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NAFTA 2.0: The Labor Chapter

To those outside the trade world, it might seem like a foregone conclusion that the Trump Administration's renegotiation of NAFTA would contain provisions hostile to, rather than supportive of, organized labor. However, trade has been the anomaly in this Administration. As we have pointed out before, the President has consistently borrowed Democratic talking points on trade. The NAFTA labor chapter is no exception.

That said, the Administration's trade record on labor is mixed.

A Brief History of Labor (and Environment) Provisions in Trade Agreements

In brief: the 1947 General Agreement on Tariffs and Trade – the contract that laid the foundation for today's WTO – had no provisions on labor or the environment. (Indeed, neither does the WTO today.) When the original NAFTA was negotiated, it also contained no such provisions. However, it had not entered into force when Bill Clinton became President. He renegotiated agreement to include side letters on labor and the environment, but they were little more than symbolic. These provisions were improved upon in subsequent agreements, but the standard was essentially for trading partners to enforce their own laws, so that if those laws afforded no real labor protections, neither did the agreement.

In 2007, when Democrats took back the House, they insisted on having meaningful labor and environment rules, and that those rules be enforceable on the same terms as other provisions in the agreement. The Bush Administration and House Republicans agreed, and the deal is referred to as the May 10th Agreement. The key provisions of May 10:

- Core labor standards are directly enforceable (freedom association, the right to bargain collectively, elimination of forced labor, abolition of child labor, and elimination of employment discrimination);
- Laws implementing these standards cannot be rolled back to promote trade or investment ("non-derogation");
- Parties are obliged to enforce their laws;
- These provisions are enforceable using the same dispute settlement mechanism as the other chapters in the agreement, such as intellectual property. However, they are only enforceable if the breach of the agreement occurs in a manner affecting trade or investment between the parties. Concerns with this language will be discussed further below.

It is worth noting that the United States is the only country that pushes for *enforceable* labor and environment standards in trade agreements. While the perception may be that the Europeans and Canadians are more "progressive" on trade, their agreements don't have enforceable labor and environmental obligations in the absence of a U.S. presence at the table. Indeed, when the United States withdrew from TPP, the TPP-11 rolled back some of the labor provisions, while renaming the agreement the "progressive" TPP.

What's Good

NAFTA 2.0's labor chapter arguably meets the May 10 standard.

- Article 23.3 requires the parties to abide by the core labor standards. It also includes acceptable conditions of work, which was added to TPP.
- Article 23.4 reflects the non-derogation requirements.
- The chapter is subject to the same dispute settlement mechanism as the other chapters in the agreement. (However, the NAFTA dispute settlement system is broken, and it is not clear that NAFTA 2.0 fixes it. This issue will be explored in a subsequent paper.)

It also contains some new provisions that are worth noting.

- *Forced labor.* Article 23.6 requires parties to prohibit any imports – in whole or in part – made with forced labor. The core labor standards discipline exploitation of labor within the party's borders.

  This provision extends the prohibition of the use of forced labor to the global supply chain. It is consistent with a change in U.S. law in 2016, which since 1930 had a noxious exception that allowed imports of goods made with forced labor as long as there were no producers of that good in the United States. The Obama Administration succeeded in including a similar provision in TPP, but the obligation is merely to "discourage" such imports, rather than to prohibit them. The change to an obligation to prohibit is significant.

  This type of prohibition has the potential to radically alter global labor practices. Because applies to imports made in whole *or in part* from forced labor, it means that importers have to know their entire supply chain in order to ensure that they aren't violating the law. Of course, this means the prohibition has to enforced, domestically, and penalties imposed for breaches.

  The NAFTA 2.0 provision does contain some squishy language, allowing parties to effectuate the prohibition "through measures it considers appropriate." The language is unnecessary – the obligation is to prohibit, full stop – and in fact embarrassing.

Is Canada or Mexico taking the position that they don't want to have a law prohibiting these imports? Do they want some other way of enforcing a provision relating to basic human decency? Why? Do they want to make it hard to prove they're violating this provision? "Oh well, we do prohibit it. We just don't have a law that says so." (This prohibition is already in U.S. law, so it is doubtful that the United States is pushing for the squishy language.)

