Dispute Settlement Under the U.S.-Peru Trade Promotion Agreement: An Overview

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Summary

The U.S.-Peru Trade Promotion Agreement (PTPA) follows current U.S. free trade agreement (FTA) practice in containing two types of formal dispute settlement: (1) State-State, applicable to disputes between the Parties to the PTPA, and (2) investor-State, applicable to claims by an investor of one State Party against the other State Party for breach of a PTPA investment obligation. A defending Party in a State-State dispute found to be in violation of a PTPA obligation is generally expected to remove the complained-of measure; remedies for non-compliance include compensation and the suspension of PTPA concessions or obligations (e.g., the imposition of a tariff surcharge on the defending Party's products), with the defending Party having the alternative of paying a fine to the prevailing Party or, in some cases, into a fund that may be used to assist the defending Party in complying with its obligations in the case. An investor-State tribunal may only make monetary awards to the claimant and thus may not direct a PTPA Party to withdraw or modify a violative measure. If the defending State Party does not comply with an award, the investor may seek to enforce it under one of the international conventions for the recognition and enforcement of arbitral awards to which the United States and Peru are party. State-State dispute settlement may also be initiated against the non-complying Party.

The PTPA State-State dispute settlement mechanism differs from earlier U.S. FTAs in that it applies to all obligations contained in the labor and environmental chapters of the PTPA instead of only domestic labor or environmental law enforcement obligations. In addition, in the event a Party is found to be in breach of one of these obligations and has not complied in the dispute, the prevailing Party may impose trade sanctions instead of, as under earlier agreements, being limited to requesting that a fine be imposed on the non-complying Party with the funds to be expended for labor or environmental initiatives in that Party's territory. The changes stem from a bipartisan agreement on trade policy between Congress and the Administration finalized on May 10, 2007 (May 10 agreement), setting out various provisions to be added to completed or substantially completed FTAs pending at the time. Among the aims of the agreement was to expand and further integrate labor and environmental obligations into the U.S. free trade agreement structure. The same approach to labor and environmental disputes is found in FTAs entered into with Colombia, Korea, and Panama, each of which continue to await congressional approval.

Implementing legislation approving the PTPA and providing legislative authorities needed to carry it out was signed into law on December 14, 2007 (P.L. 110-138). The agreement entered into force on February 1, 2009. A protocol of amendment revising the PTPA to incorporate provisions involving labor, the environment, intellectual property, port services, and investment, as set out in the May 10 agreement, entered into force on the same day.

To date, there have not been any disputes brought under the PTPA State-State dispute settlement mechanism. In general, resort to panels under FTA State-State dispute settlement has been uncommon, and thus there has been relatively little experience with the operation of this mechanism over a range of agreements and issues. FTA Investor-State disputes have occurred more frequently. A notice of intent to initiate an arbitration was submitted by a U.S. firm under the PTPA in late December 2010; the investor is reportedly pursuing the claim further. Claims have also been brought under the North American Free Trade Agreement (NAFTA) against each of the three agreement Parties. In addition, five claims have been filed by U.S. investors under the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA): one against the Dominican Republic, two against El Salvador, and two against Guatemala.

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Introduction

The U.S.-Peru Trade Promotion Agreement (PTPA)[1] follows current U.S. free trade agreement (FTA) practice in containing two types of formal dispute settlement: (1) State-State, applicable to disputes between the Parties to the PTPA, and (2) investor-State, applicable to claims by an investor of one Party against the other Party for breach of PTPA investment obligations.[2] Investor-State dispute settlement has been a key element of U.S. bilateral investment treaties, and with the inclusion of investment obligations in most U.S. FTAs, it has become a feature of these agreements as well.

The dispute settlement provisions of the PTPA need to be considered in tandem with other PTPA obligations to understand the extent to which measures adopted or maintained by a PTPA Party may be the subject of dispute settlement under the agreement. Exceptions to PTPA obligations are also an element in assessing the scope of obligations undertaken by each Party. For example, general exceptions contained in World Trade Organization (WTO) agreements—namely, Article XX of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article XIV of the General Agreement on Trade in Services (GATS)—are incorporated into the PTPA for purposes of obligations involving trade in goods and services.[3] The PTPA also contains an "essential security" exception, which, if invoked by a State Party in an investor-State arbitration or a general dispute settlement proceeding, will be found to apply.[4]

The United States-Peru Trade Promotion Agreement Implementation Act, which approves the PTPA and provides legislative authorities needed to carry it out, was signed into law December 14, 2007 (P.L. 110-138). The Agreement entered into force on February 1, 2009.[5] A protocol of amendment, signed June 24 and June 25, 2007, which revises the PTPA to incorporate certain provisions involving labor, the environment, intellectual property, government procurement, port security, and investment, entered into force on the same day. The additional language stems from a bipartisan agreement on trade policy between Congress and the Administration finalized on May 10, 2007 (often referred to as the May 10 agreement), setting out various provisions to be added to completed or substantially completed FTAs pending at the time.[6] Aimed at, among other

[1] The final text of the U.S.-Peru Trade Promotion Agreement (PTPA) is posted on the website of the Office of the United States Trade Representative (USTR) at http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa. For additional information on the PTPA, see CRS Report RL34108, *U.S.-Peru Economic Relations and the U.S.-Peru Trade Promotion Agreement*, by M. Angeles Villarreal, and CRS Report RS22521, *Peru Trade Promotion Agreement: Labor Issues*, by Mary Jane Bolle and M. Angeles Villarreal.

