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A Way Forward for Workers' Rights in US Trade Policy: A Proposal for USTR-Based Reforms

Improving Compliance in US Free Trading Partners

Recommendation

Identify Labor Problems at the Start of Trade Negotiations and Demand Solutions

The US Trade Representative (USTR) should communicate to any potential US free trading partner *at the start* of trade negotiations the areas in which that potential trading partner's labor laws and enforcement fall short of what will be required in the free trade agreement under negotiation. USTR should set forth recommendations for improvement and establish clear benchmarks that the potential trading partner must meet before being deemed in full compliance and demand that such compliance be achieved before negotiations are finalized. (This approach would loosely follow the example of Trade and Investment Framework Agreements, which the United States often negotiates with countries to "address[] specific [commercial] trade problems" and "creat[e] momentum for liberalization that in some cases can lead to a Free Trade Agreement."¹)

Improving Enforcement of US Free Trade Accords

Depoliticizing Labor Rights Enforcement Mechanisms

The regulations for the US Department of Labor's (DOL) Office of Trade and Labor Affairs (OTLA) should be amended to clarify that the decision on whether to move a labor complaint, submitted to OTLA, to the subsequent stage of a US trade accord's complaint or dispute settlement process lies with the US Secretary of Labor (as head of the US agency most

¹ US Department of State, "Trade and Investment Framework Agreements," no date, <http://www.state.gov/e/eeb/tpp/c10333.htm> (accessed September 18, 2008).



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experienced on labor-related matters and as the designated “contact point with other Parties” on such matters.²⁾ Until such clarification is made, however, insofar as USTR assumes responsibility for such decisions, USTR should take the following measures to strengthen enforcement of trade agreement workers’ rights provisions, amending its relevant regulations accordingly (and voluntarily adopting such measures until the new regulations are in force).

Recommendations

Make Progression Through the Complaint Process Mandatory Until Satisfactory Resolution

The broad discretion that the United States presently enjoys during the labor rights complaint process prior to initiation of formal dispute settlement procedures should be greatly reduced by *requiring* that: 1) the United States request and initiate cooperative consultations upon the recommendation of OTLA or upon any OTLA finding of labor-rights-related shortcomings in another party; and 2) if cooperative consultations fail to produce a mutually satisfactory resolution, the United States *must* proceed to the subsequent stage of the complaint process by convening a council of the parties’ labor ministers or a committee of experts, in the case of the North American Free Trade Agreement (NAFTA).

Base Consultations on Facts and Gear them Toward Results

US discretion in framing and managing labor-related cooperative consultations should be significantly reduced. (The procedures for implementation of final arbitral panel reports, established in all US trade accords from NAFTA to the present, with the exception of the US-Jordan agreement, provide a useful model.) Any US-initiated initial cooperative consultations, any subsequent US-initiated deliberations of a labor council or committee of experts, and any further US-initiated consultations under the formal dispute settlement process should be focused on reaching “a mutually satisfactory action plan,”³ which “shall conform with the

² See, e.g., US-Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), art. 16.4(3); US-Peru Trade Promotion Agreement (TPA), art. 17.5(5).

³ See, e.g., North American Agreement on Labor Cooperation (NAALC), art. 38; DR-CAFTA, art. 20.15(3).



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determinations and recommendations” set forth by OTLA in its examination of the labor allegations at issue.⁴

Make US Initiation of Formal Dispute Settlement and Arbitral Panel Procedures Mandatory

US discretion in the initiation of formal dispute settlement procedures and arbitral panels should also be greatly reduced. A labor complaint submitted to OTLA should be considered satisfactorily resolved only after full and expeditious implementation of an “action plan,” either based closely on OTLA recommendations or on the recommendations of an arbitral panel report, if one is produced. The United States should be required to invoke formal dispute settlement procedures if: 1) 60 days after the initiation of cooperative consultations such a “mutually satisfactory action plan” has not been developed;⁵ or 2) 180 days after a “mutually satisfactory action plan” has been established a party is not “fully implementing” the plan.⁶ Similarly, the United States should be required to convene an arbitral panel if: 1) 60 days after the launch of the formal dispute settlement process, such a “mutually satisfactory action plan” has still not been finalized; or 2) 180 days after a “mutually satisfactory action plan” has been established under the dispute settlement process, a party is not “fully implementing” the plan. (In each case, OTLA should be required to conduct a follow-up investigation to

⁴ See, e.g., NAALC, arts. 38, 39; DR-CAFTA, arts. 20.15, 20.16; US-Peru TPA, arts. 21.15, 21.16.

⁵ Each US free trade accord since NAFTA, except the US-Jordan agreement, provides that 60 days after a complaining party requests cooperative labor consultations, that party *may* initiate the formal dispute settlement process if disagreements over enforceable labor provisions have not been resolved. See, e.g., DR-CAFTA, art. 16.6(6); US-Peru TPA, art. 17.7(6). Similarly, the US-Jordan Free Trade Agreement (FTA) establishes that 60 days after cooperative consultations are requested on any matter under the accord, if no resolution is reached, either party *may* refer the case to a Joint Committee, composed of parties’ representatives and headed by their respective trade agencies; if the matter is still not resolved after 90 days under the Joint Committee, either party *may* initiate the formal dispute settlement process. US-Jordan FTA, art. 17(b), (c).

