United States

A Way Forward for Workers' Rights in US Free Trade Accords

HUMAN RIGHTS WATCH

HUMAN RIGHTS WATCH

A Way Forward for Workers' Rights in US Free Trade Accords

Printed in the United States of America
ISBN: 1-56432-387-0
Cover design by Rafael Jimenez

Human Rights Watch
350 Fifth Avenue, 34th floor
New York, NY 10118-3299 USA
Tel: +1 212 290 4700, Fax: +1 212 736 1300
hrwnyc@hrw.org

Poststraße 4-5
10178 Berlin, Germany
Tel: +49 30 2593 06-10, Fax: +49 30 2593 0629
berlin@hrw.org

Avenue des Gaulois, 7
1040 Brussels, Belgium
Tel: + 32 (2) 732 2009, Fax: + 32 (2) 732 0471
hrwbe@hrw.org

64-66 Rue de Lausanne
1202 Geneva, Switzerland
Tel: +41 22 738 0481, Fax: +41 22 738 1791
hrwgva@hrw.org

2-12 Pentonville Road, 2nd Floor
London N1 9HF, UK
Tel: +44 20 7713 1995, Fax: +44 20 7713 1800
hrwuk@hrw.org

27 Rue de Lisbonne
75008 Paris, France
Tel: +33 (1)43 59 55 35, Fax: +33 (1) 43 59 55 22
paris@hrw.org

1630 Connecticut Avenue, N.W., Suite 500
Washington, DC 20009 USA
Tel: +1 202 612 4321, Fax: +1 202 612 4333
hrwdc@hrw.org

Web Site Address: http://www.hrw.org

October 2008

ISBN: 1-56432-387-0

A Way Forward for Workers' Rights in US Free Trade Accords

Summary

The new US administration that comes into office in January 2009 will be responsible for implementing labor provisions in existing US free trade agreements and face the challenge of restructuring the accords and the larger US trade agenda to better protect workers' rights. This report examines the current US approach to workers' rights in trade agreements, identifying serious deficiencies, and proposes specific steps the new administration should take to address the shortcomings.

This report's analysis and recommendations focus primarily on how the United States can better ensure that its free trade accords guarantee respect for workers' rights in the territory of its trading partners. We recognize, however, that to create a US free trade regime rooted in respect for workers' rights, all parties to US bilateral and regional accords must press their trading partners to uphold such rights. Only then will the goal of greater labor rights protection in all trading partners, including in the United States, be achieved.

Human Rights Watch takes no position on free trade per se or the recent proliferation of US bilateral accords, but we believe that trade agreements provide important leverage and opportunities to promote workers' rights. While there has been some recent progress in US policy, including improvements based on the May 2007 trade policy template, the United States still fails to effectively utilize the powerful tool of trade accords. Human Rights Watch believes that significant, bold changes are needed that not only strengthen substantive labor provisions but improve state compliance and facilitate enforcement.

US free trade accords should clearly and unambiguously require parties to uphold core workers' rights in their domestic laws. These are universally recognized rights identified in the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work and defined in the relevant ILO conventions. Parties to trade agreements should be required to effectively enforce such laws as well as laws governing acceptable conditions of work in all sectors involving trade and

investment between the parties. Trade accords should also include provisions imposing penalties on companies and employers implicated in labor abuses.

Compliance with US trade agreements' labor requirements should be a priority from the beginning of trade negotiations, rather than, as is too often the case at present, near the end of negotiations or after they have concluded. At the first round of talks, the United States should clearly outline for each potential trading partner the areas in which its domestic labor regime falls short of trade accords' workers' rights provisions and offer necessary assistance to remedy the deficiencies. The negotiations should not conclude until compliance is achieved.

Of course, robust workers' rights provisions and early intervention to facilitate compliance are unlikely to lead to long-term improvements if the provisions are not implemented effectively. And historically, the enforcement of US free trade agreements' labor rights requirements has been terrible. In the 14 years since the first trade agreement with such provisions went into effect, not one labor-rights-related complaint under any agreement—eight are currently in force—has advanced beyond ministerial-level consultations between the parties. To ensure more effective enforcement, complaint and dispute settlement processes must be greatly depoliticized and the broad enforcement discretion enjoyed by states significantly reduced.

To these ends, clear requirements should be imposed for the initial review and investigation of each complaint alleging violation of an agreement's workers' rights provisions. State-to-state consultations should automatically follow if the initial review identifies workers' rights deficiencies; such consultations should be geared toward reaching an effective plan to remedy the failings. And until an action plan to address these labor shortcomings is established and fully implemented, the labor complaint should automatically proceed through the complaint process to initiation of formal dispute settlement procedures, the convening of an arbitral panel, and, ultimately, determination of whether an accord violation has occurred and imposition of appropriate fines or sanctions.

Trade agreement complaint and dispute settlement processes should be further improved to ensure more systematic, credible, and objective enforcement of workers' rights guaranteed by the accords. Such processes are complex, with often rigorous complaint submission criteria, and they must be more widely accessible to groups with first-hand knowledge of abuses. These processes historically have been underutilized, and mechanisms should be established to assist potential complainants, including an entity modeled on the US Department of Commerce's Trade Compliance Center (TCC), whose assistance in commerce-related cases can be accessed with a simple email, fax, or phone call. Programs should also be developed to boost awareness in the United States and abroad of trade accords' labor rights provisions and enforcement processes. In addition, the processes should be more transparent and allow for more regular public participation; organizations making allegations of labor abuse and the private employers and companies implicated should enjoy an opportunity to be heard.

Even the most accessible and transparent complaint and dispute settlement processes, however, are likely to address only a fraction of the violations, given the limited number of organizations tracking such issues. To prevent this outcome, the United States should engage in proactive monitoring, including by conducting inspections in its trading partners and initiating complaint and enforcement processes if problems are identified.

Human Rights Watch believes that implementation of these recommendations, elaborated in greater detail below, would represent an important step toward ensuring respect for the rights of workers producing goods and rendering services under US free trade accords. Without such changes, we fear that the United States will continue a strategy that purports to protect such workers' rights but fails to do so in practice.

Background: The 2007 Trade Policy Template and Shortcomings in Prior Trade Accords

The United States has concluded 13 free trade agreements with workers' rights provisions at this writing. Ten have been ratified, and eight are currently in force.[1] Four agreements—with Peru, Panama, Colombia, and Korea—include labor provisions based on the May 2007 trade policy template, a conceptual agreement that outlines a range of changes to be incorporated into pending and future US free trade accords.[2]

Shortcomings in Trade Accords Prior to the 2007 Trade Policy Template

The nine free trade agreements with labor rights requirements concluded prior to the May 2007 template suffer from serious shortcomings. These include:

- The agreements only require that countries effectively enforce certain existing domestic labor laws, regardless of whether they meet international standards. There are no penalties, such as fines or trade benefit suspension, for parties whose laws fail to uphold workers' rights.[3]

- The accords lack enforceable provisions requiring parties to implement existing domestic laws governing employment discrimination, including any bans on sexual harassment, mandatory pregnancy testing, and racial bias. And only one, the North American Free Trade Agreement (NAFTA), even encourages parties to do so. The rest are silent on the issue.[4]

---

[1] These free trade accords are the North American Free Trade Agreement (NAFTA), the US-Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), and agreements with Jordan, Chile, Singapore, Australia, Morocco, Bahrain, Oman, and Peru, though the accords with Oman and Peru have not yet entered into force.

[2] At this writing, only the US-Peru accord, known as the US-Peru Trade Promotion Agreement (TPA), has been ratified by both parties.

[3] The US-Jordan Free Trade Agreement (FTA) comes closest but still falls short, demanding that parties "*strive to* ensure" that the labor principles of the ILO Declaration on Fundamental Principles and Rights at Work and the internationally recognized labor rights defined in the accord are "recognized and protected by domestic law." US-Jordan FTA, art. 6(1) (emphasis added).

[4] Instead, all accords since NAFTA demand application of labor laws governing "internationally recognized labor rights," defined, generally, to include: the right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labor; a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and acceptable conditions of work with respect to minimum wages, hours of work, and

- The agreements, except the US-Jordan Free Trade Agreement, lack "enforcement parity" for workers' rights, which would provide the same dispute settlement processes and penalties, including fines and sanctions, for the enforcement of labor and commercial obligations. And the US-Jordan accord's enforcement parity was effectively eliminated by the Bush administration when it sent a side letter to the government of Jordan in 2001 stating that the United States did not intend to invoke the agreement's dispute settlement process in labor-related cases.[5] In all such agreements, save the US-Jordan accord, the mechanisms established for enforcing labor rights provisions are different from and inferior to those in place for commercial requirements. For example, the accords cap the fine amounts that can be imposed for workers' rights violations and reduce the punitive impact of those fines by channeling them back into, rather than out of, offending countries.[6] In contrast, fines imposed for commercial violations are calculated based on the financial harm the violations caused, regardless of how great, and unless other arrangements are made, are paid directly to the aggrieved party.[7] NAFTA underscores this enforcement disparity by including its workers' rights protections in a side accord, rather than in the main text of the agreement.

