

WAYS AND MEANS HEARING ON

“Mexico’s Labor Reform: Opportunities and Challenges for an Improved NAFTA”

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On behalf of our 55 affiliates representing more than 12.5 million working people, the AFL-CIO appreciates the opportunity to offer our comments on the opportunities presented by Mexico’s new labor law reform and the need to develop effective labor enforcement mechanisms in the new NAFTA.

The proposed agreement currently fails to include enforceable labor standards needed to ensure the security and prosperity of working people in all three countries. Without a viable enforcement mechanism, corporations will continue to benefit at our expense. That is why we cannot support the new NAFTA in its current form.

NAFTA and the Labor Side Agreement

In 1993, after the AFL-CIO raised concerns about the social and economic effects of NAFTA on working people, the Clinton Administration proposed the North American Agreement on Labor Cooperation (NAALC). As a side agreement, NAALC required parties to enforce their own labor standards. It also established eleven labor principles¹ that the U.S., Canada and Mexico were encouraged to uphold. The NAALC was based on enforcing existing flawed domestic labor laws that provided no requirement or incentive for countries to actively improve what it had on the books. The side agreement mechanism was too weak and never resulted in any meaningful sanctions.

Under NAALC, each country established a National Administrative Office (NAO) with the responsibility of receiving and reviewing complaints. If any party fails to enforce its labor commitments, a submission may be filed by individuals from one of the two countries not

¹ Freedom of association and protection of the right to organize, the right to bargain collectively, the right to strike, prohibition on forced labor, child labor protections, minimum standards with regard to wages, hours and conditions of employment, non-discrimination in employment, equal pay for equal work, health and safety protection, workers’ compensation, protection of the rights of migrant workers

involved with the alleged violation.² The NAO reviews the case, issues a report and can recommend ministerial consultations. In trade-related cases where a country repeatedly fails to effectively enforce its labor laws, an Evaluation Committee of Experts (ECE) may be created to review the case and issue a report with recommendations.³ If the ECE does not resolve a dispute, binding arbitration may occur only on claims involving occupational safety and health, child labor or minimum wage laws.

Over the course of 25 years, the AFL-CIO and other interested parties have filed approximately 40 complaints and none of them went beyond ministerial-level consultations.⁴ Many of the cases brought against Mexico were based on the Mexican government's failure to enforce its weak labor laws. In some cases, the submissions resulted in memorandums of understanding (MOUs) and educational programs. The NAALC model led to weak enforcement of the side agreement and a failure to address egregious worker rights violations. Overall, the NAALC did not result in any meaningful reforms for workers in any of the three countries.

Given the ineffectiveness of NAALC and subsequent labor chapters in other free trade agreements (FTAs), the AFL-CIO advocates for an improved NAFTA labor chapter that would strengthen enforcement and ensure each of the three countries abide by the conventions of the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work.⁵ Mexico's labor law reform and recent ratification of ILO Convention 98 on the right to organize and bargain collectively reflect an important first step in that direction, but its ability to effectively implement the reform still faces many hurdles.

In addition to NAFTA's failures, we have unfortunately learned that labor enforcement in other U.S. FTAs remains ineffective. On April 23, 2008, the AFL-CIO and six Guatemalan trade unions filed a complaint alleging that Guatemala was failing to effectively enforce its labor laws as required under Chapter 16 of the Dominican Republic - Central American Free Trade Agreement (DR-CAFTA). The complaint included five case studies where Guatemala failed to enforce its labor laws and highlighted the troubling rise in anti-union violence since the passage of the trade deal. This labor case, *U.S. v. Guatemala* was the first to ever proceed to dispute settlement since NAFTA went into force. After almost a decade (the case took an astounding nine years and 67 days from the filing date to the final report), the panel determined that the U.S. failed to prove that Guatemala was not effectively enforcing its labor laws.⁶

² See Article 15.3

³ The ECE may review cases with alleged violations in the area of prohibition of forced labor, compensation cases for occupational injuries and illnesses, protection of migration labor, elimination of employment discrimination, equal pay for men and women, labor protections for children and young persons, minimum employment standards, and prevention of occupational injuries and illnesses.