[2] The North American Free Trade Agreement (NAFTA) is unique in containing a third type of dispute settlement, applicable where one NAFTA Party undertakes an antidumping or countervailing duty investigation involving the goods of another NAFTA Party. Chapter Nineteen of the NAFTA permits a Party, either on its own accord or at the request of private party entitled to judicial review, to request that a final agency determination in a domestic antidumping or countervailing duty proceeding be reviewed by a binational panel in lieu of a court in the country in which the determination is rendered. The binational panel mechanism was originally included in the now suspended U.S.-Canada Free Trade Agreement.

[3] PTPA, Article 22.1.

[4] PTPA, Art. 22.2, n.2.

[5] Department of State, *Treaties in Force; A List of Treaties and Other International Agreements of the United States in Force on January 1, 2010*, at 219 (2010).

[6] House Ways & Means Committee summary of the May 10 agreement, at http://waysandmeans.house.gov/Media/pdf/110/05%2014%2007/05%2014%2007.pdf , and Office of the United States Trade Representative, *Trade Facts: Bipartisan Trade Deal*, May 2007, at http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf. See H.Rept. 110-421, at 1-7, for a discussion of the May 10 agreement and the (continued...)

things, expanding and further integrating labor and environmental obligations into the FTA structure, the May 10 agreement provides that labor and environmental obligations in an FTA are to be subject to the same general dispute settlement provisions, enforcement mechanisms, and remedies for non-compliance as the agreement's commercial obligations. The same approach to labor and environmental disputes is found in U.S. free trade agreements with Colombia, Korea, and Panama, each of which continue to await approval by Congress.[7]

To date, there have been no disputes brought under the PTPA State-State dispute settlement mechanism. In general, resort to panels under FTA State-State dispute settlement has been uncommon and thus there has been relatively little experience with the operation of this mechanism over a range of agreements and issues.[8] This may be the case because of FTA consultative arrangements that facilitate the informal resolution of disputes or questions over the

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incorporation of its principles into various chapters of the U.S.-Peru Trade Promotion Agreement. See also Office of the USTR, Statement from Ambassador Susan C. Schwab on U.S. trade agenda, [May 10, 2007], at http://www.ustr.gov/about-us/press-office/press-releases/archives/2007/may/statement-ambassador-susan-c-schwab-us-trade-, and *Administration Drafting Legal Text to for Labor/Environment Deal with Congress*, 24 Int'l Trade Rep. (BNA) 675 (May 17, 2007).

[7] For further information on these agreements, see CRS Report RL34470, *Proposed U.S.-Colombia Free Trade Agreement: Background and Issues*, by M. Angeles Villarreal; CRS Report RL34330, *The Proposed U.S.-South Korea Free Trade Agreement (KORUS FTA): Provisions and Implications*, coordinated by William H. Cooper; CRS Report RL32540, *The Proposed U.S.-Panama Free Trade Agreement*, by J. F. Hornbeck. For further discussion of congressional approval requirements, see CRS Report 97-896, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than as Treaties*, by Jeanne J. Grimmett.

[8] Five panel reports were issued under the general dispute settlement provisions of the currently suspended U.S.-Canada Free Trade Agreement (Chapter Eighteen) during the five years that the agreement was operative between the two Parties prior to the entry into force of the NAFTA. In the 17 years that the NAFTA has been in force, only three panel reports have been issued under the agreement's general dispute settlement chapter (Chapter Twenty). For a discussion of difficulties that the United States has faced in implementing the adverse NAFTA panel report in the U.S.-Mexico trucking dispute, a report finding that the U.S. blanket refusal to process applications of Mexican trucks to operate in the United States violated U.S. NAFTA obligations, see CRS Report RL31738, *North American Free Trade Agreement (NAFTA) Implementation: The Future of Commercial Trucking Across the Mexican Border*, by John Frittelli. Panel reports issued under the U.S.-Canada FTA and the NAFTA are available at the website of the NAFTA Secretariat at http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312. No panels have been convened to date under the State-State dispute settlement provisions of U.S. FTAs other than the U.S.-Canada FTA and the NAFTA.