- With the exception of NAFTA, each accord contains a gaping loophole that allows parties to selectively apply labor laws or slash resources for their enforcement and still be in compliance with the accord's requirement that parties effectively

---

occupational safety and health. NAFTA, for its part, articulates 11 key labor rights, including the elimination of employment discrimination, and encourages their protection, but the accord's *enforceable* requirement that labor laws be effectively applied only covers three of the 11 rights—occupational safety and health; child labor; and minimum employment standards, such as minimum wages and overtime pay. See, e.g., ibid., art. 6(4), (6); North American Agreement on Labor Cooperation (NAALC), art. 27; DR-CAFTA, arts. 16.2, 16.8.

[5] The letter stated, "[M]y Government would not expect or intend to apply the Agreement's dispute settlement procedures to secure its rights under the Agreement in a manner that results in blocking trade.... [M]y Government considers that appropriate measures for resolving any difference that may arise regarding the Agreement would be bilateral consultations and other procedures, particularly alternative mechanisms, that will help to secure compliance without recourse to traditional trade sanctions." Side Letter on Labor and Environment from Ambassador Robert B. Zoellick, US Trade Representative, to His Excellency Marwan Muasher, Ambassador of the Hashemite Kingdom of Jordan to the United States, July 23, 2001.

[6] The fines are to be paid into a fund established by a Free Trade Commission, comprised of the disputing parties' trade ministers, and "expended at the direction of the Commission for appropriate labor ... initiatives" in the violating party. See, e.g., DR-CAFTA, annex 19.1, art. 20.17. See also, NAALC, annex 39. Human Rights Watch recognizes the importance of increased funding to address violations of trade accords' labor protections. Nonetheless, we also believe that, as is the case when trade agreements' commercial provisions are violated, any fine imposed for breaching such labor requirements should constitute a net financial loss for the violating party and that accord violations should be remedied using separate and additional government funds. For further discussion, see Human Rights Watch, *CAFTA's Weak Labor Rights Protections: Why the Present Accord Should be Opposed*, March 2004, http://hrw.org/english/docs/2004/03/09/usint8099.htm.

[7] See, e.g., DR-CAFTA, art. 20.16.

enforce their labor laws. Specifically, the agreements state that a violation has not occurred as long as "a course of action or inaction" regarding labor law enforcement "reflects a reasonable exercise of … discretion, or results from a bona fide decision regarding the allocation of resources."[8]

Improvements in Trade Accords Under the 2007 Trade Policy Template

The four accords based on the new trade policy template address many of these prior agreements' shortcomings. For example, these four accords:

- Require parties to effectively enforce laws governing all fundamental workers' rights, including bans on employment discrimination, as well as laws establishing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health;[9]

- Establish enforcement parity for labor and commercial provisions, making the same dispute settlement mechanisms available to enforce all terms of the accords;

- Eliminate the language in prior accords that permits parties to cite "a reasonable exercise of … discretion" or "a bona fide decision regarding the allocation of resources" as acceptable justification for poor labor law enforcement,[10] providing instead that "[a] decision a Party makes on the distribution of enforcement resources shall not be a reason for not complying with the provisions of this [labor] Chapter";[11] and

- Require parties to "adopt and maintain" in domestic law and practice the core workers' rights "as stated" in the ILO Declaration on Fundamental Principles and

[8] See, e.g., ibid., art. 16.2(b); US-Jordan FTA, art. 4(b). As a result, if a case alleging that a party failed to effectively enforce its domestic labor laws ever came before an arbitral panel under these accords, the accused party could offer as an affirmative defense the reasonable exercise of its discretion or the legitimate allocation of its resources.

[9] See, e.g., US-Peru TPA, art. 17.3(a). The agreements require that a party "not fail to effectively enforce its labor laws … through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties."

[10] See, e.g., US-Jordan FTA, art. 4(b); DR-CAFTA, art. 16.2(b).

[11] See, e.g., US-Peru TPA, art. 17.3(1)(b).

Rights at Work,[12] though the requirement is muddied and potentially significantly weakened by a confusing footnote in each agreement, discussed below.

Human Rights Watch believes that these baseline provisions should be included in all future US free trade accords. Every effort should also be made to renegotiate past accords, beginning with NAFTA, to ensure that they, too, incorporate these labor rights protections.[13]

While the May 2007 template-based provisions represent an important step forward, they are still insufficient to guarantee workers' rights in the context of trade. In what follows, we detail the elements that a new framework for protecting workers' rights in US free trade accords should include.

[12] See, e.g., ibid., art. 17.2.

[13] During the 2008 presidential campaign, the Democratic presidential nominee, Senator Barack Obama, has repeatedly called for renegotiating portions of NAFTA to achieve more enforceable "labor standards." See, e.g., "Debate Transcript," *International Herald Tribune*, February 27, 2008, http://www.iht.com/articles/2008/02/27/america/26textdebate.php?page=7 (accessed September 29, 2008); Michael Crittenden, "Obama Economic Advisor Goes on Offense Against McCain," *The Wall Street Journal: Real Time Economics*, September 5, 2008, http://blogs.wsj.com/economics/2008/09/05/obama-economic-advisor-goes-on-offense-against-mccain/ (accessed September 29, 2008); Bob Cusack, "Obama Renews Promise on NAFTA, 'card check,'" *The Hill*, September 1, 2008, http://thehill.com/leading-the-news/obama-renews-promise-on-nafta-card-check-2008-09-01.html (accessed September 29, 2008).

Improving Workers' Rights Protections

Protecting Core Workers' Rights in Domestic Laws

Human Rights Watch believes that all parties to US trade accords should at least be required to effectively protect the four core workers' rights identified in the ILO Declaration on Fundamental Principles and Rights at Work in their domestic laws. If those laws fall short of international standards, even their diligent application will not ensure that workers can fully and freely exercise their basic rights.

At first glance, the four template-based free trade agreements include just such a requirement. However, a footnote muddies this seemingly straightforward provision, stating that the requirement that each party "adopt and maintain in its statues and regulations, and practices thereunder, the ... rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*" refers "only to the ILO Declaration."[14]

The ILO Declaration obliges all ILO members "to respect, to promote and to realize, in good faith" the ambiguous and much debated "*principles* concerning the fundamental rights," as opposed to the more clearly articulated "fundamental *rights*" specifically defined in the relevant ILO core conventions and their interpretative jurisprudence.[15] While protecting "rights" entails abiding by ILO conventions, and the main text of the template-based agreements clearly requires just such compliance from all parties, the meaning of respecting the "principles" derived from the conventions is much less clear.[16] Although a relationship exists between the nebulous "principles" and the more well-defined "rights," the relationship is unresolved and it is not clear the extent to which respecting the "principles" means adhering to ILO conventions. Instead, it is a question that will have to be answered when an arbitral panel, facing a complaint alleging failure to

[14] See, e.g., US-Peru TPA, art. 17.2.

[15] International Labor Conference, ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 18, 1998 (emphasis added).

[16] For further discussion, see Human Rights Watch, *The 2007 US Trade Policy Template: Opportunities and Risks for Workers' Rights*, no. 2, June 2007, http://hrw.org/backgrounder/usa/tradeo607/.

"adopt and maintain" core workers' rights in domestic laws, first is called on to interpret this new template-based provision.[17] Until then, the precise scope of the obligation to incorporate core workers' rights into domestic labor laws will remain unclear.

Recommendation

Require Laws that Protect Core Workers' Rights

The confusion from the above-described footnote should be eliminated. Instead, the clear language of the main text of the four template-based free trade accords should be included in all US trade agreements, without any qualification. Each US trade accord party should categorically be required to "adopt and maintain in its statues and regulations, and practices thereunder, the ... rights as stated in the *ILO Declaration*"—not the "principles concerning the fundamental rights," but the rights themselves as listed in the Declaration and defined in the ILO core conventions.

