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NAFTA

U.S. Labor Dispute Failure Prompts Calls for NAFTA Changes

Trade negotiators are facing increased pressure to beef up provisions for enforcing labor standards in future trade agreements after the U.S. lost its first-ever labor dispute settlement case earlier this month.

Since the U.S. lost the case, politicians and the AFL-CIO are saying the government needs to change the way it approaches international labor enforcement.

The U.S. brought the case against Guatemala in 2014, following a complaint by the AFL-CIO and six Guatemalan organizations in 2008 that the Guatemalan government was not effectively enforcing its labor laws. The final decision was released June 14, more than nine years after the initial labor complaint.

‘In a Manner Affecting Trade’ The U.S. successfully proved that Guatemala failed to enforce its labor laws but did not prove the labor violations affected trade, according to the arbitration panel’s final report. The Central American Free Trade Agreement (CAFTA), the treaty the U.S. used to pursue dispute settlement, says that a party must be failing to enforce labor laws repeatedly and “in a manner affecting trade.”

The final report hints that the inclusion of “in a manner affecting trade” added a layer of confusion to the proceedings since the panel had to decide what constitutes trade being affected. Ultimately, the panel found that trade is affected if lax labor enforcement “confers some competitive advantage on an employer or employers engaged in trade.”

Discouraging System AFL-CIO Trade and Globalization Policy Specialist Celeste Drake said trade is always affected when labor standards aren’t enforced, despite the trade condition in CAFTA and the outcome of the U.S.-Guatemala dispute.

Trade impact is only included as a qualifier in CAFTA labor disputes “to make it harder to show that there’s a labor violation,” Drake told Bloomberg BNA. “And why would you do that unless your point is ‘We don’t really intend this to be enforceable.’”

Drake said “in a manner affecting trade,” which is now standard inclusion in free trade agreements, should be eliminated from future agreements, beginning with a renegotiated North American Free Trade Agreement.

The AFL-CIO, which filed the initial Guatemala labor complaint, proposed a new NAFTA labor chapter in written comments to the U.S. Trade Representative. The proposal eliminates the affected trade qualifier and calls for establishment of a NAFTA labor secretariat who would have a definitive timeline in responding to labor noncompliance submissions.

Politicians Respond Democrats are beginning to rally around inclusion of tougher labor guidelines in a new NAFTA.

Weak labor standards in the Trans-Pacific Partnership led to many Democrats opposing the agreement, Rep. Lloyd Doggett (D-Texas) told U.S. Trade Representative Robert Lighthizer during a House Ways and Means hearing June 22.

NAFTA negotiators should delete “in a manner affecting trade” during upcoming talks, Doggett said in a follow-up statement to Bloomberg BNA.

In the meantime, the panel’s decision doesn’t set a precedent for future labor disputes and the Trump administration should continue to “move forward forcefully” to end other pending labor enforcement complaints in Peru, Honduras, and Colombia, Doggett said.

Reps. Richard Neal (D-Mass.), ranking member on House Ways and Means Committee, and Bill Pascrell, Jr. (D-N.J.), ranking member on the House Trade Subcommittee, released a joint statement calling the panel’s decision “detrimental to the global trading system” and questioning the effectiveness of obligations in trade agreements.

U.S. Trade Representative Robert Lighthizer said in a statement that despite the panel’s ruling, Guatemala’s poor labor enforcement did affect trade and that the U.S. will “hold accountable its trading partners, including Guatemala, and require fair labor practices” going forward.

System Shortcomings The labor dispute settlement process has structural shortcomings when compared to other dispute mechanisms in free trade agreements,

James Brudney, a Fordham University law professor and expert on international labor law, told Bloomberg BNA.

The length of the Guatemala labor dispute presents a problem, according to Brudney. Data that are collected after a proceeding begins can be rejected as evidence by a panel. But with a drawn-out proceeding, using data that are half-a-decade old makes proving recurring failure of labor law enforcement difficult.

Brudney said arbitration timelines or the ability for private parties and workers groups to pursue claims, like in investor-state dispute settlement cases, would speed up future labor cases.

“Investors in investor-state disputes typically don’t have to wait nine years to get resolutions,” Brudney said.

The Department of Labor has issued reports or held consultations with six other governments regarding labor violations in free trade agreements, but to date Guatemala is the only country with which the U.S. pursued dispute on labor violations.

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