The agreement is undergoing a legal scrub, which is a good time to delete language that is anything other than an unequivocal repudiation of imports made with forced labor.

- *Violence against workers*. Those familiar with regimes that deprive workers of core labor rights understand that violence is often an integral component of ensuring that those rights are not exercised. Colombia, for example, is notorious for a longstanding history of murders of unionists, and other forms of violence and intimidation short of murder are even more common.

  Article 23.7 specifically addresses violence against workers. It obliges parties to address violence or threats of violence against workers seek to exercise the core labor rights identified above.

  The language is important, in that it reflects a step forward in more comprehensively tackling the various mechanisms through which worker rights are suppressed. However, the obligation merely requires parties to "address" violence or threats of violence, without imposing specific obligations to investigate or prosecute crimes associated with violence against workers. In addition, the provision also contains the requirement that the breach must occur in a manner affecting trade or investment between the parties.

- *Sex-Based Discrimination in the Workplace.* Article 23.9 requires parties to implement policies that protect workers against employment discrimination on the basis of sex, including pregnancy, sexual harassment, sexual orientation, gender identity, and caregiving responsibilities. It also requires these policies to provide job-protected leave for birth or adoption and care of family members, as well as to protect against wage discrimination.

  This provision is consistent with language Canadians have included in other agreements, with the material difference being that the language in other agreements is hortatory, whereas here it is binding.

  The strongest available language in the trade agreement lexicon is for parties to "adopt, maintain, and implement laws, regulations, and practices." The language in this provision is not that strong. Nevertheless, it is language new to U.S. agreements, and its binding nature is new to the agreements of its proponent – Canada.

- *Migrant Workers.* Article 23.8 requires parties to ensure that migrant workers are protected by national labor laws, whether the workers are nationals or non-nationals. This is a novel provision, although it does not specify what those laws must provide.

What's Not Good

- *Limits on Enforceability: "in a manner affecting trade or investment between the parties."* May 10th is understood as having put labor and environment provisions on the same footing as the other chapters in these agreements. That, however, is not accurate. Provisions in other chapters are enforceable *per se*; to bring a dispute, there is no need to prove that the breach occurred in a manner affecting trade or investment between the parties.

  The response to that argument is typically that labor and environment are "local" issues and thus they are only appropriately included in a trade agreement if they actually involve trade or investment.

  This argument fails, however. Take the intellectual property chapter. It requires the parties to establish civil remedies for intellectual property rights violations, for the rightholder to be compensated for the breach. (Article 20.J.4). It even requires parties to have a *criminal* penalty regime for certain IP beaches. (Article 20.J.7) These regimes apply *even if there is no cross-border transaction whatsoever*. For example, if a Mexican national who has never left Mexico violates the copyright of a Mexican author who has also never left Mexico, NAFTA 2.0 nevertheless requires Mexico to have a law providing for civil penalties – and criminal penalties if it is done on a commercial scale. (In fact, some of the criminal penalty provisions in the chapter don't require the violations to be done a commercial scale. (For example, Article 20.H.11 (Technological Protection Measures.))

  It is reasonable to ask why the architects of May 10 agreed to this conditional language, given that the goal was to put labor and environment on equal footing with other chapters. Pragmatism is the likely answer. May 10 was a significant step forward in addressing race-to-the-bottom issues that have been endemic in the debate over globalization. The language was probably a Republican ask, and it may have seemed easy to meet the requirement that it simply occur in a manner affecting trade or investment – not a particularly stringent standard.

  Except it turns out it is. As previously discussed, a panel had to interpret similar language in a labor dispute involving Guatemala, and the panel found that it not met the burden of proof.

As long as this language remains in the labor and environment chapter, and does not apply to other provisions that are equally "local issues," it cannot be said that trade agreements treat these issues the same.