Protecting Workers in All Trade- and Investment-Related Sectors

Human Rights Watch believes that the workers' rights protections in US free trade agreements should, at a minimum, extend to all workers in sectors related to trade and investment between the parties, since those are the workers most directly affected by the accords.[18] On their face, the four template-based agreements seem to suggest such coverage, expanding on language in most prior accords that included only trade-related sectors. These four agreements establish that parties violate the accords when, "in a manner affecting trade or investment between the Parties," they fail to adopt and maintain core workers' rights in their domestic labor laws, waive or derogate from those laws or offer to do so, or fail to effectively enforce them.[19]

The concept of "affecting trade or investment between the Parties" is unclear, however, and it is important that a new administration ensure that interpretation of

[17] An arbitral panel of independent experts may be convened under a US free trade accord in the event that all attempts to resolve disputes through amicable means, including consultations, fail. After conducting an investigation following procedures outlined in the accord, the panel shall issue a report with findings of fact and a determination regarding whether a party has violated a trade agreement. See, e.g., NAALC, arts. 29-36; DR-CAFTA, arts. 20.6-20.13; US-Peru TPA, arts. 21.6-21.13.

[18] Such workers would clearly include farm workers harvesting corn for export to the United States, for example, but would not include live-in domestic workers who do not produce export goods or engage in trade-related services.

[19] See, e.g., US-Peru TPA, arts. 17.2(2), 17.3(1)(a).

the provision does not unduly limit the scope of the accords' workers' rights protections. The phrase, for example, could be narrowly construed to require a showing that a country's breach of an agreement's labor provisions led directly to lower labor costs, causing: 1) correspondingly cheaper goods, making it more difficult for producers in other trading partners to compete; or 2) increased foreign direct investment.

Such a showing, of course, would be difficult and often impossible to make. For example, it might require empirical evidence that sexual harassment of young female factory workers, facilitated by lax enforcement of anti-discrimination laws, led to more cheaply produced goods. Or it might require proof that retaliatory dismissals of union leaders and thwarted organizing drives, perpetuated by inadequate protection of the right to freedom of association, resulted in increased foreign direct investment by investors seeking a union-free environment.[20] Requiring such showings would minimize rights violations by shifting the focus to technical, often unanswerable questions of causality. In such cases, the scope of the accords' labor rights provisions would be significantly reduced and their impact greatly undermined.

Recommendation

Ensure that Labor Rights Provisions Apply to All Trade- or Investment-Related Sectors

Following the example of NAFTA, which allows for an arbitral panel to be convened to address any "trade-related" failure to enforce certain labor standards,[21] all US free trade accords should clarify that an agreement violation occurs, at a minimum, whenever workers' rights provisions are breached in "sectors related to trade or investment between the Parties."

Accounting for Corporate Responsibility

Human Rights Watch believes that all US free trade accords should recognize that private actors such as corporations can be and often are complicit in labor abuses

[20] Making such an argument could also be philosophically contradictory to the best interests of the workers' organizations that have filed the vast majority of complaints, as they would have to argue that if they were allowed to organize freely, production costs would increase.

[21] NAALC, art. 29(a).

and ensure that such actors are held accountable for workers' rights violations. Presently, US trade accords provide solely for penalties against states.

US free trade agreements, with the exception of the US-Jordan accord, currently give at least a nod to corporate complicity in labor rights violations, but they fail to address the culpability of corporations and employers with any degree of specificity. With the exception of NAFTA, existing accords suggest but do not require that states "first seek to" suspend trade benefits in the same sector or sectors at issue in the labor complaint in question, thereby penalizing the industry most responsible for the violations.[22] NAFTA demands that "a complaining Party *shall* first seek to suspend benefits in the same sector or sectors" at issue.[23] These agreements, however, including NAFTA, allow states to sidestep these provisions, stating that if a complaining state finds such same-sector suspension not "practicable" or "effective," it may choose to suspend benefits in other sectors. In such cases, the punitive and deterrent effects on the employers and corporations that actually violated workers' rights would be negated.[24]

Furthermore, US trade accords provide a violating state with the option of paying an annual fine instead of suspending trade benefits. But the agreements do not suggest, much less provide a mechanism for, recouping some or all of that fine from the sector or sectors where the labor rights violations at issue occurred. Thus, if a state opts to pay a fine, employers and corporations enjoy impunity under the accords for their complicity in workers' rights violations.

Recommendations

Require Arbitral Panel Reports and Action Plans to Address Private-Public Complicity

US free trade agreements should require that an arbitral panel's report propose both concrete recommendations to a violating government and to each private employer and corporation directly or indirectly implicated in any rights abuses identified. Recommendations to employers and corporations should include specific provisions for compensation to the workers whose rights have been violated. Similarly, any

[22] See, e.g., DR-CAFTA, art. 20.16(5); US-Peru TPA, art. 21.16(5) (emphasis added).

[23] NAALC, annex 41-B(2) (emphasis added).

[24] See, e.g., US-Peru TPA, art. 21.16(5); DR-CAFTA, art. 20.16(5).

resolution reached by the parties to address the rights violations confirmed in the arbitral panel's report should include remedial measures to be taken by the implicated employers and corporations, including direct payments, other appropriate redress for the affected workers, and measures to prevent future violations.

Suspend Benefits for Corporate Violators of Workers' Rights

US free trade accords should provide that if a penalty—whether fine or sanction—is imposed on a violating state, the private exporters implicated in the violation lose trade agreement benefits unless they adopt and implement all relevant arbitral panel recommendations. Such exporters should be deprived of trade agreement benefits:

1) in whole, if the arbitral panel confirms that the exporters participated directly in the abuses at issue by violating their employees' rights or by failing to protect the rights of workers employed on their worksites;

2) in part, if the arbitral panel confirms that the exporters participated indirectly in the abuses at issue by sourcing from the third-party suppliers or producers directly implicated in the violations. In such cases, the exporters should lose benefits in proportion to the percentage of their exports to the complaining party sourced from the violating facilities.

Improving Compliance in US Trading Partners

All parties to US free trade agreements should make compliance with workers' rights provisions a priority from the start of trade talks. To facilitate such compliance, the United States should raise workers'-rights-related concerns with its potential trading partners at the beginning of trade negotiations and make clear that it will not conclude an agreement until such concerns are satisfactorily addressed.

In contrast to commercial concerns, which the United States customarily identifies near the beginning of trade accord negotiations and pressures a potential trading partner to rectify before talks wrap up, workers'-rights-related deficiencies are often not raised until the last stages of negotiations or, worse, until after they have concluded. Even the "meaningful labor rights report" that the now-expired Trade Act of 2002 required the executive branch to prepare on each potential US trading partner's labor laws and practices was drafted in every case after the trade accord had been concluded and only shortly before the accord was submitted to the US Congress for approval.[25]

The measures needed to bring a country's labor laws and practice into compliance with the workers' rights provisions contained in US trade agreements are frequently complicated and politically fraught, and they can take years to complete—often the full two to three years that many trade negotiations last.[26] A last-minute approach to

---

[25] Trade Act of 2002, secs. 2102(c)(8); 2107(a), (b). The report is to be submitted to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate. Such a "meaningful labor rights report," issued by the US Department of Labor, describes a country's "relevant legal framework (national laws and international conventions) and practices" for the protection of workers' rights, including "the administration of labor law, labor institutions, and the system of labor justice." See, e.g., US Department of Labor Bureau of International Labor Affairs (ILAB), "Peru Labor Rights Report," September 2007, p. 3; ILAB, "Colombia Labor Rights Report," March 2008, p. 3.

[26] For example, talks for DR-CAFTA were announced in January 2003, and the accord was signed in August 2004; negotiations for a US-Andean Free Trade Agreement were announced in November 2003, and the US-Peru Trade Promotion Agreement was signed in September 2006. See, e.g., "United States and Central American Nations Launch Free Trade Negotiations," United States Trade Representative (USTR) press release, January 8, 2003, http://www.ustr.gov/Document_Library/Press_Releases/2003/January/United_States_Central_American_Nations_Launch_Free_Trade_Negotiations.html (accessed September 22, 2008); USTR, "CAFTA-DR Final Text," no date, http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (accessed September 22, 2008); "USTR Notifies Congress of Intent to Initiate Free Trade Talks with Andean Countries," USTR press release, November 18, 2003, http://www.ustr.gov/Document_Library/Press_Releases/2003/November/USTR_Notifies_Congress_of_Intent_to_Initiate_Free_Trade_Talks_with_Andean_Countries.html (accessed September 22, 2008); "United States and Peru Sign Trade Promotion Agreement," USTR press release, April 12, 2006,

identifying labor-rights-related deficiencies, therefore, can lead to imperfect and incomplete solutions, as potential US trading partners scramble to remedy their failings before their accords are sent to a demanding and, at times, hostile US Congress. For example, Peru issued piecemeal, controversial labor-related executive decrees on the eve of congressional consideration of the US-Peru agreement, in lieu of more effective and comprehensive but time-intensive labor law reforms. Similarly, in the case of the pending US-Colombia accord, instead of working closely with Colombia on its workers' rights problems from the start of trade talks in November 2003, the US government is now seeking to identify quick and easy fixes as the debate over the accord rages, rather than long-term, sophisticated solutions that Colombia's entrenched and complex problems demand.

