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Labor Enforcement Issues in U.S. FTAs

Background

Labor provisions in free trade agreements (FTAs)—both in the United States 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 only 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 FTA obligations, 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. Other Members question whether FTAs are appropriate or the most effective vehicle for addressing the cross-cutting issue of worker rights. 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; WTO members deferred to the ILO as the competent body to deal with such issues, while denouncing "use of labor standards for protectionist purposes." Limited progress at the WTO led to labor provisions within FTAs and in eligibility criteria of trade preferences programs.

U.S. FTAs have set precedents in terms of the scope and enforceability of labor provisions. An ILO report found as of 2019, 90 FTAs, or a third of agreements in force globally, have labor provisions. Unlike U.S. practice, the majority of these agreements do not subject labor provisions to DS; they provide a framework for dialogue, capacity building, and monitoring, rather than link violations to economic consequences, such as trade sanctions. In cases where DS is applicable, such mechanisms have been rarely invoked; countries largely aim to solve disputes via cooperative consultations.

Enforcement Mechanisms in U.S. FTAs

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

- **NAALC** provisions were subject to separate dispute settlement procedures from those applicable to the main NAFTA. NAALC aimed to settle labor complaints primarily via dialogue and consultations. Full dispute procedures, e.g., arbitral panel and limited monetary penalties, applied to a limited set of obligations or allegations 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 DS procedures supersede NAALC for labor disputes (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, aimed 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. It called for: an additional enforceable commitment that FTA parties adopt and maintain core labor principles of the 1998 ILO Declaration; and the same DS procedures and remedies for FTA labor provisions that applied to FTA 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.
- **USMCA** replaced NAFTA and includes a dedicated labor chapter, which largely reflects negotiating objectives in the latest version of TPA (TPA-2015, which expired 2021). It also imposed commitments that go beyond the U.S. FTAs with Peru and Colombia, and created a new facility-specific "rapid-response" labor mechanism for addressing certain worker rights violations. Regarding disputes, USMCA shifts the burden of proof through a presumption that an alleged violation of labor commitments affects trade and investment, unless demonstrated otherwise—this clarifying language was motivated by the U.S. dispute loss against Guatemala (see below). Changes to overall USMCA DS provisions aim to prevent a party from blocking the formation of a dispute panel.

Summary of U.S. Labor Disputes

The Office of Trade and Labor Affairs (OTLA) within the Bureau of International Labor Affairs (ILAB) of the U.S. Department of Labor (DOL) receives and reviews complaints (termed "submissions") of alleged violations of FTA labor commitments. 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...and illustrate a country's failure to comply with its obligations." If the submission is accepted, OTLA reviews and issues a public report with its findings and recommendations to the FTA partner. OTLA may recommend further actions, e.g., that the United States request bilateral consultations—if these are unsuccessful, state-state DS may be invoked.

Under NAALC, OTLA received more than 20 submissions. It accepted and issued reviews for 13 (**Table 1**). Canada and Mexico also processed complaints against the United States. Among U.S. FTAs with labor chapters, OTLA has issued seven reviews involving six countries. The 2008 Guatemala dispute led to the first formal consultations requested by the United States, although other FTA submissions resulted in ministerial (NAALC) or informal consultations. It is also the only case to undergo full DS.

Table 1. U.S. Labor Chapter Submissions Reviewed

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; contact point consultations in 2017

Source: U.S. Department of Labor, various reports.
Notes: For Mexico, one report covered two submissions. Does not include USMCA labor disputes.

In addition to state-state DS procedures, distinct from other U.S. FTAs, the USMCA "rapid response" labor mechanism provides for an independent panel to investigate alleged denial of certain labor rights at "covered facilities," with the potential to block imports for repeat offenses. Several complaints have been initiated and resolved. Five U.S. petitions against facilities in Mexico resulted in some remediation. Two U.S. petitions were filed in early 2023.

Guatemala Labor Dispute

In 2008, the AFL-CIO and Guatemalan labor unions filed a complaint under CAFTA-DR alleging that Guatemala failed to effectively enforce labor laws with respect to freedom of association, rights to organize and bargain collectively, and acceptable conditions of work. In 2010, U.S. officials initiated consultations, and in 2011 requested establishment of an arbitral panel. The panel was suspended while the two sides negotiated an 18-point labor enforcement plan. After Guatemala allegedly failed to implement the plan, the panel resumed in 2014 and issued its decision in 2017. It found that, Guatemala failed to enforce certain laws, but 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 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 commitments, such as Mexico's concerns over protections for migrant workers. Other Members and observers question whether FTAs are an appropriate vehicle for addressing worker rights, and do not fully support the use of trade sanctions as a remedy. Some analysts argue that the debate over labor provisions in FTAs, coupled with robust consultative mechanisms, have led to greater cooperation and helped improve standards.

FTA Partner Compliance. FTAs' effectiveness in raising labor standards, the extent to which countries comply, and the most effective approaches to improve compliance are debated. Some studies document that U.S. FTA partners have taken steps to improve worker rights pursuant to FTA obligations, yet concerns remain over gaps in protections, attributed to lack of enforcement capacity and limited public awareness of petition processes. Observers point to FTAs' success in creating new avenues for cooperation on trade-related labor issues. Most experts agree technical assistance and capacity building are critical tools. Among U.S. agencies providing capacity building, about 20% of funding went to trade-related labor issues in FY2020. Congress made strengthening trading partner capacity a priority in TPA and through funding, including in the USMCA Implementation Act (P.L. 116-260).

U.S. Enforcement Track Record. U.S. labor advocates contested the outcome of the Guatemala dispute and called for reforms to FTA provisions. Critics broadly view the number of petitions accepted for review, delays, and only one case processed through DS, as shortcomings in U.S. practice. Others contest this view, supporting the first labor dispute as a key precedent. Observers view the USMCA labor mechanism and USTR action to self-initiate cases as evidence the U.S. government has elevated enforcement of trade-related labor issues. ILAB's head noted that the U.S. "wants to be more engaged, more proactive, more strategic about" monitoring and enforcing FTA labor commitments. Congress may assess future priorities for disputes pursued by USTR, how revised DS mechanisms are implemented, and whether they effectively resolve labor disputes.

Evolving Labor Chapters and Enforcement. Some question whether the USMCA's new labor provisions and enforcement mechanisms will serve as a new U.S. FTA template. The Biden Administration is not pursuing comprehensive FTAs, and instead is negotiating initiatives with targeted agendas, like the Indo-Pacific Economic Framework for Prosperity (IPEF). IPEF includes a "trade pillar" with labor as a core component, but it is unclear what potential commitments may be binding or enforceable. USTR Katherine Tai has indicated IPEF may consider including some mechanism like the USMCA rapid-response mechanism. As Congress oversees implementation of FTA labor chapters and new executive-led trade initiatives, Members may consider the effectiveness of enforcement mechanisms or seek changes to underlying labor obligations within any future TPA legislation.

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