⁶ NAFTA provides 60 days to develop an action plan based on a final arbitral panel report, produced during the formal dispute settlement process, and 180 days for a party to demonstrate that it is “fully implementing” such a plan before that arbitral panel can be reconvened and a fine or sanction imposed on the violating party. The US-Jordan agreement provides only 30 days from the receipt of such an arbitral panel report “to resolve the dispute” before a party is “entitled to take any appropriate and commensurate measure,” including the imposition of fines or sanctions, but the agreement is silent on the issue of resolution implementation. And all other US trade accords with labor rights protections provide 45 days to “reach an agreement on a resolution,” based on such an arbitral panel report, before “mutually acceptable compensation,” including fines or sanctions, can be imposed, though like the US-Jordan accord, they are also all silent on the time period allowed for a resolution’s full implementation. See, e.g., NAALC, art. 39; US-Jordan FTA, art. 17(2)(b); DR-CAFTA, art. 20.17; US-Peru TPA, art. 21.16.

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verify implementation of the action plan, consulting closely with the group or groups that submitted the labor complaint at issue.)

Improving Enforcement of US Trade Preference Programs**Recommendations***Allow for the Receipt of Labor Petitions Throughout the Year*

USTR regulations governing petitions requesting review of a beneficiary country's eligibility status under US trade preference programs (including the Generalized System of Preferences (GSP) and the Andean Trade Promotion and Drug Eradication Act (ATPDEA)) with respect to workers' rights designation criteria should be amended to allow for the submission and review of such "labor petitions" at any time during the year, rather than annually as is presently the case.⁷

Require a Written Rationale for Failure to Accept or for Continuing Review of a Labor Petition

USTR regulations governing labor petitions under US trade preference programs should be amended to require that when USTR fails to accept a labor petition for review or continues the review beyond an initial established deadline, USTR must provide to the submitting party, in writing, a well-reasoned rationale for such denial or continuation. (Current regulations only require provision of a rationale when USTR reviews a petition but fails to take the action requested.⁸) Until USTR regulations are so amended, USTR should voluntarily provide such written explanations.

Limit Timetable for and Continuation of Labor Petition Reviews

USTR regulations governing labor petitions under US trade preference programs should be amended to require that USTR comply strictly with a

⁷ The interim regulations relating to the GSP, published in 1985, provided for submission and review of such petitions "[a]t any time during the calendar year," but the final regulations, published in 1986, provided only for annual submission and review. See USTR, "Revision of Regulations Relating to the Generalized System of Preferences," *Federal Register*, vol. 50, no. 91, May 10, 1985, pp. 19672; USTR, "Revision of Regulations Relating to the Generalized System of Preferences (GSP)," *Federal Register*, vol. 51, no. 28, February 11, 1986, p. 5037.

⁸ See USTR, "Revision of Regulations Relating to the Generalized System of Preferences (GSP)," *Federal Register*, vol. 51, no. 28, February 11, 1986, p. 5037.



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reasonable timetable for review of such petitions,⁹ such as the 60-day review period set forth under the proposed New Partnership for Development Act of 2007.¹⁰ USTR regulations should further be amended to allow USTR to continue review of a labor petition beyond the established deadline only under extenuating and unusual circumstances. Until USTR regulations are so amended, USTR should voluntarily adopt such policies.

Consider Labor Criteria in Reviewing Requests for Modification of Eligible Articles

USTR regulations governing requests for modifications in the list of eligible articles under a US trade preference program should be amended explicitly to: 1) require that any party requesting the designation of new articles include information on compliance with the relevant preference program's labor criteria in the sector(s) or firm(s) at issue; 2) allow parties requesting withdrawal, limitation, or suspension of designated articles' eligibility to present evidence of failure of the sector(s) or firm(s) at issue to comply with the relevant program's labor criteria; and 3) require USTR to recommend that the President deny, withdraw, limit, or suspend articles' eligibility if compliance with the labor designation criteria in the relevant sector(s) or firm(s) is not demonstrated. Until USTR regulations are so amended, USTR should make such changes voluntarily.

Require USTR-Initiated Labor Review of Beneficiary Countries' Eligibility Status

USTR should initiate, on its own motion, a review of a beneficiary country's eligibility status under US trade preference programs with respect to workers' rights designation criteria upon receiving information that "if substantiated, would constitute a failure of ... [the beneficiary country] to comply."¹¹ Such information should include, but not be limited to, that received from US embassies in beneficiary countries and that

⁹ USTR regulations relating to the GSP currently provide for a roughly ten-month time table for review of labor petitions. This timetable should be shortened considerably. *Ibid.*

¹⁰ See New Partnership for Development Act of 2007, HR 3905, 110th Cong., 1st Sess. (October 18, 2007), sec. 402(d).

¹¹ DOL Bureau of International Labor Affairs (ILAB), "Notice of Reassignment of Functions of Office of Trade Agreement Implementation to Office of Trade and Labor Affairs; Notice of Procedural Guidelines," *Federal Register*, p. 76695. This factor is a key consideration for OTLA in determining whether to accept a submission for review of a US free trading partner's compliance with trade accord workers' rights requirements.



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