Recommendations

Require that a Redefined "Meaningful Labor Rights Report" be Produced Before Trade Talks Start

The US Department of Labor should be required to prepare a truly "meaningful labor rights report," one that is submitted to the US trade negotiating team and relevant committees of the US Congress before any trade talks start, is sufficiently succinct to be useful, and is redefined to focus on the areas in which a potential trading partner's labor laws and enforcement fall short of what will be required in the free trade agreement under negotiation.[27] The report should also set forth recommendations for improvement and establish clear benchmarks that a potential trading partner must meet before being deemed in full compliance.

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

US trade negotiating teams should communicate to any potential US free trading partner at the start of trade negotiations the findings, recommendations, and benchmarks set forth in the redefined "meaningful labor rights report" prepared for that country and demand that the recommendations be fulfilled and the benchmarks met before negotiations are finalized. This approach would loosely follow the example of Trade and Investment Framework Agreements, which the United States

---

http://www.ustr.gov/Document_Library/Press_Releases/2006/April/United_States_Peru_Sign_Trade_Promotion_Agreement.html (accessed September 22, 2008).

[27] Presently, most "meaningful labor rights reports" are simply summaries of potential US trading partners' national legal frameworks governing the workers' rights covered under the free trade accords.

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."[28]

Facilitate Compliance

The United States should assist trading partners by providing technical assistance and needed capacity building, including financial assistance, both during trade talks and after agreements are in force to facilitate compliance with recommendations and benchmarks on effective labor law enforcement.[29] To ensure that such assistance is effectively and appropriately utilized, the US Congress should explicitly grant the US Department of Labor multi-year spending authority to distribute needed aid but make each disbursement of aid contingent upon regular demonstrations by the receiving parties of measurable workers'-rights-related improvements.

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

[29] Each US trade accord with workers' rights protections, with the exception of the US-Jordan agreement, already requires labor-related cooperation and capacity building activities. See, e.g., NAALC, art. 11; DR-CAFTA, annex 16.5; US-Peru TPA, annex 17.6.

Improving Enforcement

The record of enforcement of US free trade agreements' labor rights provisions has been abysmal. In the 14 years since US free trade accords began including workers' rights protections, no labor-rights-related complaint has progressed past ministerial-level consultations between the parties. And of the 34 cases filed under NAFTA, only 14 even made it that far.[30] As a result, no complaint has led to an in-depth, independent, expert investigation of the claims. And no case has resulted in the initiation of the dispute settlement process or the convening of an arbitral panel to determine whether violations occurred and whether the imposition of fines or benefit suspension was warranted.

The lack of US government mechanisms to promote such enforcement contributes to this egregious failure. While the US Department of Commerce and International Trade Commission (ITC) have programs to assist US entities seeking to file commerce-related complaints, no parallel assistance is available for potential labor complainants. And although the US Department of Agriculture Food Safety and Inspection Service sends inspectors abroad annually to audit compliance with US meat-, poultry-, and egg-related regulations, no similar foreign monitoring occurs to audit compliance with trade accords' workers' rights provisions.

In this section, we examine the inadequacy of the tools currently available to US government officials to promote enforcement of US free trade agreements' labor protections, identify other key factors that have contributed to the glaring enforcement failure, and offer recommendations for improvement.

Depoliticizing Labor Rights Enforcement Mechanisms

Two interrelated factors are chiefly responsible for ineffective enforcement of US trade accords' workers' rights provisions: the excessive discretion granted parties in determining the fate of complaints alleging labor rights violations; and the extreme

[30] ILAB, "Public Submissions," October 2007, http://www.dol.gov/ilab/porgrans/nao/submissions.htm (accessed August 7, 2008).

politicization of labor rights complaint and dispute settlement processes. These shortcomings can render workers' rights provisions virtually impotent even in the face of egregious violations.

In the United States, the Department of Labor's Office of Trade and Labor Affairs (OTLA) is responsible for receiving submissions alleging noncompliance with US trade agreements' labor provisions. However, OTLA regulations ambiguously instruct the office to "conduct further examination of the submission *as may be appropriate*" and issue a report that includes "*any* findings and recommendations."[31] The regulations fail to require OTLA to follow a specific investigative methodology and fail to demand that findings and recommendations be made on every issue raised in a complaint.[32]

OTLA regulations also provide that once OTLA completes its review of a labor complaint and issues a report, the office may only make nonbinding recommendations to the US Secretary of Labor regarding whether cooperative consultations with the accused party are appropriate;[33] whether a council of the parties' labor ministers or a committee of experts, in the case of NAFTA, should be convened in the event that the initial cooperative consultations fail;[34] and whether the formal dispute settlement process should be initiated in the event that no

---

[31] 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*, vol. 71, no. 245, December 21, 2006, pp. 76695-76696.

[32] The reports issued by the US National Administrative Office (NAO), an OTLA predecessor, occasionally fell short of this standard. For example, in 1996, Human Rights Watch, the International Labor Rights Fund, and the National Association of Democratic Lawyers in Mexico submitted a complaint to the US NAO addressing a dispute over the representation of employees at the Mexican Ministry of the Environment, Natural Resources, and Fishing. The complaint included charges that union members were unable to enjoy rights that they eventually won in court, due in part to the government's failure to recognize the workers' legal victory. The US NAO report on the case, however, failed to address this allegation. See Human Rights Watch, *Trading Away Rights: The Unfulfilled Promise of NAFTA's Labor Side Agreement*, vol. 13, no. 2(B), April 2001, p. 38; ILAB, NAO, "NAO Submission No. 9601: Public Report of Review," January 27, 1997, http://www.dol.gov/ILAB/media/reports/nao/9601.htm (accessed September 19, 2008).

[33] Cooperative consultations generally occur between parties' national contact points or ministries of labor, and parties are required to "make every attempt" to resolve the matter through such consultations before a submission is moved to the subsequent stage of the labor complaint process. See, e.g., NAALC, arts. 21, 22; US-Jordan FTA, arts. 16, 17; DR-CAFTA, art. 16.6; US-Peru TPA, art. 17.7.

[34] Each accord following NAFTA, with the exception of the US-Jordan agreement, establishes a Labor Affairs Council, "comprising cabinet-level officials," which shall, among other functions, "oversee the implementation of and review progress under" the accord's labor chapter. See, e.g., DR-CAFTA, art. 16.4; US-Peru TPA, art. 17.5. The US-Jordan accord similarly requires the creation of a Joint Committee to "supervise the proper implementation" of the entire agreement, not solely the labor provisions. US-Jordan FTA, art. 15.

resolution is reached through the council or expert committee.[35] Under the regulations, the United States enjoys complete discretion in making these decisions—though the specific US agency to which these decisions fall is left unclear—and can ignore any relevant OTLA recommendations on the matter.[36]

Such broad discretion is rooted, in part, in the language of US free trade accords, which gives states significant freedom to decide whether to invoke labor rights complaint and dispute settlement systems. For example, agreements establish that a party: "*may* request" cooperative labor consultations with another party regarding issues arising under the agreement; "*may* request" that a labor council or committee of experts, in the case of NAFTA, be convened if the first cooperative consultations fail; and, if the matter still remains unresolved, "*may*" invoke the formal dispute settlement process.[37] The trade agreements further extend a party's enforcement discretion to the formal dispute settlement process itself, providing that if additional consultations held under the dispute process also fail, a party "*may* request … the establishment of an arbitral panel" to assess if accord violations occurred and to potentially determine an appropriate fine or sanction.[38]

Furthermore, governments also have significant discretion over the content of certain key stages in the complaint and dispute settlement processes. For example, once the United States decides that cooperative labor consultations with an accused party are appropriate, there is no requirement that the consultations lead to the resolution of or even address the key shortcomings or recommendations identified in an OTLA report.[39] In addition, all trade accords since NAFTA with the exception of the US-Jordan agreement explicitly allow a party to initiate formal dispute settlement procedures as soon as 60 days after a party's request for the initial cooperative

---

[35] OTLA regulations explicitly give the US Secretary of Labor discretion on these matters, providing only that OTLA can "make a recommendation" to the secretary at each stage. See 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. 76696.

