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Selected Update on Trade Agreements in the Americas and Trade News Highlights from May 2010 through July 2010

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SELECTED UPDATE ON TRADE AGREEMENTS IN THE AMERICAS AND TRADE NEWS HIGHLIGHTS FROM MAY 2010 THROUGH JULY 2010

*Chad Bond**

I. UNITED STATES TO CHALLENGE LABOR STANDARDS IN GUATEMALA UNDER CAFTA-DR

ON July 30, 2010, Ambassador Ron Kirk announced the intention of the U.S. Trade Department to pursue a case against Guatemala in what would be the first-ever case by the United States based on a free trade agreement to enforce labor standards in another country.¹ The case concerns the existence of what the United States alleges are pervasive and ongoing violations of labor rights obligations by Guatemala.² During a speech at a metals manufacturer in Pennsylvania, Ambassador Kirk stated, “[w]ith this case, we are sending a strong message that our trading partners must protect their own workers. . . and that we are prepared to enforce the full spectrum of American trade rights from labor to the environment.”³ Based on data from the Office of the U.S. Trade Representative, exports to Guatemala were up 37.6% in 2009 from 2005, prior to the free trade agreement, and Guatemala is currently the 50th largest trading partner with the United States.⁴ But, according to the Chairman of the U.S. House Education and Labor Committee, George Miller, Guatemala is second only to Columbia in assassination of union leaders.⁵

The issue was initially brought to the attention of the U.S. Department of Labor on April 23, 2008 when six Guatemalan labor unions along with

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1. Ron Kirk, U.S. Trade Ambassador, Remarks on Enforcement at Allegheny Technologies, Inc. (July 30, 2010), *available at* <http://www.ustr.gov/about-us/press-office/speeches/transcripts/2010>.

2. *Id.*

3. *Id.*

4. Guatemala, Office of the United States Trade Representative, <http://www.ustr.gov/countries-regions/americas/guatemala> (last visited Aug. 8, 2010).

5. Press Release, House Educ. and Labor Comm., Chairman Miller Applauds Administration Action on Labor Rights in Guatemala (July 30, 2010), *available at* <http://edlabor.house.gov/newsroom/archives.shtml> [hereinafter Chairman Miller Statements].

the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) filed a labor complaint under Chapter 16 of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).⁶ The complaint included five examples that it argues were failures by the Guatemalan government “to address violations of worker’s rights, including that of freedom of association, against unlawful firings, and against threats and acts of violence.”⁷ In a report of the review of the complaint conducted by the Office of Trade and Labor Affairs (OTLA), several issues were noted as affecting labor standards in Guatemala:

- The enforcement ability of the Ministry of Labor is hindered by the lack of authority to sanction labor law violations—enforcement is left to the judicial system, and once a case is referred, the Ministry of Labor no longer has jurisdiction and therefore, no way to track responses to findings of violations.
- Court orders, specifically protective orders and reinstatement orders meant to remedy retaliatory firings and unlawful dismissals, are not being complied with in multiple cases.
- A high rate of violent crimes places a burden on the labor sector and the Guatemalan economy as a whole.⁸

As part of OTLA’s Procedural Guidelines,⁹ at the time the report was released in January 2009 it was recommended that the Secretary of Labor not pursue consultations under Article 16.6.1 of CAFTA-DR.¹⁰ Consultations are a formal dispute settlement procedure that may be invoked by the parties to CAFTA-DR—the United States, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua¹¹—concerning any issue covered by the agreement.¹² Article 16.2.1(a) of the agreement holds that “[a] Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties. . . .”¹³ Although the 2009 OTLA Report did not recommend consultations, it did state that progress on the issues

6. *AFL-CIO, Guatemalan Unions File First CAFTA Labor Complaint*, INSIDE U.S. TRADE, May 2, 2008, available at 2008 WLNR 8191274.

7. *Id.*

8. U.S. DEP’T OF LABOR, PUBLIC REPORT OF REVIEW OF OFFICE OF TRADE AND LABOR AFFAIRS U.S. SUBMISSION 2008-01 (GUATEMALA), ii-iv (2009), available at <http://www.dol.gov/ilab/media/reports/otla/20090116Guatemala.pdf> [hereinafter OTLA REPORT].

9. Notice of Procedural Guidelines, 71 Fed. Reg. 76,691, 76,696 (Dec. 21, 2006).

10. OTLA REPORT, *supra* note 8, at 34.

11. CAFTA-DR (Dominican Republic-Central America FTA), Office of the United States Trade Representative, <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> (last visited Aug. 8, 2010).

12. Len Bracken, *U.S. Will File First-Ever FTA Labor Case Against Guatemala*, *USTR Chief Kirk Says*, 27 INT’L TRADE REP. (BNA) 1170, 1170 (2010).

