissimilar enforcement procedures for violation of labor as opposed to other provisions. Model 3 has relatively similar procedures for violations under both types of provisions. However, both Models 1 and 3 place caps on potential maximum monetary penalties for violation of labor provisions, but place no caps on penalties for violations of other provisions. Models 2 and 4 have a single set of enforcement procedures covering labor and other provisions and place no caps on penalties. However, as mentioned, under the Model 2, U.S.-Jordan FTA, the Parties agree to make every attempt to arrive at a mutually agreeable resolution through consultations and without application of the FTA's dispute settlement procedures.

3. Limits Placed on Scope of Definition of a Term in Labor Provisions

Labor provisions in Model 4 agreements are "fully enforceable" through the same dispute resolution procedures available for other disputes. However, a footnote limits a key labor provision—that countries adopt and maintain in their laws and practices, the rights as stated in the *ILO Declaration*. The footnote limits the scope of the definition, as mentioned, by saying, "The

[12] Under the two-page dispute settlement section in the U.S.-Jordan FTA, which includes much less detail in its procedures than do Model 4 FTAs, if the Joint Committee does not resolve the dispute within 30 days after the presentation of the panel report, the affected Party shall be entitled to take "any appropriate and commensurate measure." However, the dispute settlement, begins with language specifying that "the Parties shall make every attempt to arrive at a mutually agreeable resolution through consultations," and, as mentioned earlier, this provision was reinforced by a mutual exchange of letters between the two countries before Congress considered the implementing legislation.

[13] U.S. Department of Labor, Office of Trade and Labor Affairs.

obligations set out in Article 17.2, as they relate to the ILO, refer only to the *ILO Declaration*." This would suggest that trading Partners could be held to the principles of the *Declaration*, but not the details of the Conventions and not the *Follow-Up* procedures.[14] Some observers have raised concerns that some of the details in some of the ILO core labor standard conventions conflict with some U.S. labor laws, particularly state laws.

4. Differentials in Procedures for Considering Disputes on Labor vs. Other Provisions

Differences in the way that commercial and labor disputes are considered by the Department of Commerce (DOC) and the Department of Labor (DOL) can be summarized as follows: The DOC receives complaints about compliance with trade agreements from the Market Access and Compliance Office's Trade Compliance Center "hotline," industry groups, trade associations, Congress, U.S. Foreign Commercial Service officers, the USTR *National Trade Estimates Report*, and other sources. It uses its many resources to conduct research on compliance cases.[15] The DOL does not have a comparable "hotline," but does have procedures for receiving complaints about labor violations under a free trade agreement.[16] The DOL also states (1) that its core mission is primarily to protect the needs of U.S. workers, rather than those of other countries, which is where complaints about labor conditions related to trade agreements typically arise; and (2) that its international responsibilities include ensuring compliance with labor provisions of trade agreements and trade preference programs. The DOL receives information on foreign labor conditions from a number of sources including trade unions, Congress, Department of State labor officers at U.S. embassies, and the State Department's *Country Reports on Human Rights Practices*. The DOL, like the DOC, may take action to resolve an issue at any stage prior to dispute resolution.[17] Any case not so resolved, may be referred by the respective agency to the Office of the USTR.

5. Priorities for Disputes to be Pursued by the USTR

Labor submissions have been filed with the DOL alleging violations of the labor provisions of the FTAs involving a number of countries, including Guatemala, Bahrain, Honduras, the Dominican Republic, Mexico, and Peru. However, to date, none of these disputes has resulted in formal consultation between the USTR and a foreign government, potentially leading to dispute resolution. Two cases currently pending are: one involving Guatemala, on which negotiations are still proceeding short of formal consultation; and another involving Bahrain, on which the Department of Labor has recommended to the USTR that the United States launch formal consultations.[18]

Should a case not be resolved short of dispute resolution, the USTR must decide which cases it will pursue based on priorities. The USTR is a small operation. Entering into the dispute

[14] The United States has ratified only two of the eight ILO core labor principles, although most of their substance is covered by U.S. law.

[15] Phone conversation with Commerce Department officials February 15, 2008.

[16] Procedural guidelines for submitting complaints to the DOL, Office of Trade and Labor Affairs (OTLA) under a labor chapter of a free trade agreement are located in the Federal Register, Vol. 7, p. 245. December. 21, 2006.

[17] Phone conversation with USTR officials, April 4, 2008.

[18] *World Trade Online*, U.S., Guatemala Takes Another Stab at Resolving CAFTA Labor Fight, December 22, 2011; and DOL Report Recommends Bahrain Consultations Over FTA Labor Violation, January 3, 2013.

resolution process is a lengthy, involved, expensive process in terms of both personnel and resources. The USTR typically chooses cases to pursue based on a number of factors. These may include cases that involve clear violations, could clarify particular issues and/or be cases the USTR believes it can win, based on evidence and facts.

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