On July 30, 2010, the USTR requested consultations with Guatemala under the labor chapter of the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA) regarding what USTR deemed to be the apparent failure by Guatemala to effectively enforce its labor laws as required under Article 16.2.1(a) of the agreement, a step that could ultimately result in the initiation of a DR-CAFTA dispute settlement proceeding. Press Release, Office of the USTR, USTR Kirk Announces Labor Rights Trade Enforcement Case Against Guatemala (July 30, 2010), at http://www.ustr.gov/about-us/press-office/press-releases/2010/july/united-states-trade-representative-kirk-announces-lab. Because the initial consultation period did not result in a resolution of the matter to the satisfaction of the United States, the USTR, on May 16, 2011, requested a meeting of the DR-CAFTA Free Trade Commission (FTC), effectively initiating dispute settlement proceedings under Chapter Twenty of the agreement. Press Release, Office of the USTR, USTR Kirk Seeks Enforcement of Labor Laws in Guatemala (May 16, 2011), at http://www.ustr.gov/about-us/press-office/press-releases/2011/may/ustr-kirk-seeks-enforcement-labor-laws-guatemala. The FTC, which is composed of cabinet-level representatives of the DR-CAFTA Parties or their designees, is generally expected to convene within 10 days and to "endeavor to resolve the dispute promptly." DR-CAFTA, art. 20.5.4. If the disputing Parties fail to resolve the dispute within 30 days after the FTC convenes or within another period that the disputing Parties agree upon, the United States may request the establishment of an arbitral panel. DR-CAFTA, art. 20.6.1. A July 2010 labor union submission to the Department of Labor seeking review of the alleged failure of the government of Costa Rica to effectively enforce its labor laws was reportedly withdrawn in April 2011, resulting in the department's closure of the case. See *id.*; *DOL Closes Costa Rica Labor Case After Union Withdraws Petition*, INSIDE U.S. TRADE, May 6, 2011, at 16; *US Drops Costa Rica Labor Case*, WASHINGTON TRADE DAILY, May 6, 2011, at 4.

scope of an agreement or its application in a particular instance before resort to more structured dispute settlement procedures is considered necessary. In addition, WTO dispute settlement is generally available where a dispute arises under both a WTO agreement and an FTA.[9]

Investor-State claims under FTAs have been relatively more common. A notice of intent to initiate an arbitration under the PTPA was submitted by the U.S. firm Renco Group, Inc., in late December 2010. The firm, which alleges that Peru violated investment agreements and PTPA investment obligations with regard to its treatment of a metallurgical smeltering and refining operation run by a Renco affiliate in Peru, is reportedly further pursuing its arbitral claim.[10] Investor-State claims have been the most prevalent under the North American Free Trade Agreement (NAFTA), with cases brought against each of the three agreement Parties; in addition, five cases have been filed by U.S. investors under the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA): one against the Dominican Republic, two against El Salvador, and two against Guatemala.[11] To date, no investor-State claims have been filed under other U.S. FTAs.[12]

[9] U.S. FTAs, including the PTPA, generally have a "choice of forum" provision for such cases, permitting the complainant to select the trade agreement under which it wishes to resolve its dispute. See, e.g., PTPA, Art. 21.3. If a NAFTA Party initially chooses to pursue a case in the WTO, however, the NAFTA permits the defending Party, in certain cases, to seek resolution of the dispute under NAFTA dispute settlement procedures. NAFTA, Art. 2005. For further information on WTO dispute settlement procedures, see CRS Report RS20088, *Dispute Settlement in the World Trade Organization (WTO): An Overview*, by Jeanne J. Grimmett.

[10] Renco Group, Inc. v. Republic of Peru, Claimant's Notice of Intent to Commence Arbitration Under United States-Peru Trade Promotion Agreement, at http://ita.law.uvic.ca/documents/RencoGroupVPeru_NOI.pdf; *Renco Commences Arbitration Against Peru in First Case Under U.S. FTA*, INSIDE U.S. TRADE, April 8, 2011; *Renco asks for arbitration with Peru over Doe Run*, REUTERS, April 13, 2011, at http://www.reuters.com/article/2011/04/14/metals-peru-doerun-idUSN138992720110414.

[11] For information on NAFTA investor-State disputes, see the U.S. Department of State website, *NAFTA Investor-State Arbitrations*, at http://www.state.gov/s/l/c3439.htm. For information on DR-CAFTA disputes, see the U.S. Department of State website, *CAFTA-DR Investor-State Arbitrations*, at http://www.state.gov/s/l/c33165.htm; see also TECO Guatemala Holdings, LLC v. Republic of Guatemala (ICSID Case No. ARB/10/23), at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending; Dep't of State, *2011 Investment Climate Statement—Guatemala*, "Dispute Settlement" (March 2011), at http://www.state.gov/e/eeb/rls/othr/ics/2011/157286.htm http://www.state.gov/e/eeb/rls/othr/ics/2011/157286.htm. One of the arbitrations involving El Salvador, *Commerce Group Corp. v. Republic of El Salvador*, was dismissed by the arbitral panel in March 2011 on jurisdictional grounds due to the fact that the complaining U.S. investors had not terminated related domestic court proceedings in El Salvador as required in the DR-CAFTA. *Arbitration Panel Dismisses CAFTA-DR Case Against El Salvador Over Investment Provision*, 28 Int'l Trade Rep. (BNA) 506 (March 24, 2011). The case was heard under the rules of the International Center for the Settlement of Disputes (ICSID); the award, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17 (March 14, 2011), is available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1971_En&caseId=C741.

[12] Investor-State dispute settlement is also contained in U.S. FTAs with Chile, Singapore, Morocco, and Oman. While the U.S.-Australia FTA contains investment obligations, it does not provide for investor-State dispute settlement. Neither the U.S.-Jordan FTA nor the U.S.-Bahrain FTA contains an investment chapter; instead, bilateral investment treaties (BITs) are in force between the parties. The U.S.-Israel FTA, the earliest U.S. free trade agreement, does not contain an investment article; to date, the United States and Israel have not entered into a BIT.

