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Abstract
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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 10 Free Trade Agreements (FTAs) that contain labor provisions with different degrees of enforceability. Three more (with Colombia, Peru, and South Korea) await congressional consideration. This report identifies two types of 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 will be updated as events warrant.

Background

The inclusion of enforceable labor provisions — that is, those subject to dispute resolution procedures — in various trade promotion authorities and free trade agreements negotiated under them, has evolved slowly.[1] At first, U.S. trade policy focused on lowering tariffs on goods. It was later extended to various types of non-tariff barriers.

Labor provisions have not been part of multilateral trade agreements because the regulation of labor was generally considered to be a domestic issue and not applicable to trade. Early on, the responsibility for monitoring labor protections fell to the International Labor Organization (ILO), founded in 1919 and now an arm of the United Nations (UN). 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 currently adopted at least 183 Conventions. Eight of these conventions reflect four key areas or categories that have come to be considered "core labor

[1] Trade promotion authority refers to presidential authority to negotiate trade agreements that Congress then considers without amendment and under limited debate (most recently in Title XXI of the *Trade Act of 2002*, P.L. 107-210).

standards." This came about when first, a UN 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 *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up* in 1998. 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 implementing the various rights.[3]

Affirming the efforts of the ILO, the World Trade Organization, at its Singapore Ministerial meeting in 1996, declared that the ILO would be the "competent body to set and deal with ... internationally recognized core labor standards."[4] The ILO has no enforcement tools, but rather promotes labor standards through consensus, moral suasion, and technical assistance.

Meanwhile, the United States unilaterally promoted the development of a list of standards similar to those in the *ILO Declaration* through its trade preference laws for developing countries. These trade preference laws covered four programs: the *Generalized System of Preferences* (GSP), 1975; the *Caribbean Basin Initiative* (CBI), 1983; the *Andean Trade Preference Act* (ATPA), 1991; and the *African Growth and Opportunity Act* (AGOA), 2000. These laws all require that as a condition of obtaining and maintaining program eligibility, beneficiary countries must be taking steps to afford their workers "*internationally recognized worker rights*." These rights are listed in *Trade Act of 1974* as amended, Sec. 507, as similar to ILO core labor standards listed above, except the U.S. list substitutes for (d) above: labor standards relating to minimum wages, maximum hours, and occupational safety and health.

Inclusion of labor (and environment) provisions in trade agreements came about incrementally. The first two U.S. FTAS with Israel, 1985, and Canada, 1988) did not include labor provisions, even though such provisions already existed in the GSP and CBI legislation. 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 worker rights. Fourth, business groups have increasingly been willing to make some concessions to labor groups in order

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[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 [http://www.wto.org/english/theWTO_e/minist_e/min96_e/wtodec_e.htm].

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. 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 *New Trade Policy With America*. Jointly agreed to by the leadership in Congress and the Administration on May 10, 2007, this policy calls for, among other things, two key labor provisions in FTAs: The first is 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*. The second is the use of identical enforcement provisions for labor and commercial disputes.

Labor and enforcement provisions in these various trade agreements can be categorized into four different models.

Model 1. 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 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. There are no monetary assessments under the *NAFTA*.

Model 2. In the *U.S.-Jordan Free Trade Agreement*, labor provisions and commercial provisions share the same dispute resolution procedures. The agreement incorporates a number of labor provisions, including that a 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*. Technically under the agreement, all labor provisions and commercial provisions are equally enforceable. If the dispute is not resolved under procedures specified in the agreement, 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.[5]

Model 3. 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. On May 10, 2007, the Democratic leadership in Congress and the Administration agreed to a *New Trade Policy for America*. It included four enforceable labor concepts, which pending free trade agreements (with Peru, Colombia, Panama, and South Korea) would be amended to include. 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 same dispute settlement mechanisms or penalties available for other FTA obligations (such as commercial interests.)[6]

The four concepts have been inserted into all four agreements as "template language" — that is, language that was specifically agreed to by the Administration and leadership in Congress and was then inserted into all four agreements in virtually identical form. The template language makes an important change from item (1) in the *New Trade Policy*, described above. The template language states 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*. However, a footnote in each trade agreement limits obligations of Parties to those specified in the *ILO Declaration* (i.e., without also including the *Follow-Up*, which, as mentioned, calls for annual reports by countries that have not ratified one or more Conventions, on the status of implementing the core labor standards). Another footnote requires that a party seeking to challenge violations is required to demonstrate that the failure to adopt or maintain *ILO core labor standards* has been "in a manner affecting *either* trade *or* investment between the two countries," (Article 17, footnote 1 of the FTA with Peru.) In Model 4 agreements, there are no caps on penalties. Only the agreement with Peru has been approved by Congress at this time (P.L. 110-138, December 14, 2007).