⁴ See, US DOL, Submissions under the North American Agreement on Labor Cooperation (NAALC), available at <https://www.dol.gov/ilab/trade/agreements/naalc.htm>

⁵ See, e.g., Chapter 17 of the US-Colombia Free Trade Agreement, Article 17.2, available at https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file993_10146.pdf

⁶ For further analysis see Vogt, Compa and Gottwald, "[Wrong Turn for Workers' Rights: The U.S.-Guatemala CAFTA Labor Arbitration Ruling – And What To Do About It](#)"

In addition, after pressure from labor and human rights organizations, in April 2011, the U.S. and Colombian governments agreed to an “Action Plan Related to Labor Rights” (Labor Action Plan) that outlined specific steps to be taken by the Colombian government within a concrete timeline. This was done to help ensure passage of the U.S.-Colombia Trade Promotion Agreement in the United States.

Colombia made commitments, both under the trade agreement and in other global arenas, to improve worker rights, end attacks and murders of trade unionists and bring perpetrators of violence to justice. The country also signed a peace accord with the FARC that committed to ending the conflict and addressing many of the core factors that continue to lead to high levels of inequality and violence.

But despite these ongoing commitments by various Colombian administrations and President Iván Duque Márquez, the situation for Colombian workers and trade unionists continues to deteriorate. The recent Colombian National Development Plan⁷ includes some rollbacks in their commitments to strengthening labor rights.

As a side agreement, the Labor Action Plan had no effective enforcement mechanism, and in May 2016, the AFL-CIO and Colombian unions submitted a complaint under the FTA, documenting ongoing egregious violations of the agreement’s labor commitments. It has been three years since submission of the labor complaint, and the AFL-CIO and Colombian unions are still waiting for an answer.

Meanwhile, from January 2016-April 2019, 681 social leaders and human rights defenders were murdered⁸; and between 2016 and 2018, 70 trade unionists were killed.⁹ In fact, from the year the U.S.-Colombia Trade Promotion Agreement (TPA) went into force until today, 172 trade unionists have been murdered.¹⁰

Guatemala and Colombia are just two examples of why it is imperative to get the enforcement mechanism in the agreement and ensure that Mexico’s labor law reforms are properly implemented, funded and enforced in the new NAFTA. Meanwhile outstanding complaints against Bahrain (filed in 2011), the Dominican Republic (filed in 2011), Honduras (filed in 2012) and Peru (filed in 2015) remain unresolved.

Mexico’s Labor Law Reform Process

Mexico’s labor law reform process represents an important opportunity for Mexico’s workers, but passage of the law is just the first step. The effective enforcement of Mexico’s new labor

<https://laborrights.org/sites/default/files/publications/Wrong%20Turn%20for%20Workers%20Rights%20-%20March%202018.pdf>

⁷ <http://ail.ens.org.co/opinion/plan-nacional-de-desarrollo-y-trabajo-decente-si-pero-no/>

⁸ <http://www.indepaz.org.co/separata-de-actualizacion-de-informe-todos-los-nombres-todos-los-rostros-abril-30-de-2019/Marcha+Patriotica/Cumbre/Indepaz>

⁹ <http://ail.ens.org.co/informe-especial/en-2018-crecio-la-arremetida-contra-activistas-y-lideres-sindicales/>

¹⁰ <http://ail.ens.org.co/informe-especial/en-2018-crecio-la-arremetida-contra-activistas-y-lideres-sindicales/>

laws will be key to ensuring that the new NAFTA can actually benefit workers. For decades, these unions in name only manage contracts to service the interests of employers seeking to avoid real collective bargaining and undermine the emergence of a democratic, independent workers' movement.