State-State Dispute Settlement (Chapter Twenty-One)

State-State or general dispute settlement is set out in Chapter Twenty-One of the PTPA, which applies to disputes involving the interpretation or application of the Agreement or wherever a Party considers (1) that an actual or proposed measure of the other Party is or would be inconsistent with the PTPA, (2) that the other Party has violated the PTPA, or (3) that one or more of enumerated PTPA benefits owed it by the other Party—for example, a tariff reduction—is being nullified or impaired by a measure of the other Party that not inconsistent with the agreement.

Initial Consultations

Dispute settlement begins with a consultation request by the complaining Party, to which the other Party must promptly respond.[13] During such consultations, each Party is expected to provided "sufficient information to enable a full examination of how the actual or proposed measure or other matter may affect the operation and application" of the PTPA.

Cabinet-Level Consultations

If the dispute is not resolved within 60 days of the initial request (15 days for matters involving perishable products) or another period that the Parties may agree upon, either Party may request a meeting of the U.S.-Peru Free Trade Commission, an administrative body established under the agreement consisting of cabinet-level officials of the Parties or their designees.[14] If the Commission decides to convene, its aim is to promptly resolve the dispute. To assist the Parties in doing so, the Commission may:

(a) call on such technical advisers or create such working groups or expert groups as it deems necessary;

(b) have recourse to good offices, conciliation, or mediation;

(c) make recommendations.[15]

Panels

If the consulting Parties fail to resolve a matter within 30 days after the Commission has convened, or if the Commission has decided not to convene, within 75 days after the initial request for consultations (30 days if perishable goods are concerned), or another agreed-upon period, any consulting Party that participated in or requested a meeting of the Commission, may request that an arbitral panel be established. An arbitral panel is automatically established upon delivery of a request to the other Party.

[13] PTPA, Art. 21.4.

[14] PTPA, Art. 21.5. Regarding the Commission, see PTPA, Art. 20.1, Annex 20.1, Art. 21.5, n.1.

[15] PTPA, Art. 21.5.4.

Panels consist of three members. The complaining and defending Parties appoint one panelist each. If either fails to do so, the panelist is to be selected by lot from the roster of panelists established under the agreement.[16] The Parties are expected to agree on a third panelist to chair the panel, but if they cannot agree, the chair will be selected by lot from roster members who are not nationals of either of the disputing Parties. Panel selection is subject to timelines set out in the agreement.

Unless the disputing Parties agree otherwise, the panel is to present its initial report to the disputing parties within 120 days after the last panelist is selected. The report is to contain (1) findings of facts and (2) the panel's determination as to whether a disputing Party is in compliance with its PTPA obligations, or whether a measure is causing nullification or impairment of PTPA benefits, as the case may be (or any other panel determination that has been requested). The report must also contain recommendations for resolving the dispute if requested by the Parties. After considering any written comments or requests for clarifications by the Parties, the panel will issue its final report. The final report is due 30 days after the initial report is presented unless the Parties agree otherwise.

Implementation/Remedies for Non-Compliance

On receiving the final report, the disputing Parties are to agree on the resolution of the dispute, which should normally conform with the panel's findings and recommendations. If the panel has found that the defending Party "has not conformed" with its PTPA obligations, the resolution, "wherever possible, shall be to eliminate the non-conformity."[17] This would presumably occur by the defending Party's withdrawing or modifying the challenged law, regulation, or practice, but the Parties could possibly agree to another solution.[18] Compensation, suspension of benefits, and annual monetary assessments are allowed as temporary measures pending full compliance.[19]

For purposes of U.S. law, dispute settlement results under trade agreements are considered to be non-self-executing and thus, where a federal law or regulation is faulted and the executive branch does not have sufficient delegated authority to act, legislation would be needed to comply.[20]

[16] Article 21.7 requires the Parties to establish and maintain "an indicative roster of individuals who are willing an able to serve as panelists." Three members of the roster are to be nationals of the United States; three members, nationals of Peru; and two members, not nationals of either Party. Qualifications for panelists are set out at Article 21.8 of the PTPA. See generally Free Trade Agreements; Invitation for Applications for Inclusion on Dispute Settlement Rosters for the U.S.-Chile Free Trade Agreement ("FTA"), the Dominican Republic-Central America-United States FTA, the North American FTA, and the U.S.-Peru Trade Promotion Agreement, 75 Fed. Reg. 4607 (January 28, 2010).

[17] PTPA, Art. 21.15.2.

[18] Cf. David A. Gantz, *Settlement of Disputes under the Central America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. INT'L & COMP. L. REV. 331, 400 (2007)(discusses identical language in the CAFTA)[hereinafter Gantz].

[19] PTPA, Art. 21.16.9.

[20] Note § 102(a) of the United States-Peru Trade Promotion Agreement Implementation Act (PTPA Implementation Act), P.L. 110-138, 19 U.S.C. § 3805 note, stating that "No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect." See also § 102(b) of the statute regarding the relationship of the PTPA to state law.

