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Worker Rights Provisions in Free Trade Agreements (FTAs)

Overview

Worker rights are a prominent issue in U.S. FTA negotiations. Some stakeholders believe worker rights provisions are necessary to protect U.S. workers from perceived unfair competition and to raise labor standards abroad. Others believe these rights are more appropriately addressed at the International Labor Organization (ILO) or through cooperative efforts and capacity building. Since 1988, Congress has included worker rights as a principal negotiating objective in Trade Promotion Authority (TPA) legislation. The United States has been in the forefront of using FTAs to promote core internationally recognized worker rights. Labor provisions have evolved significantly since the North American Free Trade Agreement (NAFTA), moving from side agreements to integral chapters within FTA texts, with more provisions subject to enforcement. The conclusion of NAFTA renegotiations resulted in the U.S.-Mexico-Canada Agreement (USMCA), which replaces NAFTA and has a new labor chapter and enforcement mechanism. USMCA entered into force in July 2020.

International Labor Organization

Most FTAs with provisions on worker rights refer to commitments made in the ILO. The ILO is the primary multilateral organization responsible for promoting labor standards through international conventions and principles. A specialized agency of the United Nations, the ILO is composed of representatives from government, business and labor organizations. It promotes labor rights through assessment of country standards and technical assistance, but has no real enforcement authority. The World Trade Organization (WTO) does not address worker rights, as members were unable to reach consensus on the issue.

What are the ILO conventions?

The ILO has adopted 194 multilateral conventions or protocols; eight are considered to be “core labor standards.” The 1998 *Declaration on the Fundamental Principles and Rights at Work* incorporates core principles from these eight conventions, to be adhered to by all countries whether or not they are signatories to the underlying conventions. The United States has endorsed these principles, incorporating them in recent FTAs as enforceable provisions. It has ratified only two of the core ILO conventions: abolition of forced labor, and prohibition and elimination of the worst forms of child labor. As a result, U.S. FTAs do not include commitments to enforce the conventions themselves.

Are any U.S. laws in conflict with ILO conventions?

The U.S. Tripartite Advisory Panel on International Labor Standards of the President’s Committee on the ILO has found that U.S. law is at least partially inconsistent with

five of the core conventions: freedom of association; right to organize/collective bargaining; forced labor; minimum age; and equal remuneration. For example, U.S. laws on prison labor may conflict with the forced labor convention.

The 1998 ILO Declaration Principles

- Freedom of association and the effective recognition to the right to collective bargaining.
- Elimination of all forms of forced or compulsory labor.
- Effective abolition of child labor and minimum age of work.
- Elimination of discrimination in respect of employment or occupation.

Labor Provisions in U.S. FTAs

Worker rights provisions in U.S. FTAs, first included in NAFTA in 1994, have evolved significantly, from requirements for parties to enforce their own labor laws, and to strive not to waive or derogate from its laws as an encouragement to trade, to commitments to adopt, maintain, and enforce laws that incorporate core ILO principles. Other provisions address labor cooperation and capacity building. “Internationally recognized worker rights” were based on language in the U.S. Generalized System of Preferences (GSP) statute and largely track the ILO Declaration, but also refer to “acceptable conditions” regarding minimum wages, hours of work, and occupational safety and health. Recent U.S. FTAs reflect the negotiating objectives under TPA statutes. These objectives have become more comprehensive over time.

NAFTA. The original NAFTA did not include labor provisions, leading President Clinton to negotiate a side agreement, called the North American Agreement on Labor Cooperation. It contained 11 “guiding principles” on worker rights in matters affecting trade, technical assistance and capacity building provisions, and a separate dispute settlement arrangement, along with a labor cooperation mechanism. Full dispute procedures applied to failure to enforce a country’s laws regarding: child labor, minimum wage, and occupational safety and health. Other issues, such as freedom of association and the right to organize were limited to ministerial consultations, which resulted in some bilateral and trilateral cooperation.

Jordan. The U.S.-Jordan FTA (2001) contains labor provisions that were incorporated into the agreement itself. These provisions also became a template for future FTAs and negotiating objectives in the 2002 TPA authorization. While the provisions are enforceable, both countries committed to resolve disputes outside of dispute settlement.

Trade Promotion Authority of 2002. Seven U.S. FTAs were negotiated under TPA-2002. These agreements went beyond the scope of the Jordan FTA, but included one

enforceable labor provision: a party shall not fail to effectively enforce its labor laws “in a manner affecting trade.” “Labor laws” were defined as worker rights as in the GSP statute. Dispute procedures placed limits on monetary penalties, unlike those for commercial disputes. The FTAs also included: commitments not to derogate from labor laws to encourage trade; provisions for cooperation and capacity building; and creation of a labor affairs council.