[36] See ibid.

[37] See, e.g., NAALC, arts. 21-23, 27; US-Jordan FTA, arts. 16, 17; DR-CAFTA, art. 16.6; US-Peru TPA, art. 17.7 (emphasis added).

[38] See, e.g., US-Jordan FTA, art. 17(1)(c); DR-CAFTA, art. 20.6(1); US-Peru TPA, art. 21.6(1); see also, NAALC, art. 29.

[39] Many cooperative ministerial consultations held under NAFTA—the only such consultations held to date—have failed to meet this standard, involving, instead, information exchanges, the establishment of working groups, the development of information materials, and the holding of conferences on one or two issues raised in the complaints, rather than concrete action plans to expeditiously remedy all confirmed labor-rights-related failings.

consultations but do not establish a deadline for when such cooperative consultations must be concluded. Nor do they establish a deadline for fulfillment of implementation agreements resulting from these consultations. This has led to years of delay in some cases.

Human Rights Watch understands that such enforcement discretion is not unique to labor rights provisions of trade agreements. Similar discretion is also a standard element of state-to-state enforcement of commercial provisions in bilateral and regional US trade accords and in multilateral trade instruments, such as the World Trade Organization's Dispute Settlement Understanding. Furthermore, Human Rights Watch recognizes that such discretion has opened the door for overburdened US government agencies responsible for administering trade agreements' commercial provisions to increasingly de-prioritize enforcement of such provisions,[40] resulting in fewer commercial enforcement actions per year despite an ever-growing number of trade accords.[41] US industries and members of the US Congress have taken notice,[42] including Senator Max Baucus, who sponsored the Trade Enforcement Act of 2007, designed in part to "significantly bolster enforcement of our trade agreements abroad."[43]

Human Rights Watch takes no position on the negative impact of broad state discretion on the application of commercial requirements. Nor do we have views on the measures that may be appropriate to remedy any such enforcement shortcomings, including whether our labor-related recommendations below should be adapted to the commercial context. Our focus, instead, is on addressing the

---

[40] See, e.g., US Government Accountability Office (GAO), "International Trade: Further Improvements Needed to Handle Growing Workload for Monitoring and Enforcing Trade Agreements," June 2005, http://www.gao.gov/new.items/d05537.pdf (accessed October 16, 2008). The GAO report notes that these US agencies—the Office of the US Trade Representative and the US Departments of Agriculture, Commerce, and State—have myriad other trade-related responsibilities, including trade negotiations, that compete for scarce funding.

[41] "Statement of Lael Brainard, Vice President and Bernard L. Schwartz Chair, International Economics Brookings Institute, Committee on Senate Finance," *Congressional Quarterly Transcriptions,* May 22, 2008.

[42] See, e.g., "U.S. Carriers, Vendors Urge USTR to Act on Rates For Mobile Termination, Practices in Mexico, China," *Telecommunications Reports International*, February 1, 2004.

[43] "Statement of Max Baucus, Chairman Senate Finance Committee, Committee on Senate Finance," *Congressional Quarterly Transcriptions,* May 22, 2008. The act never proceeded past the Senate Finance Committee, however.

devastating consequences that virtually unfettered state enforcement discretion has had on the application of US trade accords' labor rights requirements.

The tendency to de-prioritize enforcement—an often unpleasant, acrimonious process—evidenced in the commercial setting has been further exacerbated in the labor rights context by the unwillingness of the United States and its trading partners to strain diplomatic relations over workers' rights concerns. Historically, non-labor-related considerations—geopolitical, strategic, and others—have taken priority even in the face of egregious abuses.

As a result, the decisions regarding labor rights enforcement have had little to do with actual levels of compliance with US trade agreements and very much to do with political expediency. This trend must be reversed; observance of and adherence to fundamental human rights should not depend on accord parties' political whims.

Recommendations

Strengthen OTLA Regulations on Complaint Reviews

OTLA regulations should be amended to require that, for every complaint accepted for review, OTLA:

1) produce a report that must at least include specific findings and detailed analyses on all of the issues raised in the submission;[44]

2) in each report, provide concrete recommendations to address every allegation confirmed by the OTLA investigation, including specific recommendations for each private employer and corporation directly or indirectly implicated. Such recommendations should include direct payments and other appropriate compensation for the workers suffering the violations and steps to prevent future abuses;

3) during in-country investigations, conduct meetings with national and regional labor ministry and inspectorate offices; consult with local civil society organizations, including trade unions, most familiar with the issues; and

[44] See, e.g., Human Rights Watch, *Trading Away Rights*, pp. 5-6.

perform site visits to each employer specifically named in the complaint. During each site visit, OTLA should conduct anonymous worker and worker representative interviews, meet with managers, tour and observe the workplace, and collect and review relevant documents. The United States should encourage and facilitate the development of similar regulations for its trading partners' national "contact points,"[45] also charged with receiving submissions alleging violation of US accords' workers' rights requirements.

Clarify the Secretary of Labor's Lead Role in Complaint and Dispute Settlement Processes

OTLA regulations should be amended to clarify that each decision on whether to move a US labor submission to the subsequent stage of an accord's complaint or dispute settlement process lies with the US Secretary of Labor, as head of the US agency most experienced on labor-related matters and as the designated "contact point with other Parties" on such matters.[46] Such a clarification would recognize that US free trade accords establish a key role for labor ministries in the administration of workers' rights provisions and that labor-related expertise is critical to ensure effective implementation of these provisions.

Make Progression Through the Complaint Process Mandatory Until Satisfactory Resolution

US free trade agreements should greatly reduce the broad discretion parties have during the labor rights complaint process prior to initiation of formal dispute settlement procedures by *requiring* that: 1) a party request and initiate cooperative consultations upon the recommendation of its national contact point, such as OTLA, or upon any finding by that contact point of labor-rights-related shortcomings in another party; and 2) if cooperative consultations fail to produce a mutually satisfactory resolution of the matter, a party *must* proceed to the subsequent stage

[45] Each US free trade accord with labor rights provisions, with the exception of the US-Jordan agreement, requires each party to designate an office within its labor ministry to "serve as a contact point" with the other parties and the public, including by assisting with labor cooperation and capacity building activities and providing for the submission, receipt, and review of labor complaints. See, e.g., NAALC, arts. 15, 16; DR-CAFTA, art. 16.4(3); US-Peru TPA, art. 17.5(5). The US-Jordan accord also requires the creation of a contact point but to "receive official correspondence related to" the entire agreement, not solely the accord's labor provisions, and to provide any needed administrative assistance related to the agreement's implementation. US-Jordan FTA, art. 15(6).

[46] See, e.g., DR-CAFTA, art. 16.4(3); US-Peru TPA, art. 17.5(5).

of the complaint process by convening a council of the parties' labor ministers or a committee of experts, in the case of NAFTA.

Base Consultations on Facts and Gear them Toward Results

US free trade agreements should significantly reduce parties' discretion in framing and managing cooperative consultations. 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. US trade accords should require that initial cooperative consultations, any subsequent deliberations of a labor council or committee of experts, and any further consultations under the formal dispute settlement process be focused on reaching "a mutually satisfactory action plan,"[47] which "shall conform with the determinations and recommendations" set forth by the relevant national contact point,[48] such as OTLA, in its examination of the labor allegations at issue.[49] Until these changes are made in US free trade accords, the US Department of Labor should issue regulations requiring that all such US-initiated consultations and labor council and committee of experts deliberations meet these requirements.

Make Initiation of Formal Dispute Settlement and Arbitral Panel Procedures Mandatory

US free trade accords should significantly reduce parties' discretion in the initiation of formal dispute settlement procedures and arbitral panels. US free trade accords should establish that a labor complaint shall be considered satisfactorily resolved only after full and expeditious implementation of an "action plan," based closely on national contact point recommendations or on the recommendations of an arbitral panel report, if one is produced. US trade agreements should *require* parties 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;[50] or 2) 180 days after a "mutually satisfactory action plan" has been

---

[47] See, e.g., NAALC, art. 38; DR-CAFTA, art. 20.15(3).

[48] See, e.g., NAALC, art. 38; DR-CAFTA, art. 20.15(3); US-Peru TPA, art. 21.15(1).

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

[50] 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

established a party is not "fully implementing" the plan.[51] Similarly, US trade agreements should require parties 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, the relevant national contact point should conduct a follow-up investigation to verify implementation of the action plan, consulting closely with the group or groups that submitted the labor complaint at issue.