Compensation and Suspension of Benefits

If the defending Party needs to take action and the disputing Parties cannot agree on resolving the dispute within 45 days after receiving the final report (or within another agreed-upon period), the defending Party must enter into compensation negotiations with the complainant. If the Parties cannot agree on compensation within 30 days, or if they have agreed on compensation or a means of resolving the dispute and the defending Party has not complied with the agreement, the complaining Party may suspend benefits "of equivalent effect," for example, impose tariff surcharges on selected imports from the defending Party in the appropriate amount. The complaining Party must notify the defending Party of its intent, including the amount of proposed retaliation.

If the defending Party believes that the amount is "manifestly excessive," or believes that it has complied in the dispute, it may ask the panel to reconvene to consider these issues.[21] If the panel determines that the proposed suspension of benefits is excessive, it must determine the proper level of retaliation. The complaining Party may suspend benefits up to this level, or if the amount has not been arbitrated, the level that it originally proposed, unless the defending Party has been found to be in compliance.

Annual Monetary Assessments (Fines)

The complaining Party may not suspend benefits if the defending Party notifies the complainant by a given date that it will pay an "annual monetary assessment" or fine. The disputing Parties are to consult on the amount, but if they are unable to agree within 30 days, the fine will be set at the level permitted under the agreement. This is a level, in U.S. dollars, equal to 50% of the level of benefits the panel has determined to be proper or, if there has not been a panel determination, 50% of the amount originally proposed by the complaining Party.[22]

The assessment is to paid to the complaining Party in equal quarterly installments, unless the Free Trade Commission decides instead that the assessment is to be paid into a fund and expended at the Commission's direction "for appropriate initiatives to facilitate trade between the disputing Parties including by further reducing unreasonable trade barriers or by assisting a disputing Party in carrying out its obligations under this Agreement."[23] If the defending Party does not pay the assessment, the complaining Party may suspend agreement benefits as proposed or arbitrated, as the case may be.

Compliance Review after Sanctions or Fine Instituted

As explained above, the defending Party has a right to a compliance determination by a panel before the prevailing Party imposes sanctions or the defending Party begins paying a fine. In addition, the defending Party may also seek a compliance panel after either of these actions occur if the defending Party later believes that it has complied in the proceeding.[24] The panel is to issue its report within 90 days after the defending Party notifies the complaining Party of its panel

[21] PTPA, Art. 21.16.3

[22] PTPA, Art. 21.16.6.

[23] PTPA, Art. 21.16.7.

[24] PTPA, Art. 21.17.

request. If the panel decides in favor of the defending Party, the complaining Party must promptly terminate any trade retaliation and the defending Party will no longer be under an obligation to pay any monetary assessment it has agreed to.

No Private Rights of Action

The PTPA prohibits a Party from providing a private right of action under its domestic law against the other Party on the ground that the latter has failed to conform with its PTPA obligations.

As has been the practice with past FTAs, the PTPA implementing legislation precludes private rights of action under the PTPA or private rights of action based on congressional approval of the agreement.[25] The statute also prohibits persons other than the United States from challenging any action or inaction by a U.S. federal, state, or local agency on the ground that the action or inaction is inconsistent with the PTPA.

Labor and Environmental Disputes

Due to its incorporation of principles set out in the inter-branch "May 10 agreement," the PTPA differs from earlier FTAs with labor and environment chapters in containing additional labor and environmental obligations, not restricting its general dispute settlement procedures to specified provisions of its labor and environmental chapters, and not limiting the remedy for non-compliance with an adverse panel report to the payment of an annual monetary assessment, that is, a fine by the defending Party.[26]

Labor Disputes

As noted, the PTPA adds to the substantive labor obligations contained in earlier FTAs and, makes its State-State dispute settlement procedures generally applicable to disputes arising under, its labor chapter. While the PTPA, like earlier FTAs, requires each Party to "not fail to effectively enforce its labor laws ... in a manner affecting trade or investment between the Parties ... ,"[27] the PTPA further requires that each Party "adopt and maintain in its statutes and regulations, and practices" enumerated labor rights as stated in the 1998 International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work.[28] To establish a violation of this obligation, however, a Party must also show that bilateral trade or investment is affected.[29] The PTPA also requires Parties not to waive or otherwise derogate from ILO-related implementing measures in a manner affecting bilateral trade or investment, where the derogation would be inconsistent with a fundamental labor right,[30] and includes within its domestic labor law

[25] PTPA Implementation Act, P.L. 110-138, § 102(c), 19 U.S.C. § 3805 note. See also H.Rep. 100-421, at 9.

[26] An example of contrasting earlier provisions may be found in the DR-CAFTA at Articles 16.6.7, 17.10.7, and 20.17.1.

[27] PTPA, Art. 17.3.1.

[28] PTPA, Art. 17.2.1.

[29] PTPA, Art. 17.2, n.1.

