



Justice Delayed

the Long Road of the Guatemala CAFTA Complaint

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In September 2014, the United States Trade Representative (USTR) announced that it will finally proceed to arbitration against the Government of Guatemala, more than six years after a complaint was filed alleging that Guatemala was violating the labor standards contained in the Central American Free Trade Agreement (CAFTA).

The announcement is welcome news for advocates of binding labor standards in international trade agreements and, more importantly, Guatemalan workers who continue to wait for their government to enforce even the most basic labor laws. It also marks the first time the U.S. government has proceeded to the arbitration phase for a complaint alleging violations of the labor chapter of a free trade agreement.

However, a review of the complaint's history raises troubling questions about the ability of FTAs to deliver justice to workers denied their fundamental labor rights.

THE SLOW ROAD TO JUSTICE

On April 23, 2008, six Guatemalan trade unions and the AFL-CIO filed a complaint alleging that the Government of Guatemala was failing to enforce its domestic labor laws, highlighting cases of anti-union discrimination, unscrupulous employers refusing to pay minimum wages and provide legally required benefits, and a systematic failure to investigate and prosecute violence against trade unionists.

In January, 2009, the U.S. Department of Labor issued a report finding systemic failures in the enforcement of Guatemalan labor laws, but declined to invoke formal labor consultations (the first step under CAFTA towards enforcing a complaint), in-

stead providing the Guatemalan government with an initial six month period to address the issues raised in the report. In a pattern that would repeat itself, the U.S. granted multiple extensions on this initial deadline, despite little evidence that the Guatemalan government was taking the necessary steps to address the systematic failures.

On July 30, 2010, the United States Trade Representative (USTR) announced that it would proceed with the trade enforcement case against Guatemala by requesting formal consultations under Chapter 16, the first labor case ever initiated against a trade partner.

Finally, in August, 2011, after the formal labor consultations failed to yield significant improvements, USTR announced it was ready to proceed to arbitration of the dispute, a process that could require Guatemala to pay fines of up to \$15 million per year into a fund earmarked for projects to improve labor rights enforcement.

Yet at that decisive moment, the U.S. government blinked, agreeing to yet another delay while both governments negotiated a "labor enforcement plan", which was not signed until April, 2013. When Guatemala missed the enforcement plan's one year implementation deadline in February, 2014, USTR granted an additional four month extension. Only after Guatemala could not meet this final deadline did USTR announce, once again, that it was ready to proceed with the arbitration process.

On November 3, 2014, the United States submitted a 70-page brief to the arbitral panel in the Guatemala case. The panel is composed of one member chosen by the United States (an American trade law specialist), one member chosen by Guatemala (a Guatema-



lan constitutional law specialist) and a neutral chair chosen jointly (a Canadian law professor familiar with international trade and labor rights).

The U.S. brief cited dozens of cases in which Guatemala failed to effectively enforce its labor laws. Employers denied inspectors entry to workplaces, and nothing happened. Employers refused to pay fines, and nothing happened. Courts ordered reinstatement of workers fired for organizing, and nothing happened. Authorities denied registration to newly-formed unions, and nothing happened.

For its part, Guatemala asked the arbitral panel to dismiss the case on procedural due process grounds. The government argued that it did not have sufficient notice and specification of the alleged failures of labor law enforcement. The claim was preposterous, in light of years of intensive discussion, “action plans” and “road maps” laying out the problems and what needs to be done about them. But arbitration is a highly legalistic procedure, and arbitrators tend to be conservative about deciding cases when procedural issues are unresolved. Thus, advocates might have to wait even longer for results in this landmark case.

VIOLENCE AGAINST TRADE UNIONISTS NOT COVERED UNDER CAFTA

Not surprisingly, the CAFTA labor complaint against Guatemala prominently features cases where violence (including murder) is used as a tool to intimidate trade unionists from organizing and asserting their rights in the workplace. According to a widely cited annual survey, Guatemala has become the most dangerous country in the world for trade unionists: at least sixty-four union leaders have been killed since 2007.

Two cases cited in the CAFTA complaint involve the brutal murders of union leaders and threats of violence against union organizers. During an ongoing labor dispute, the General Secretary of the Port Quetzal Company Workers’ Union (STEPQ) was shot roughly twenty times in front of his children by a group of assailants; yet the Guatemalan authorities made virtually no effort to prosecute anyone for the crime. Likewise, the Special Prosecutor’s Unit for Crimes against Unionists and Journalists refused to

investigate the murder of a leader of the Izabal Banana Workers’ Union (SITRABI), who was killed on company property amidst numerous cases of attacks against SITRABI members. Shockingly, 7 members of SITRABI have been murdered since the union co-signed the CAFTA complaint in 2008.