Provide for Independent Investigation of Complaints if OTLA Reviews Fall Short

At this writing, no labor complaint review process has been concluded under the December 2006 regulations that transferred responsibility for labor provision enforcement from the Office of Trade Agreement Implementation (OTAI) to the newly established Office of Trade and Labor Affairs. Nor has any complaint review process been concluded involving any US trade accord besides NAFTA.[52] As a result, it is too soon to assess whether the investigative methodology that OTLA will adopt and the final reports that OTLA will produce under the new regulations and under the more recent trade agreements, with more robust labor provisions, will yield objective findings and recommendations on all matters raised in the submissions.

If OTLA fails to achieve such standards, Human Rights Watch believes that more dramatic changes will be necessary to ensure that the labor rights complaint process under US free trade accords is truly impartial from the very beginning. Under such

---

US-Jordan Free Trade Agreement 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).

[51] 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.

[52] OTAI followed the US National Administrative Office, created pursuant to NAFTA.

circumstances, OTLA should immediately turn over any labor complaint that meets its submission criteria to an independent team of experts, "with experience in labor law or its enforcement,"[53] to investigate the complaint and fulfill the other complaint-related responsibilities previously charged to OTLA.[54]

Ensuring Transparency and Public Participation in Labor Rights Enforcement

Human Rights Watch believes that all phases of the labor complaint and dispute settlement processes should be open and transparent. Government officials should facilitate public participation during initial investigations into labor submissions, cooperative consultations, labor council or committee of expert proceedings, and arbitral panel deliberations. The contributions of civil society groups most familiar with the workers' rights abuses alleged should be an integral component of any analysis of alleged trade agreement violations. And private corporations and employers accused of labor abuses should have an opportunity to respond to claims against them, particularly if they may face potential penalties under the accords.

Existing labor complaint and dispute settlement procedures established in US trade accords do not mandate that parties facilitate such public participation and transparency. For example, NAFTA provides that if a committee of experts is convened, following unsuccessful ministerial consultations, the committee "*may* invite written submissions from ... the public" and "*may* consider, in preparing its report, any information provided by ... organizations, institutions and persons with relevant expertise, and the public."[55] Similarly, even though the arbitral panel rules of procedure in all accords since the US-Jordan agreement require at least one hearing open to the public and mandate that the parties' written submissions, written versions of oral statements, and written responses to panel inquiries be publicly available, the rules fail to explicitly provide for public participation. Instead,

---

[53] The NAALC includes such expertise as a potential criterion for the selection of arbitral panelists. NAALC, art. 30(2)(a).

[54] Human Rights Watch recommends that, in such situations, the United States convene the expert panel by selecting impartial investigators from the roster of "individuals who are willing and able to serve as [arbitral] panelists" under the accords. The agreements explicitly provide that such arbitral panelists must be experts "chosen strictly on the basis of objectivity, ... reliability and sound judgment" and must be "independent of, and not be affiliated with or take instructions from, any Party." See, e.g., ibid., art. 30; DR-CAFTA, art. 20.7; US-Peru TPA, arts. 21.7, 21.8.

[55] NAALC, art. 24 (emphasis added).

they only instruct an arbitral panel to "*consider* requests from non-governmental entities in the disputing parties" to provide their written views.[56]

It is only for the very initial stage of the labor complaint process that, in some cases, domestic regulations require that public participation be facilitated. For example, US regulations governing such labor submissions establish that OTLA "shall provide a process for the public to submit information relevant to the review, ... which may include holding a public hearing."[57]

Recommendation

Guarantee Opportunities for Public Participation

The public and, in particular, civil society groups and private companies and employers implicated in a complaint should be explicitly granted an opportunity to be heard during each phase of the labor complaint and dispute settlement processes.[58] This opportunity should include at least one public hearing in the country where the alleged abuses occurred that allows for the possibility of calling workers, management, and other witnesses to testify and the presentation of written or oral statements. These public views, especially those presented by relevant organizations and companies, should be incorporated into any report by a national contact point or arbitral panel and in the development of "mutually satisfactory action plans" to remedy any labor rights shortcomings identified.

Facilitating Access to Labor Rights Enforcement Mechanisms

The labor complaint process should be easily accessible and widely utilized to ensure that workers' rights provisions in trade agreements are effectively enforced. Since the first US trade accord with labor protections took effect 14 years ago, only 23 workers' rights cases against four trading partners have been filed in the United States, though there are eight accords with workers' rights provisions in force

[56] See, e.g., DR-CAFTA, art. 20.10(d); US-Peru TPA, art. 21.10(d) (emphasis added).

[57] 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. 76696 (emphasis added). OTLA has held a total of ten public hearings—all of them related to complaints filed under NAFTA. ILAB, "Public Submissions," October 2007.

[58] This includes all national contact point investigations, cooperative consultations, council of ministers or committee of experts deliberations, and arbitral panel procedures.

involving 13 different countries.[59] In contrast, over that same period, reports by the ILO Committee on Freedom of Association and the US Department of State together have documented repeated failure by at least ten of the 13 trading partners to effectively enforce their domestic labor laws, potentially in violation of the agreements.[60]

There are many reasons for the apparent underutilization of US trade agreements' complaints processes, including potential disillusionment with the processes themselves. One key factor, however, is the complexity of the US complaint submission process and the significant level of trade law expertise, resources, and

[59] Twenty-one labor complaints have been filed with the United States against Mexico and Canada; one case has been filed with the United States against Guatemala under the DR-CAFTA; and one has been filed under the US-Jordan Free Trade Agreement, though the process for such submissions under the US-Jordan accord are less defined and not governed by OTLA regulations. ILAB, "Public Submissions," October 2007; 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. 76691.

[60] See, e.g., ILO Committee on Freedom of Association, *Complaint against the Government of El Salvador presented by the National Trade Union Federation of Salvadorian Workers (FENASTRAS)*, report no. 346, case no. 2487, vol. XC, 2007, series B, no. 2, paras. 926-928; ILO Committee on Freedom of Association, *Complaint against the Government of Guatemala presented by the General Confederation of Agricultural and Urban Workers (CTC), the General Confederation of Workers of Guatemala (CGTG), the Unified Trade Union Confederation of Guatemala (CUSG), the National Coordinating Body of Farmworkers' Organizations (CNOC), the National Trade Union and People's Coordinating Body (CNSP), the National Trade Union Federation of Public Employees of Guatemala (FENASTEG), the Trade Union Federation of Bank and Service Industry Employees (FESEBS), the Trade Union Federation of Food and Allied Industry Workers (FESTRAS), the Trade Union Federation of Farmworkers (FESOC), the National Front for the Defence of Public Services and Natural Resources (FNL), the Izabal Banana Workers' Union (SITRABI), the Western Distribution Workers' Union SA (SITRADEOCSA), the Eastern Electricity Distribution Workers' Union SA (SITRADEORSA), the Eastern Petenero Distribution Workers' Union (SITRAPDEORSA) and the Trade Union of Workers of Guatemala (UNSITRAGUA),* report no. 350, case no. 2609, vol. XCI, 2008, series B, no. 2, para. 905; ILO Committee on Freedom of Association, *Complaint against the Government of Honduras presented by the International Textile, Garment and Leather Workers' Federation (ITGLWF)*, report no. 348, case no. 2517, vol. XC, 2007, series B, no. 3, para. 837; US Department of State Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices—2007: Bahrain," March 11, 2008, http://www.state.gov/g/drl/rls/hrrpt/2007/100593.htm (accessed October 8, 2008); US Department of State Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices—2007: Chile," March 11, 2008, http://www.state.gov/g/drl/rls/hrrpt/2007/100632.htm (accessed October 8, 2008); US Department of State Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices—2007: Dominican Republic," March 11, 2008, http://www.state.gov/g/drl/rls/hrrpt/2007/100637.htm (accessed October 8, 2008); US Department of State Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices—2007: El Salvador," March 11, 2008, http://www.state.gov/g/drl/rls/hrrpt/2007/100639.htm (accessed October 8, 2008); US Department of State Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices—2007: Guatemala," March 11, 2008, http://www.state.gov/g/drl/rls/hrrpt/2007/100641.htm (accessed October 8, 2008); US Department of State Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices—2007: Honduras," March 11, 2008, http://www.state.gov/g/drl/rls/hrrpt/2007/100644.htm (accessed October 8, 2008); US Department of State Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices—2007: Jordan," March 11, 2008, http://www.state.gov/g/drl/rls/hrrpt/2007/100598.htm (accessed October 8, 2008); US Department of State Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices—2007: Mexico," March 11, 2008, http://www.state.gov/g/drl/rls/hrrpt/2007/100646.htm (accessed October 8, 2008); US Department of State Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices—2007: Morocco," March 11, 2008, http://www.state.gov/g/drl/rls/hrrpt/2007/100602.htm (accessed October 8, 2008); US Department of State Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices—2007: Nicaragua," March 11, 2008, http://www.state.gov/g/drl/rls/hrrpt/2007/100647.htm (accessed October 8, 2008).

basic technical capacity required to draft complaints that satisfy the submission requirements.