[30] PTPA, Art. 17.2.2.

enforcement requirement laws adopted or maintained in accordance with the new ILO-related provision.[31]

While most earlier FTAs allowed general dispute settlement procedures to be initiated only with regard to their labor law enforcement requirement, PTPA general dispute procedures apply to disputes arising under Chapter Seventeen, the agreement's labor chapter, without such a limitation. As under earlier agreements, a Party must first seek to resolve a labor issue under the labor chapter's consultation provisions before it may invoke general PTPA dispute settlement provisions.[32] Chapter Seventeen consultations provide for initial discussions between the Parties and subsequent assistance, if needed, from the bilateral Labor Affairs Council established under agreement.[33] If the Parties fail to resolve a dispute within 60 days after Chapter Seventeen consultations are requested, the complaining Party may seek consultations or a meeting of the U.S.-Peru Free Trade Commission under the general dispute settlement chapter and, following this, may invoke the rest of the chapter.

Unlike most earlier FTAs with labor chapters, the prevailing Party in a PTPA dispute is not initially limited to seeking the payment of an annual monetary assessment or fine by the defending Party in the event the defending Party has not complied with its obligations in the case. Fines under these earlier agreements are imposed by the panel and are ordinarily capped at $15 million annually, adjusted for inflation. The fine is to be paid into a fund administered by representatives of the disputing Parties for distribution to the non-complying Party for labor initiatives, including efforts to improve labor law enforcement in its territory. The prevailing Party has a right to impose trade sanctions under these earlier agreements, however, if the defending Party fails to pay the monetary assessment.

Because the general dispute settlement procedures of the PTPA apply to labor disputes to the same extent as disputes over commercial obligations, the prevailing Party in a dispute may initially impose trade sanctions on the non-complying Party based on the value of the dispute. As noted earlier, where a prevailing PTPA Party does propose trade sanctions, the defending Party has the option of paying an annual monetary assessment to the prevailing Party, or, if the Parties agree, to a fund that would distribute funds to the defending Party to facilitate compliance with its obligations in the case.

Environmental Disputes

As is the case with labor issues, the PTPA differs from earlier FTAs with respect to substantive environmental obligations as well as the extent to which its general dispute settlement procedures apply to environmental disputes. Like earlier FTAs, the PTPA requires each Party to "not fail to effectively enforce its environmental laws ... in a manner affecting trade or investment between the Parties...."[34] It also places a new requirement on each Party to "adopt, maintain, and implement laws, regulations and all other measures to fulfill its obligations" under listed multilateral environmental agreements (MEAs), and includes laws implementing the MEAs within its domestic enforcement obligation.[35] To establish a violation of the MEA implementation

[31] PTPA, Art. 17.3.1(a).

[32] PTPA, Art. 17.7.7.

[33] PTPA, Arts. 17.7.3-17.7.5.

[34] PTPA, Art. 18.3.1.

[35] PTPA, Art. 18.2. Listed MEAs are the Convention on International Trade in Endangered Species, the Montreal (continued...)

requirement, however, the complaining Party must also demonstrate that the other Party has failed to act in a manner affecting bilateral trade or investment.[36]

Chapter Twenty-One dispute settlement procedures generally apply to disputes arising under Chapter Eighteen, the agreement's environment chapter, but in any such case, the complaining Party may not resort to Chapter Twenty-One procedures unless it first seeks to resolve the matter under the environment chapter's consultation provisions.[37] Chapter Eighteen consultations provide for initial discussions between the Parties, subsequent assistance, if needed, from the bilateral Environmental Affairs Council established under agreement, and, where a dispute involves obligations under an MEA, coordination with any relevant MEA mechanisms.[38] If the Parties fail to resolve a dispute within 60 days of the initial Chapter Eighteen consultation request, the complaining Party may seek consultations or a meeting of the U.S.-Peru Free Trade Commission under Chapter Twenty-One, and may then proceed under the other provisions of the chapter if it so chooses.

If a dispute panel is convened and the dispute involves an obligation under a covered multilateral environmental agreement, the panel must follow specified directions in making its findings and determination as to whether the defending Member is in compliance with its PTPA environmental obligations.[39] For example, where the MEA "admits of more than one permissible interpretation relevant to an issue in the dispute and the Party complained against relies on one such interpretation," the panel is to accept that interpretation for purposes of its findings and determination.[40]

Unlike most earlier FTAs with environment chapters, the prevailing Party in a dispute is not initially limited to seeking the payment of a fine by the defending Party in the event the defending Party has not complied with its obligations in the case. As in labor disputes, such fines are imposed by the panel and ordinarily capped at $15 million annually, adjustable for inflation. The fine is paid into a fund for distribution to the defending Party to assist it in complying with its agreement obligations. The prevailing Party may impose sanctions under these agreements, however, if the defending Party has not paid the fine that has been assessed.

Because general dispute settlement procedures apply to environmental disputes under the PTPA as they do to disputes over commercial obligations, the prevailing Party may initially impose

(...continued)

Protocol on Substances that Deplete the Ozone Layer, and conventions on wetlands, pollution from ships, and various marine species. PTPA, Annex 18.2. The PTPA also generally requires Parties not to derogate from environmental laws in a manner that weakens protections afforded in those laws in a manner affecting bilateral trade and investment, PTPA, Art. 18.3.2, and contains an Annex on Forest Sector Governance. PTPA, Annex 18.3.4.

[36] PTPA, Art. 18.2, n.1.