In 2014, when Mondelez Mexico (formerly and commonly known as Nabisco in the United States) opened a new, large plant in the town of Salinas Victoria, Nueva Leon, they started laying off large parts of their U.S. workforce. It was widely believed the facility was operating under a protection contract. When the Bakery, Confectionery, Tobacco Workers and Grain Millers (BCTGM) union in the U.S. requested and received a copy of the protection contract—a rare feat—it was found that the workers in the Salinas Victoria plant had a 3-tier scale. The highest pay rate converted to \$1.29 U.S. dollars per hour, the middle rate to \$1.14 per hour, and the lowest, a mere 97 cents per hour.

The proposed labor chapter in the new NAFTA includes provisions that require Mexico to end corporatist unions and their protection contracts, recognize independent unions, conduct elections for contracts and leaders and establish independent labor courts. These are important reforms that must be properly funded in order to ensure that they are implemented and enforced in a timely manner.

Despite the important step of passing the labor law reform, many possible challenges remain including:

Opposition to labor law reforms: Ongoing resistance grows to the reforms by protection contract unions, employers and some governors responsible for overseeing the implementation in their states. For close to 70 years, protectionist unions have weakened workers' representation. The largest faux union, the Confederation of Mexican Workers (CTM), recently stated that it would file legal challenges to the constitutionality of the labor law reform legislation.¹¹ It is expected more challenges will be filed but it remains unclear whether any of these claims will prevail.¹² However, the prospect of widespread litigation is likely to create uncertainty and delay the implementation of the labor reforms.

Tight timeline for implementation: The labor law reform took effect on May 2, 2019 and established a four-year timeline for implementation. Key deadlines include:

- May 2, 2020: All new and renegotiated collective bargaining agreements must be ratified by a majority of workers.
- May 2, 2021: The Federal Center for Contract Registration and Conciliation (CFCRL) takes over the registration of contracts from the existing Federal and

¹¹<https://www.lineadecontraste.com/sindicatos-ratificaran-amparos-contras-excesos-de-la-ley-federal-del-trabajo/>

¹² The appeals contend that the following provisions of the labor reform are unconstitutional because they interfere with trade union autonomy and freedom of association under ILO Conventions 87 and 98 as incorporated into the Mexican Constitution.

Local Conciliation and Arbitration Boards (CABs). The CFCRL must review all existing CBAs (whether or not they have been renegotiated) to determine whether workers are aware of and have approved them. There are an estimated 50,000 CBAs in the federal jurisdiction, including peak industries such as mining, steel and automotive. The Ministry of Labor (STPS) has provided an estimate of the existence of 530,000 protection contracts,¹³ but this may be a significant undercount. Overall, the process of reviewing these contracts will be challenging given the large number, limited resources and need to train workers on their rights under ILO Convention 98.

- By May 2, 2023 – The CFCRL must review all existing CBAs (whether or not they have been renegotiated) to determine whether workers are aware of and have approved them.¹⁴

Lack of trained personnel: In order to staff the CFCRL, it is estimated that 230 conciliators and 321 registrars will be required.¹⁵ Additionally, administrative and support staff will be needed. Trained personnel will also be necessary for the Labor Tribunals and the Local Conciliation Centers. Currently, the Mexican Labor Ministry (STPS) reports about 1,000 inspectors and plans to add another 500. According to the global standard established by the ILO, these numbers are inadequate. There should be one inspector for every 10,000 workers or about 5,600 inspectors in total¹⁶. The Ministry will require substantial resources for training and salaries to ensure an effective CFCRL.

Limited resources: To ensure enforcement, the labor law reform requires substantial resources. Currently, no budget has been approved by the Mexican congress to fund the new laws and the agencies needed to carry them out. The projected six-year budget for the CFCRL is a reported 2,223 million pesos (111 million USD)¹⁷, but this does not include the cost of the labor tribunals or local conciliation centers, and the treasury secretariat will not present a budget proposal until September 2019. At the state level, budgets for new institutions cannot be presented until enabling legislation is enacted, and without funds, the implementation process cannot begin.