For example, a submission to OTLA not only must specify all allegations and include, "wherever possible," available supporting laws and regulations, but also should, "as relevant," identify the particular accord commitments allegedly violated; describe the extent of any harm to the submitter or other persons; show whether the allegations "demonstrate a sustained or recurring course of action or inaction" of labor law non-enforcement; explain whether the alleged violation affects trade between the accord parties; and note the status of any domestic or international legal proceedings underway on the issues raised.[61] These requirements may be extremely difficult to meet for workers suffering abuses and the underfunded and understaffed civil society organizations that often serve them, particularly the notoriously resource-strapped groups in "developing" US trading partners.

Human Rights Watch proposes that two complementary approaches be adopted to facilitate the filing of workers' rights complaints under US trade accords: 1) the creation of an independent, private entity to assist those organizations whose resource constraints and limited technical expertise impede them from filing complaints that fulfill OTLA's rigorous submission criteria; and 2) the expansion of OTLA's mandate to explicitly charge the office with assisting small entities, including businesses, labor unions, and nongovernmental organizations, in understanding US trade agreements' labor provisions and the intricacies of the complaint filing process. Useful models for both such organizations are found in the US Department of Commerce and International Trade Commission bureaucracy established to facilitate the filing of commerce-related complaints under US trade agreements and trade laws. Such US government-provided guidance has proven invaluable for many US entities seeking redress for commercial injuries arising from unlawful trade practices; similar assistance should be available to those seeking justice for labor abuses committed in the context of free trade.

[61] 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.

Private Labor Complaint Filing Assistance

The US Department of Commerce's Trade Compliance Center provides an instructive model for how a private organization might streamline the labor complaint filing process. The TCC is the self-described "one-stop shop for getting U.S. government assistance in resolving the trade barriers or unfair situations you encounter in foreign markets."[62] Unfair treatment in commercial cases can be reported to the TCC with just "one e-mail, fax or phone call"—no fulfillment of demanding submission criteria is required.[63] The TCC explains:

> You don't have to be a trade agreement expert. If you believe you are facing an unfair situation, let us know. Our specialists can determine if a trade agreement covers your case. If we believe it does, we will handle it as a compliance complaint.[64]

Human Rights Watch does not advocate precisely the same approach with respect to labor rights provisions; there are good reasons for rigorous submission criteria for workers' rights complaints under US free trade accords. The uniform standard that these criteria establish and the detail and analysis they require help ensure at least a minimum level of transparency and corresponding accountability for OTLA as it reviews these publicly available complaints. Instead, we suggest establishing an entity, borrowing from the TCC model, to receive allegations of labor-rights-related trade accord violations, both from US groups and those in US trading partners, and to follow up with much-needed assistance in transforming those allegations into complaints that fulfill OTLA's submission criteria. Well-funded public awareness campaigns in the United States and its trading partners should publicize the launch of the new entity. To help ensure that the new organization is not politicized, Human Rights Watch recommends that it be private and government funded.

Recommendation

Create a Private Government-Funded Entity to Assist Potential Complainants

---

[62] TCC, "Making America's Trade Agreements Work for You!," no date, http://tcc.export.gov/ (accessed August 22, 2008).

[63] Ibid.

[64] TCC, "Frequently Asked Questions," no date, http://tcc.export.gov/ (accessed August 22, 2008).

A new entity, composed of workers' rights experts and providing services in English and the national language of each US trading partner, should be created in the United States to:

1) receive informal allegations of potential violations of trade accords' workers' rights provisions from groups in the United States and abroad, including by fax, email, or a telephone hotline established specifically for this purpose;

2) investigate all such allegations, in consultation with relevant labor and trade experts;

3) determine whether the allegations, "if substantiated, would constitute a failure of ... [a] Party to comply with its [labor] obligations or commitments" under a US trade accord, and:[65]
   a) if not, provide a detailed explanation to the submitting parties;
   b) if so, prepare and submit a formal workers' rights complaint according to OTLA submission requirements.

Conduct Public Awareness Campaigns in Countries Party to US Trade Agreements

US embassies in each US trading partner, through their labor officers or other relevant personnel and in close coordination with OTLA, should launch in-country public information campaigns, which should include intensive trainings for local workers' rights experts, nominated by local labor rights specialists and organizations, including local trade unions, to serve as a resource for civil society organizations. Such campaigns are necessary to help ensure that local groups, including trade unions and workers' rights nongovernmental organizations, in such countries are fully aware of trade accords' labor complaint procedures and any available complaint filing assistance programs.

Fund Private Complaint Filing Assistance

All US free trade accord implementing legislation should authorize annual appropriations of "such sums as may be necessary for the establishment and

[65] 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.

operations" of a private, government-funded entity in the United States to assist in the submission of workers' rights complaints under US trade agreements.[66]

Informal Government Labor Complaint Filing Guidance

Even organizations capable of successfully accessing US trade accords' labor rights complaint procedures could still benefit significantly from informal government guidance on trade agreements' labor provisions and the complexities of the complaint submission requirements. Such advice is currently available from the Department of Commerce and the US International Trade Commission for entities submitting or considering submitting commercial complaints under US free trade accords and trade laws. Human Rights Watch believes that similar guidance should be provided by the US Department of Labor's OTLA for trade-related labor claims.

The Department of Commerce has a Petition Counseling and Analysis Unit consisting of "a dedicated staff of professionals who are available to assist U.S. companies in a myriad of ways with respect to the U.S. unfair trade laws," including by: 1) helping them "understand U.S. unfair trade laws … and the process of filing a petition requesting the initiation of an investigation"; 2) "[p]roviding guidance to potential petitioners to assist them in determining what types of information will be required"; and 3) "[a]ssisting potential petitioners in ensuring their petition is in compliance with statutory initiation standards."[67]

Similarly, the Trade Remedy Assistance Office (TRAO) in the ITC provides small businesses and other small entities, such as small trade associations and worker organizations, "with general information on specific U.S. trade laws and provides technical assistance to eligible small entities seeking relief under the trade laws."[68] According to the TRAO, "Technical assistance includes … informal legal support, intended to enable eligible small entities to determine the appropriateness of

---

[66] Similar language appears in US trade accord implementing legislation to ensure the successful establishment and operation of an office in the US Department of Commerce responsible for providing administrative assistance to dispute settlement panels convened under the accords. See, e.g., DR-CAFTA Implementation Act of 2005, sec. 105(b).

[67] US Department of Commerce International Trade Administration, "Antidumping/Countervailing Duty Petition Counseling and Analysis Unit," June 6, 2008, http://ia.ita.doc.gov/pcp/pcp-index.html (accessed August 27, 2008).

[68] ITC, "Trade Remedy Investigations: Trade Remedy Assistance Program Information," no date, http://www.usitc.gov/trade_remedy/trao/trao.htm (accessed August 27, 2008).

pursuing remedies under the trade laws, to prepare petitions and complaints, and to seek to obtain the remedies and benefits available under the trade laws."[69] In addition, both the Department of Commerce and the ITC "welcome the opportunity to review a petition before it is filed," noting that "[t]he petitioner benefits by being informed of any deficiencies in the petition which, if not corrected in time, may delay or prevent initiation of the investigation."[70]

Recommendation

Provide US Government Assistance to Potential Complainants

To help organizations understand trade accords' workers' rights provisions and satisfy OTLA complaint submission criteria, OTLA's mandate should be expanded to include complaint filing assistance. Such assistance should be based on the models of the Department of Commerce's Petition Counseling and Analysis Unit and the ITC's Trade Remedy Assistance Office, described above. Specifically, OTLA's responsibilities should be expanded to call explicitly for the provision of non-adversarial, informal legal support to potential petitioners under US trade accords, including:

1) guidance in understanding US trade agreements' labor protections and in determining whether the filing of a formal complaint alleging violation is appropriate;

2) assistance in understanding the complaint submission process and fulfilling the submission criteria;

3) review of complaints before they are filed to identify any deficiencies or gaps, especially those which, if not corrected, might lead to complaint rejection for failure to meet submission requirements.