[37] PTPA, Art. 18.12.17. Chapter Eighteen also permits a national or a firm of a Party to file a submission with a secretariat or other body designated by the Parties "asserting that a Party is failing to effectively enforce its environmental laws." PTPA, Art. 18.8.1. Because a procedure for such submissions is available to U.S. persons under the North American Agreement on Environmental Cooperation, an entity established under the environmental side agreement to the NAFTA, a U.S. national or firm may not file a submission under the PTPA alleging a failure to enforce environmental laws by the United States. Art. 18.8.3. In some cases, a private party submission may lead to the development of a "factual record" on the issue by the designated secretariat and further action by the Parties to address any environmental enforcement deficiencies involving the cited Party. PTPA, Art. 18.9.

[38] PTPA, Arts. 18.12.3-18.12.5.

[39] PTPA, Art. 18.12.8.

[40] PTPA, Art. 18.22.8(c).

trade sanctions on the non-complying Party based on the value of the dispute. As noted earlier, in the event the prevailing PTPA Party does propose trade sanctions, the defending Party has the option of paying an annual monetary assessment to the prevailing Party, or, if the Parties agree, to a fund that would distribute funds to the defending Party to facilitate compliance with its obligations in the case.

Investor-State Dispute Settlement (Chapter Ten, Section B)

Like bilateral investment treaties (BITs) and the investment chapters of other U.S. free trade agreements, Chapter Ten, the PTPA investment chapter, sets out rights and obligations aimed at facilitating investment by nationals of the United States and Peru in each other's territory. As in other U.S. investment agreements, key elements of Chapter Ten are its coverage of all forms of investment and obligations placed on the Parties to accord foreign investors national, most-favored-nation, and minimum standards of treatment; to compensate investors adequately for expropriation of their property; to permit the free transfer of investment-related funds into and out of the host Party's territory; and to refrain from imposing certain performance requirements, for example, requirements that an investment achieve a given level of domestic content or export a given level of goods or services.

Chapter Ten obligations are also subject to various exceptions, exemptions and qualifications, as well as annexes pertaining to specific investment issues, such as the situations that will give rise to a direct or indirect expropriation. In addition, the PTPA incorporates language reflecting a trade negotiating objective set out in the Trade Act of 2002, namely that negotiators, in seeking to reduce foreign investment barriers, also ensure that "foreign investors in the United State are not accorded greater substantive rights with respect to investment protections than United States investors in the United States,"[41] an issue raised by various critics of FTAs that was also addressed in the May 10 agreement discussed earlier. To this end, the PTPA states in its preamble that the Parties are resolved to "Agree that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement."[42]

Another long-standing and fundamental element of BITs and FTA investment chapters that is contained in the PTPA is its provision for investor-State dispute settlement, permitting U.S. investors in Peru and, likewise, Peruvian investors in the United States, to file arbitral claims against Peru and the United States, respectively, for violations of Chapter Ten obligations.[43] Claims against the Parties may involve federal or central government measures, as well as

[41] Trade Act of 2002, P.L. 107-210, § 2103(b)(3), 19 U.S.C. § 3802(b)(3).

[42] For additional discussion of substantive rights and obligations in the PTPA, see *New Investment and Dispute Settlement Provisions in U.S.-Peru Trade Agreement, in* John R. Crook ed., Contemporary Practice of the United States Relating to International Law, 103 AM. J. INT'L L. 741, 768 (2009).

[43] As described by one commentator, the rationale for investor-State dispute settlement, which originally appeared in bilateral investment treaties (BITs), "was to depoliticize investment disputes by taking them out of a state-to-state forum and empowering investors to seek redress in their own right." Daniel M. Price, *Some Observations on Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 421, 427 (2000).

measures of state and local governments to the extent they are subject to Chapter Ten requirements.[44]

Under the PTPA, if an investor does not believe that an investment dispute with a PTPA party can be settled through consultation and negotiation, the investor may seek to resolve the dispute through arbitration.[45] An arbitral proceeding may be initiated by an "investor of a Party" on the ground that other State Party has breached a PTPA investment obligation, an investment authorization, or an investment agreement, and the investor has incurred loss or damage from the breach.[46] The investor may also submit a claim on behalf of an enterprise of the other PTPA Party that the investor owns or controls, where the enterprise is alleged to have been injured by the breach.[47] Investor-State dispute settlement may also be invoked in certain cases involving investors and investments in financial services institutions in the United States and Peru.[48]

Chapter Ten contains a statute of limitations, prohibiting a claim from being brought if more than three years have elapsed from the date that the claimant "first acquired, or should have first acquired, knowledge of the alleged breach" and knowledge that the claimant or enterprise "has incurred loss or damage."[49] The United States and Peru give their blanket consent in the PTPA to the submission of Chapter Ten investor claims against them.[50] The claimant must consent to arbitration in writing.[51] Chapter Ten does not require that an investor, or an investor and an enterprise, exhaust local judicial or administrative remedies before a claim may be filed.[52]

The investor may submit a claim under various arbitral mechanisms, including the Convention on the Settlement of Investment Disputes (ICSID Convention) and ICSID Rules of Procedure, United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, or, if the disputants agree, any other arbitration institution or rules. Both the United States and Peru are

[44] The PTPA provides that non-conforming "regional" government measures are not subject to PTPA obligations involving national and most-favored-nation treatment, performance requirements, and the nationality of senior management and boards of directors, if the measures are listed by a Party in an Annex to the agreement. PTPA, Art. 10.13.1(a)(ii). The agreement defines the term "regional level of government," where the United States is concerned, as a state, the District of Colombia, or Puerto Rico. Art. 1.3. The agreement further states that "For Peru, as a unitary republic, the term 'regional level of government' is not applicable." *Id.*

Non-conforming measures of a "local level of government" are entirely exempted from the above-cited obligations. PTPA, Art. 10.13.1(a)(iii). Local measures remain subject to other PTPA requirements, however, including those regarding the minimum treatment standard and the expropriation of an investor's property. The term "local level of government" is not defined in the PTPA.