Unresolved cases: While the reform process is debated and implemented, many workers still await justice for pending cases where workers have been fired, assaulted and killed for

¹³<https://www.elnorte.com/libre/acceso/accesofb.htm?urlredirect=/aplicaciones/articulo/default.aspx?id=1704778>

¹⁴ By law all CBAs have a two-year duration, with a one-year wage reopener. However, a CBA that is not renegotiated after two years does not expire, but simply rolls over. This enables protection contracts (negotiated without workers' knowledge or assent) to exist in perpetuity. Transition Article XI of the reform law requires a review of every existing CBA; if it is determined that a CBA lacks worker support, it is nullified (although its terms and conditions are retained).

¹⁵<https://factorcapitalhumano.com/leyes-y-gobierno/implementar-la-reforma-laboral-costara-2223-millones-de-pesos/2019/02/>

¹⁶ México en el top 10 de países con menos inspectores de trabajo, El Financiero, 4 Oct. 2016; Próximo gobierno intensificará inspección laboral, El Economista, 10 Jul. 2018

¹⁷ Implementar la reforma laboral costará 2,223 millones de pesos, El Financiero, 26 Feb. 2019

attempting to form a union. These cases will represent an important test to the commitment of Mexico to address these egregious labor violations.

Given these many challenges, it will be critical to ensure that the new NAFTA includes a strong and effective monitoring and enforcement mechanism, and adequate funding. Yet, the proposed new NAFTA relies on the same flawed enforcement mechanisms of previous FTAs. For example, the proposed new NAFTA's state-to-state consultations have proven ineffective. Labor issues are rarely taken seriously in these consultations. Under NAFTA, signatory countries can block the dispute settlement process from advancing by refusing to reach consensus. This problem had been resolved in later FTAs, so its reemergence the new NAFTA represents a major retreat in the fight to ensure effective enforcement. The AFL-CIO strongly believes that dispute resolution panels must be mandatory.

Additionally, under the current model, a party must demonstrate that a violation was committed through a "sustained or recurring course of action or inaction, in a manner affecting trade or investment between the parties."¹⁸ This remains in the current text of the new NAFTA and has proved insurmountable in the only case ever to have been arbitrated under the labor chapter of an FTA *U.S. v. Guatemala*.¹⁹ The AFL-CIO strongly recommends the removal of footnotes 8 and 11 in the current new NAFTA text requiring petitioners to prove that a violation has been "sustained and recurring".

The labor obligations proposed in the new NAFTA must also be supported by an independent enforcement mechanism with innovative tools and penalties to change the culture and promote a strong commitment to the protection of worker rights. All parties should work together to develop a model that would allow for the inspection of facilities suspected of violating labor standards and apply penalties for violations. Workplace inspections could be conducted in industries that are widely known for labor violations, including agriculture, mining and manufacturing, along with entities in the production chain, exporters of services and their subcontractors. If facilities are found in violation, a country could take action to deny preferential tariff treatment to all goods imported from that facility. The AFL-CIO strongly believes that any good found in violation of a trade agreement, not just a violation of forced labor, should be denied entry at the border.

This proposal could easily be modeled on the U.S.-Peru FTA's forestry annex,²⁰ which gives the U.S. the authority to verify that Peruvian lumber has been produced legally, by conducting on-site inspections in Peru. Customs officers are given the authority to block illegal products at the border and prohibit future shipments. High levels of corruption in Peru have made

¹⁸ Article 17.3

¹⁹ See, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, available at <https://www.trade.gov/industry/tas/>

²⁰ <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/january/ustr-requests-first-ever>
Section 501 of PL 110-138: <https://www.congress.gov/110/plaws/publ138/PLAW-110publ138.pdf>
<https://www.congress.gov/congressional-report/110th-congress/house-report/421/1?overview=closed>

implementation challenging but if the enforcement mechanism is strengthened this could be an important model for enforcing labor standards in the new NAFTA.

U.S. Senators Sherrod Brown and Ron Wyden are currently working on a comprehensive proposal that contains many of these recommendations, and we both support and appreciate their efforts.

We have a unique opportunity to construct a strong, enforceable and impactful agreement that creates good-paying jobs in each of the three NAFTA countries. But until the proposed agreement is rewritten to work for working people, we simply cannot support it.