[69] Ibid.

[70] ITC Office of Investigations, "Antidumping and Countervailing Duty Handbook," April 2007, http://www.usitc.gov/trade_remedy/731_ad_701_cvd/documents/handbook.pdf (accessed September 19, 2008), p. I-4.

Monitoring Trade Accord Labor Rights Compliance

There are not enough organizations tracking workers' rights abuses to file complaints for all or even most violations of US trade accords' labor provisions. As a result, Human Rights Watch believes that affirmative government monitoring is needed. Trade agreements' labor protections would benefit from a two-pronged approach to enforcement, just as US labor laws are enforced domestically through individual and collective complaints to the justice system and inspections and follow-up actions by the Department of Labor's various agencies. Similarly, just as the US Department of Agriculture Food Safety and Inspection Service inspectors conduct routine annual audits abroad to better ensure adequate food safety for US consumers,[71] US Department of Labor inspectors should conduct routine annual inspections abroad to ensure respect for workers' rights under US trade accords.

Although OTLA presently serves "as the Contact Point for purposes of administering the labor chapters" and "labor provisions" of US free trade accords,[72] its regulations do not explicitly charge the office with proactively monitoring compliance. The closest the regulations come to suggesting a possible monitoring function is permitting OTLA to independently "initiate a review of any matter arising under" US trade agreements' labor provisions; "make a recommendation at any time to the Secretary of Labor as to whether the United States should request consultations with another Party"; and, as appropriate:

> establish working or expert groups; consult with and seek advice of non-governmental organizations or persons; prepare and publish reports … on matters related to the implementation of a [trade accord] labor chapter …; and collect and maintain information on labor law matters involving another Party.[73]

---

[71] US Department of Agriculture Food Safety and Inspection Service, "Regulations and Policies: Import Information," August 12, 2008, http://www.fsis.usda.gov/regulations_&_policies/Foreign_Audit_Reports/index.asp (accessed October 8, 2008). For example, US Department of Agriculture Food Safety and Inspection Service inspectors inspect Mexican beef, pork, and poultry exporting plants to ensure compliance with the requirements of the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Products Inspection Act.

[72] 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. 76691.

[73] Ibid., pp. 76694-76696.

To help ensure that US free trade agreements' labor provisions are applied in practice, OTLA should, in addition, be charged with an affirmative monitoring role in US trading partners' compliance and should be expanded accordingly.

Recommendations

Expand OTLA's Monitoring and Inspection Capacity

Roughly following the model of the US Department of Agriculture Food Safety and Inspection Service, OTLA should be expanded to include expert inspectors charged with conducting annual monitoring visits in countries party to US trade agreements. Their responsibilities should include visits to national and regional labor inspectorates and to a representative random sampling of exporting facilities in different sectors, following the in-country investigative methodology proposed above for OTLA review of labor complaints. OTLA inspectors should be required to produce a public foreign audit report after such investigations.

Strengthen and Reorganize the US Labor Officer Program

The US Department of State's Labor Officer Program should be shifted to the US Department of Labor's Bureau of International Labor Affairs (ILAB), whose resources should be correspondingly expanded to ensure adequate capacity to manage and oversee the program. This reorganization will help ensure greater collaboration among US government officers who focus on labor matters abroad and facilitate OTLA's monitoring of foreign compliance with workers' rights provisions in US trade accords. The number of labor officers, charged with "promot[ing] labor policies in countries to support U.S. interests and provid[ing] information on local labor laws and practices,"[74] should also be increased to guarantee at least one full-time officer dedicated to labor-related issues in each US free trade partner. The officers should complement the monitoring work conducted by the new OTLA inspectors and coordinate closely with them in the preparation of annual foreign audit reports. In the interim, until such shift is made, a previous program allowing US Department of Labor officials to be detailed to the US Department of State and assigned to US embassies abroad should be reactivated and a detailed Department of Labor official placed in each US trading partner to fulfill the above-described duties.

[74] US Department of State, "A U.S. Embassy at Work," no date, http://www.state.gov/r/pa/ei/8710.htm (accessed September 15, 2008).

Require OTLA- Initiated Review of US Trading Partners

If OTLA's annual foreign audit report includes information that, "if substantiated, would constitute a failure of the other Party to comply with its [labor rights] obligations or commitments" under a US free trade accord,[75] OTLA should be required to treat the foreign audit report as a submission alleging trade agreement noncompliance, triggering US initiation of the labor complaint process.

[75] 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.

Conclusion

US free trade accords can be an important and powerful tool for advancing workers' rights. To date, however, despite recent reforms, US policy and practice in this area have fallen short, squandering the opportunities presented by the negotiation and execution of trade agreements. The recommendations presented here outline the reforms that Human Rights Watch believes are necessary to begin to remedy those failures.

We recognize that additional legal reforms and policy changes are also necessary to ensure that these accords reach their full potential for workers' rights promotion. For example, a new approach must be adopted for any new trade promotion authority or "fast track" legislation, one that prioritizes workers' rights,[76] including in the selection of future US trading partners. And labor-related technical assistance and capacity building should consistently prioritize aid for civil society organizations, including unions, that are best positioned to assist workers seeking to exercise their fundamental rights.

Human Rights Watch urges a new US administration, taking office in January 2009, both to embrace our proposals and to recognize that they form only one component of a multifaceted strategy that must be implemented to ensure effective protection of workers' rights in US free trade accords. Failure to do so will result in the continuation of a flawed US trading model incapable of upholding the promise to workers that their rights will be a priority in the global marketplace.

[76] The primary purpose of trade promotion or "fast track" authority is to allow the US president to negotiate free trade agreements that the US Congress can only approve or reject, not amend, but the legislation also establishes a substantive and procedural framework for the negotiation and subsequent congressional consideration of accords. See, e.g., Carol Pier, "Workers' Rights Provisions in Fast Track Authority, 1974-2007: An Historical Perspective and Current Analysis," *Indiana Journal of Global Legal Studies*, vol. 13, winter 2006.

Acknowledgments

Carol Pier, labor rights and trade senior researcher for the Business and Human Rights Program of Human Rights Watch, researched and wrote this report. The report was edited by Arvind Ganesan, director of the Business and Human Rights Program; Aisling Reidy, senior legal advisor; and Joseph Saunders, deputy program director. Carly Tubbs, coordinator for the Business and Human Rights Program, provided research assistance and staff support and prepared the report for publication. Layout and production were coordinated by Tubbs and Grace Choi, publications director. Printing and distribution were performed by Fitzroy Hepkins and José Martínez. Outside trade and labor rights lawyers also shared their knowledge and expertise with us during the research and writing process, and we are grateful for their invaluable contributions.

HUMAN RIGHTS WATCH
350 Fifth Avenue, 34th Floor
New York, NY 10118-3299

www.hrw.org

HUMAN RIGHTS WATCH

A Way Forward for Workers' Rights in US Free Trade Accords

The new US administration that takes office in January 2009 will be responsible for implementing labor provisions in existing US free trade agreements and face the challenge of restructuring the accords and the larger US trade agenda to better protect workers' rights. There has been some recent progress in US policy, but significant, bold changes are needed.

A Way Forward for Workers' Rights in US Free Trade Accords examines the current US approach to workers' rights in trade agreements, identifies serious deficiencies, and proposes specific steps the new administration should take to address the shortcomings.

The report sets forth concrete recommendations to strengthen US trade accords' substantive labor provisions, proposing that all such agreements: unambiguously require all parties to uphold core labor rights in their domestic laws; penalize states that fail to enforce their labor laws in all cases involving trade or investment between the parties; punish corporations implicated in labor abuses; and depoliticize enforcement, in part, by requiring that meritorious labor complaints proceed through the complaint and dispute settlement processes unless they are satisfactorily resolved.

It develops specific guidelines for prioritizing compliance and enforcement, drawing on commercial examples and best practices. The report recommends that a new US administration: raise labor rights with potential trading partners from the beginning of free trade talks; require that deficiencies be remedied before negotiations conclude; create and fund mechanisms to assist private parties seeking to file labor complaints; raise awareness in US trading partner countries of the agreements' labor provisions and enforcement processes; and engage in proactive monitoring, including by conducting on-site inspections abroad.

Human Rights Watch believes that such changes are essential for the US trading model to finally fulfill its promise of making workers' rights a priority in the global marketplace. Without them, the United States will continue to squander much of the leverage and opportunity that trade accords provide for advancing workers' rights.