[45] PTPA, Arts. 10.15, 10.16.

[46] An "investor of a Party" is "a Party or a state enterprise thereof, or a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality." PTPA, Art. 10.28.

[47] An "enterprise of a Party" is "an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there." PTPA, Art. 10.28.

[48] PTPA, Art. 12.1.1.

[49] PTPA, Art. 10.18.1.

[50] PTPA, Art. 10.17.1.

[51] PTPA, Art. 10.10.2(a).

[52] Chapter Ten, however, precludes investors (and investors and enterprises) from maintaining local proceedings and Chapter Ten arbitrations simultaneously except for, in some cases, local proceedings for interim injunctive relief that does not involve the payment of monetary damages. PTPA, Arts.10.18.2, 10.18.3; Annex 10-G (separate rule for U.S. investors).

Parties to the ICSID Convention and may thus avail themselves of the Convention and its procedural rules.[53]

Once an investor claim is filed, a three-member arbitral tribunal will be established. One arbitrator is to be appointed by each disputing party, and the third, the presiding arbitrator, is to be appointed by agreement. If the tribunal has not been constituted within 75 days after the claim is filed, the Secretary-General of ICSID, if requested, will appoint the outstanding arbitrator or arbitrators.

Chapter Ten contains rules for the conduct of the arbitration, including various provisions aimed at transparency and efficiency of the arbitral proceedings.[54] Tribunals may accept and consider *amicus* submissions from persons or entities that are not disputing Parties. Tribunals are required to rule expeditiously on any preliminary objections by the defending Party that the claim submitted is legally not a claim for which a Chapter Ten award can be made or that the dispute is not within the competence of the tribunal.[55] As a result, defending Parties may obtain an early ruling on a jurisdictional issue, and thus, possible dismissal of the case, and need not necessarily wait for a combined tribunal ruling on panel jurisdiction and the merits of the case.[56] Multiple claims with certain common elements may be consolidated. Subject to provisions aimed at preventing disclosure of protected information, documents submitted by the parties and tribunal orders, awards and decisions are to be made available to the public. The tribunal must also conduct public hearings.

When a claim involves an alleged breach of a PTPA obligation, the tribunal is to decide the issues in accordance with the PTPA and applicable rules of international law.[57] If the U.S.-Peru Free Trade Commission has issued an interpretation of a PTPA provision, as it is authorized to do under Article 20.1.3(c) of the PTPA, the decision is binding on the tribunal and any tribunal decision or award must be consistent with the Commission decision.[58]

A tribunal may only make monetary awards to the claimant and thus may not direct a Party to withdraw or modify a disputed measure. An award may consist of monetary damages, restitution of property, or both. If restitution is awarded, the Party is to pay monetary damages and applicable interest in lieu of restitution. The tribunal may also award costs and attorney's fees. It may not award punitive damages.

An arbitral award has no binding force except between the disputing Parties and with respect to the case at hand.[59] A prevailing investor may not seek enforcement of the final award until 90 or 120 days after it is issued (depending on the arbitral rules used), a period allowing for possible proceedings to revise or annul the award. If the defending Party does not ultimately abide by a

[53] For further information on arbitration under the ICSID Convention, see http://www.worldbank.org/icsid/.

[54] PTPA, Art. 10.20.

[55] Arts. 10.20.4, 10.20.5.

[56] See generally Gantz, *supra* note 18, at 376-78 (discussing similar provisions in the DR-CAFTA).

[57] PTPA, Art. 10.22.1. Certain special rules apply in an investor-State proceeding where an investor alleges that a Party other than the United States has breached an investment obligation by imposing a restrictive measure involving payments and transfers unless the alleged violation has to with a denial of most-favored-nation or national treatment. PTPA, Annex 10-E.

[58] PTPA, Art. 10.11.3.

[59] PTPA, Art. 10.26.4.

final award, the Party of the claimant may request that a panel be established under the PTPA State-State dispute settlement chapter and ask that it determine that the defending Party's failure to comply with the award is inconsistent with PTPA obligations and recommend that the Party comply.[60] Regardless of whether a compliance panel is sought, however, the prevailing investor may seek judicial enforcement of the award under any of three multilateral conventions providing for the recognition and enforcement of international arbitral awards to which the United States and Peru are Parties: the ICSID Convention, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Inter-American Convention on International Commercial Arbitration.[61]

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[60] PTPA, Art. 10.26.4.

[61] PTPA, Art. 10.26.9.