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[5] Specifically the identical letters stated that they "would not expect or intend to apply the Agreement's dispute settlement enforcement procedures to secure its rights under the Agreement 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.

[6] 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.

Enforcement Issues

Based on these different provisions, policy issues can be divided into two categories: enforceability issues relating to the FTA provisions (addressed in issues 1-3 below), and issues relating to the agencies charged with enforcement (addressed in issues 4 and 5 below).

1. Only Some Provisions Are Enforceable. One issue relating to the enforcement of labor provisions in trade agreements is that only certain labor provisions in some trade agreements are enforceable, whereas all commercial provisions in trade agreements are fully enforceable. More specifically, under Model 1, the model for the *NAFTA*, the labor side agreement, *NAALC*, as mentioned, includes only certain enforceable provisions — that a country must enforce its labor standards relating to child labor, minimum wages, and occupational safety and health. Not enforceable is the requirement that a country enforce its laws relating to the most basic core labor rights: to organize and bargain collectively. These two labor standards account for 16 out of the 21 labor submissions filed with *NAALC*.[7]

Under the FTAs described by model 3, as mentioned, only one labor provision is enforceable: Each country must enforce its own labor laws (defined as "a Party's statutes or regulations directly related to the list of U.S. *internationally recognized worker rights"*) in a manner affecting trade between the Parties.

2. Different Enforcement Procedures for and Caps on Penalties for Labor Provisions. For labor and commercial disputes, Model 1 has separate and dissimilar enforcement provision procedures from Model 3. However, both place caps on potential maximum monetary penalties for labor disputes, but place no caps on penalties for commercial disputes.

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 as are available for commercial disputes. As mentioned under the description for Model 4, the template language in the trade agreements includes a footnote saying, "The 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. *The House Committee Report on the U.S.-Peru Trade Promotion Agreement Implementation Act*, H.Rept. 110-421, is silent on the issue. The U.S. Council on International Business (USCIB), the American Affiliate of the International Chamber of Commerce, argues that if trading partners were held to the details of Conventions supporting the core labor standards, a number of U.S. labor laws could need to be changed to comply with the *ILO core labor standards* as defined and clarified by the various conventions.[8]

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[7] See [http://www.dol.gov/ilab/programs/nao/submissions.htm].

[8] See CRS Report RL33864, *Trade Promotion Authority (TPA) Renewal: Core Labor Standards Issues*, by Mary Jane Bolle.

4. Differentials in Federal Resources Available for Labor as Compared with Commercial Disputes. In the U.S. government, there is a large differential between support available to enforce labor provisions and support available to enforce commercial provisions in preparing any petition for enforcement to be submitted to the USTR. The U.S. government's monitoring and enforcement activities for non-agricultural commercial issues are primarily centered in the Office of the USTR and U.S. Department of Commerce (DOC). The DOC Trade Compliance Center (TCC) Web page describes the TCC as being "the U.S. Government's focal point for monitoring foreign compliance with trade agreements to see that U.S. firms *and workers* get the maximum benefits from these agreements"(emphasis added). None of the related links on the page, however, leads the viewer specifically to labor compliance assistance.[9] The DOC receives complaints about compliance with trade agreements from the TCC "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 a compliance case. If a case is not resolved short of the dispute resolution process, it may be referred to the Office of the USTR.[10]

The Department of Labor (DOL) is less directly involved in researching issues of labor noncompliance. Petitions for enforcement of a trade agreement are typically researched and prepared by an outside interested party, such as a labor union. That petition is then reviewed by the Trade Agreement Administration and Technical Cooperation Division, within the Department of Labor's Office of Trade and Labor Affairs at the Department of Labor.[11]

5. Priorities for Disputes to be Pursued by the USTR. To date, no labor dispute under any of the free trade agreements has reached the USTR. Therefore, this discussion is purely hypothetical. 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 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 could showcase or clarify particular issues, strengthen support of U.S. positions, and/or be cases the USTR believes it can win.

Labor disputes could be more difficult to resolve than commercial disputes. This is because the labor principles in the *ILO Declaration* against which foreign actions could be compared are less detailed and specific. Moreover, under model 4, the USTR may not wish to pursue the enforcement of these principles because if Conventions were to enter the cases as definitions for the principles, this could possibly, as the USCIB argues, subject a number of U.S. labor laws to challenge.

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[9] CRS Report RL30828, *Trade Agreement Monitoring and Enforcement: Issues for Congress*, by Dick K. Nanto and Mary Jane Bolle. See also [http://tcc.export.gov].

[10] Phone conversation with Skip Jones, Deputy Assistant Secretary for Trade Agreements and Compliance, Department of Commerce, February 15, 2008.

[11] Phone conversation with Celeste Helm, Chief, Division of Trade Agreement Administration and Technical Cooperation, February 15, 2008.