Labor and environmental issues are also often dismissed as "social issues." They are not "social issues." They go to the very heart of competitiveness. If low wages are the comparative advantage that allows certain countries to attract investment, then those countries have every incentive to make sure those wages remain suppressed in order retain the advantage. That then creates a false comparative advantage. This is precisely the race-to-the-bottom incentive structure in trade that aggravates income inequality, trade skepticism, and trade anxiety.

For those who think Econ 101 actually has anything to do with trade in the real world (it doesn't), recognize that one of the premises is that lower-wage countries will experience wage growth as a result of trade, and thus the parties will reach equilibrium. When governments interfere with wage growth, they prevent equilibrium from being reached – and not only unnaturally siphon off jobs from higher-wage countries, but suppress wages in those higher-wage countries as well.

- *Lack of Confidence in Actual Enforcement: Colombia.* Not only are the labor provisions subject to unnecessary enforceability criteria, but there is a demonstrated insouciance toward enforcing them. As has been previously noted, the AFL-CIO filed a petition several years ago, alleging that Colombia is in breach of its obligations under the labor provisions of the U.S.-Colombia trade agreement.

  Although the Obama Administration did not bring a dispute against Colombia, it did hold up Colombia's accession to the Organization for Economic Cooperation and Development (OECD), a think tank of wealthier countries. There is a cachet associated with being an OECD member, and applicants must follow roadmaps to accession – including on labor.

  Inexplicably, the Trump Administration allowed Colombia in. It did have a few hang-ups with Colombia: intellectual property, and trucks. But not systemic Colombian problems with labor, including the violence noted above.

  The Administration is aware of longstanding concerns over lack of enforcement of labor provisions. At a Senate hearing in July, Senator Shaheen pressed Ambassador Lighthizer on the subject and he replied that "if there are labor violation cases to be brought, we are certainly willing to bring them . . . . [P]eople bring them to us."

  But people have brought cases to the Administration. Not only was a petition filed on Colombia, but another was filed on Peru.

And the Administration has not pursued them. As Senator Shaheen explained, these agreements impact workers, and the failure to enforce labor provisions remains an issue.

- *Sex Discrimination. Why not Race*? It seems the language on gender discrimination was taken from the Canadian update to its agreement with Chile. However, that agreement had a special set of provisions relating to trade and gender. Accordingly, the provision does not extend to racial discrimination in the workplace – an oversight that cannot be justified in a chapter that covers labor generally.

The Annex

The agreement contains an annex with a specific set of obligations applicable to Mexico, which has a history of government collusion with industry to suppress worker rights.

The Annex states that the parties expect Mexico to adopt legislation to implement these obligations before January 1, 2019, and states that entry into force of the agreement "may" be delayed until the legislation is effective.

While the Annex sets out a series of measures that get at the heart of labor rights suppression in Mexico, there are procedural concerns. Mexico can adopt the legislation to comply with these obligations – the incoming Administration is supportive of labor – but nothing stops a subsequent government from reversing it. In what can only be seen as a regrettable step, the outgoing Mexican ruling party in March introduced labor legislation that was considered a step backward from efforts made to comply with TPP. Of course these obligations are enforceable, but this circumstance – the threat of reversing labor reforms - is why the failure to enforce labor rights in trade agreements is so problematic. The provisions in any particular agreement may be fine, but if there is no political will to enforce them, their efficacy is diminished.

The Agreement does provide that its entry into force "may be delayed" if the legislation is not enacted. It is not clear what effect entry into force will have in respect of the current NAFTA, because the provision setting out the transition is blank. The United States and Mexico already enjoy duty-free trade under the original NAFTA, and delaying entry into force may not be of much meaning if it doesn't affect trade between the parties. Of course, the threat of withdrawal always looms.

In this regard, the TPP side letter between the United States and Vietnam had a more well-defined enforcement mechanism. If Vietnam did not comply with the provisions of the letter, the United States had the right, after five years, to suspend benefits, without going through dispute settlement. (Note that the side letter is simply bilateral. As has previously been noted,

it is the United States that presses for meaningful, enforceable labor and environmental provisions in trade agreements.)