However, any hope that the complaint would squarely address violence and impunity was severely undermined by a little known, controversial USTR policy that violence against trade union leaders is not a violation of CAFTA’s labor chapter.

Though never announced publicly, the policy is clear from a review of USTR’s statements on the Guatemala complaint, which conspicuously omit violence against trade unionists from the formal list of issues where the Government of Guatemala is failing to meet its obligations under CAFTA.¹ This means that, whatever decision is eventually made by an arbitration panel, it will not address what is arguably the most pressing issue facing the Guatemalan labor movement: the systematic use of threats and violence by Guatemalan employers to intimidate union organizers and their supporters.

Whatever USTR’s reasons for adopting this policy, it appears to be at odds established International Labor Organization (ILO) jurisprudence recognizing an essential link between fundamental human rights and the effective exercise of freedom of association:

“...freedom of association can only be exercised in conditions in which fundamental rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed, and the rights of workers’ and employers’ organizations can only be exercised in a climate that is free from violence...”²

It’s also fair to question whether this interpretation of CAFTA is consistent with Congress’ intent when it passed the trade agreement. Given the amount of debate dedicated to examining the poor labor rights records of several CAFTA countries, it’s simply difficult to believe that Congress intended to create such a fundamental loophole in CAFTA’s labor rights provisions.



RECOMMENDATIONS: LESSONS LEARNED

Over the past few decades, much has been achieved in the struggle to link global trade to respect for international labor rights. Indeed, labor rights provisions are no longer placed in unenforceable “side agreements,” but are now fully enforceable on par, at least in theory, with commercial issues. But as the long journey of the Guatemala CAFTA complaint shows, there is more work to be done to make the promise of labor chapters real for workers denied their fundamental labor rights.

Below are some recommendations for advocates and policymakers interested in making labor chapters more effective:

- Obligations for companies, not just governments: Future FTAs should incorporate the labor provisions of the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business & Human Rights (“Ruggie Principles”) to hold multinational companies, not just governments, accountable for upholding international labor standards.
- A role for civil society: Current FTA’s shunt trade unions, NGOs and other civil society actors to the side after they file a complaint. Moving a complaint forward through the dispute resolution system, policy choices, legal arguments and other decisions are entirely in governments’ hands. So is appearance and argument before arbitral panels: civil society organizations and even the workers victimized by violations have no standing to push their complaint forward, appear and argue before relevant consultation bodies or arbitral panels, submit briefs, appeal decisions or otherwise play a role in the process. FTA labor chapters should open up the process to full participation by relevant actors at all stages of the dispute resolution process.
- Address labor violence: Lawmakers should include express language concerning the obligations of each party to investigate and prosecute cases of violence against trade unionists.
- Faster, clearer process: As seen by the Guatemala complaint process, governments often fail to meet their promised deadlines with no consequences, creating endless delays and denying justice to workers. Future FTAs should establish harder deadlines, limiting the number and duration of extensions before a case must be resolved or proceed to arbitration.
- Create a secretariat: FTAs should back up a commitment to workers’ rights by establishing a permanent secretariat or observatory (the name does not matter) to monitor and report on labor developments in parties to the agreement. Such a body could:
 - Review and evaluate multinational companies’ internal systems of due diligence, communication and management of the firm’s social performance;
 - Conduct an annual Labor Information Audit on the state of labor rights and labor standards in firms involved in transatlantic trade and investment (noting, for example, whether firms have been found in violation of national labor laws or international labor standards);
 - Conduct investigations and issue findings and recommendations on alleged violations of international labor standards;
 - Undertake research to produce an annual report on the effects of the agreement on working people, and whether it is positive or negative, in each country that is party to the agreement.

¹ See, e.g., Press Release, United States Trade Representative, “United States Trade Representative Kirk Announces Labor Rights Trade Enforcement Case Against Guatemala,” (July 30th, 2010) at: <http://www.ustr.gov/about-us/press-office/press-releases/2011/may/ustr-kirk-seeks-enforcement-labor-laws-guatemala>

² ILO CFA Complaint Report 345, Case No. 2540, paragraph 318.