Figure 1. Evolution of Labor Commitments

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| NAFTA (1994): Side agreement • Shall enforce own laws • Separate dispute resolution |
| Trade Act of 2002 FTAs: Body of agreement • Shall not fail to enforce own laws in a manner affecting trade/investment • Separate dispute settlement |
| TPA-2015: Body of agreement • Adopt, maintain and do not fail to effectively enforce laws consistent with ILO fundamental principles • Shall not derogate from laws to attract trade/investment • Integral dispute settlement |
| USMCA (future template?): TPA-2015 plus: Statutes on acceptable conditions of work • Coverage to include EPZs • Prohibits imports produced by forced labor • Commitments on violence against workers, migrant workers, and discrimination • Rapid-response dispute mechanism |

Source: CRS.

TPA-2015. In effect through July 1, 2021, TPA-2015 enhanced the negotiating objectives on labor, with guidance from a May 2007 bipartisan agreement, which laid out new congressional objectives for FTAs. TPA-2015 called for:

- including the same dispute settlement mechanisms and penalties for labor as for other FTA chapters;
- requiring the maintenance in laws and practice of principles stated in the ILO Declaration;
- prohibiting the diminution of labor standards to attract trade and investment; and
- limiting prosecutorial and enforcement discretion, as grounds for defending a failure to enforce labor laws.

U.S.-Mexico-Canada Agreement (USMCA). USMCA includes several new features on labor, in addition to core provisions from TPA. Some view USMCA as a possible template for future U.S. FTAs. Provisions include:

- “adopt and maintain” statutes and regulations governing acceptable conditions of work;
- extension of the principle of nonderogation of rights to export processing zones (EPZs);
- prohibiting imports produced by forced labor;
- commitments on violence against workers, migrant worker protections, and discrimination in the workplace;
- establishment of a “cooperative labor dialogue,” as an alternative to formal labor consultation.

Throughout the negotiations, there were calls by some Members of Congress for additional obligations for Mexico to address concerns over worker rights protections. Some advocated for a specific labor plan for Mexico, such as the Obama Administration’s Colombia labor action plan in which Colombia committed to specific actions prior to

congressional consideration of the U.S.-Colombia FTA. USMCA commits Mexico to pass labor reforms related to collective bargaining that had been underway since 2017. Mexico passed the legislation in May 2019 and is in the implementation phase. In addition, separate from the labor chapter, the auto rules of origin have certain wage requirements for the first time in an FTA.

Some stakeholders and Members of Congress also pushed strongly for strengthening labor enforcement mechanisms. A new rapid-response mechanism in USMCA provides for an independent panel investigation of covered facilities if suspected of denying workers the right of free association and collective bargaining. Other notable changes to dispute settlement procedures include preventing a party from blocking the formation of a panel, and presuming that a failure to comply with the main labor commitments is “in a manner affecting trade or investment,” unless a party demonstrates otherwise. For more detail, see CRS In Focus IF11308, *USMCA: Labor Provisions*.

Labor Disputes under U.S. FTAs

In coordination with USTR, the Department of Labor (DOL) is responsible for reviewing complaints on alleged violations of enforceable labor commitments in U.S. FTAs. In the past decade, the DOL has issued reviews for seven complaints. One, involving Guatemala, proceeded past consultations to formal dispute settlement. In December 2017, an arbitral panel ruled against the United States. It found while Guatemala had failed to effectively enforce certain labor laws, the evidence did not prove it was both “sustained or recurring” and “in a manner affecting trade.” U.S. stakeholders have contested the outcome. Other concerns include procedural delays in processing complaints and compliance issues more broadly. The AFL-CIO has stated plans to bring its first complaint under USMCA rapid-response mechanism in September. For more information, see CRS In Focus IF10972, *Labor Enforcement Issues in U.S. FTAs*.

Issues for Congress

In considering future TPA legislation (the current reauthorization expires in July 2021) or trade negotiations, Congress may wish to examine the application of worker rights provisions in FTAs. This debate could include:

- The effectiveness of FTAs as a vehicle for improving worker rights and labor standards in other countries;
- The extent to which FTA partners are complying with labor obligations and whether dispute settlement provisions have been applied effectively;
- Whether USMCA labor provisions serve as a new template for future U.S. FTAs;
- The effectiveness of FTAs in providing technical assistance and trade capacity building; and
- The role of businesses in promoting U.S. labor practices abroad and conducting supply chain due diligence.

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