13. Dominican Republic-Central America-United States Free Trade Agreement, art. 16.2.1(a), Aug. 5, 2004, 119 Stat. 462, available at http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf [hereinafter CAFTA-DR].

would be monitored and that a recommendation for Article 16.6.1 consultations in the future was a possibility.¹⁴

Now, by formally invoking consultations, the United States puts Guatemala on a timeline of sixty days—the consultation period—after which, if the desired progression on labor issues is not made, the case will go to the CAFTA-DR Free Trade Commission.¹⁵ If within thirty days a settlement cannot be reached with the Commission, the United States may request the establishment of a dispute settlement/arbitral panel.¹⁶ Possible remedies call for fines of up to \$15 million to be paid into funds that support initiatives to improve labor standards and enforcement of labor laws in the violating country.¹⁷ Chairman Miller of the U.S. House Education and Labor Committee supported the move in statements made in a news release: “While Guatemala made significant strides to eliminate anti-labor killings leading up to [CAFTA-DR’s] ratification, I have been concerned with the increased violence in the country since the treaty’s adoption. This action helps American workers by ensuring that our nation’s trading partners live up to their promises.”¹⁸ The adequacy of labor rights in the region has been an ongoing issue of contention in the U.S. Congress from the time of the agreement’s passage in the United States in 2005, when after intense lobbying the agreement passed by a margin of only two votes,¹⁹ to after the release of the OTLA Report in 2009, when forty members of Congress sent a letter to President Colom urging action be taken to address “[t]he ongoing problems of worker exploitation and labor violence.”²⁰

II. WTO PANEL TO RULE ON ZEROING IN CALCULATING JUICE DUTIES

A World Trade Organization (WTO) dispute panel, assembled in response to a complaint by Brazil against the United States concerning the use of zeroing²¹ by the U.S. Department of Commerce (DOC) in calculating antidumping duties, has announced its intention to issue a decision by February 2011.²² Brazil claims that the use of zeroing “led to the im-

14. OTLA REPORT, *supra* note 8, at 34.

15. Bracken, *supra* note 12, at 1170.

16. CAFTA-DR, *supra* note 13, art. 20.6.

17. Bracken, *supra* note 12, at 1170.

18. Chairman Miller Statements, *supra* note 5.

19. Bracken, *supra* note 12, at 1170.

20. *Members of Congress Urge Guatemalan President to Stop Worker Exploitation, Labor Violence*, U.S. FED. NEWS, July 14, 2009, available at 2009 WLNR 13339897.

21. See generally, Olivia D. Howe, *Recent Developments in NAFTA Law-Spring Update 2010*, 16 LAW & BUS. REV. AM. 361; Posting of Chad Bond to SMU ILRA FORUM, *NAFTA Panel Charms Betsy*, July 20, 2010, <http://studentorgs.law.smu.edu/International-Law-Review-Association/News/Current/NAFTA-Panel-Charms-Betsy.aspx> (for background on the use of zeroing by the Department of Commerce, its treatment by U.S. federal courts, and its rejection by a recent NAFTA panel).

22. Daniel Pruzin, *WTO Panel Sets Early 2011 Date To Issue Ruling on U.S. Juice Duties*, 27 INT’L TRADE REP. (BNA) 1179 (2010).

position of definitive duties of up to 4.81% on imports of Brazilian orange juice.”²³ The WTO has consistently condemned the practice of zeroing, but the United States insists that individual duty orders must be challenged through dispute settlement procedures at the WTO before amendments to duty orders will be made.²⁴ Brazil is the worldwide leading producer of orange juice, with twenty percent of exports going to the United States.²⁵

In the first written submission by the United States to the WTO panel dated June 17, 2010, the United States primarily advances an argument that attempts to limit the precedential value of previous WTO Appellate Body reports by arguing that such reports have taken a negative view of zeroing under a “product as a whole” concept.²⁶ The U.S. response lists “a number of dispute settlement panels. . . [that] have found that there is no obligation to provide offsets—that is, to reduce antidumping duties on dumped imports by the amounts by which any other imports covered by the same assessment proceedings exceed normal value.”²⁷ The United States argues that the dispute panel in the present case should find, as other dispute panels have, that “the interpretation that dumping may be determined at the level of individual export transactions is a permissible interpretation of the [Anti-Dumping] Agreement.”²⁸ Basically, the issue turns on whether dumping is determined based on specific “individual export transactions” or whether it is determined at the general level of the “product under consideration.”²⁹ The United States further notes that Appellate Body reports may create expectations among WTO members, but that their decisions are not strictly binding on dispute settlement panels, whose primary obligation is to consider the interpretation of the covered agreements.³⁰ But, in a recent Appellate Body report addressing the issue of precedence in which a panel departed from established Appellate Body jurisprudence, the Appellate Body made the following observation:

[T]he legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring “security and predictability” in the dispute settlement system, as contemplated in Article 3.2 of the [Dispute Settlement Understanding], implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same

23. *Id.*

24. *Id.*

25. *Id.*

26. First Written Submission of the United States of America, *United States—Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, ¶ 2, WT/DS382 (June 17, 2010), available at http://www.ustr.gov/webfm_send/1983.

27. *Id.*

28. *Id.* ¶ 5.

29. *Id.* ¶ 3.

30. *Id.* ¶ 30.

way in a subsequent case.³¹

As at least one commentator has noted, based on the statement by the Appellate Body on the issue of precedent and of zeroing in general, it is unlikely that the U.S. argument will prevail and the panel in the present case will follow the zeroing jurisprudence established by the Appellate Body.³²

III. CANADA PASSES IMPLEMENTING LEGISLATION FOR FTA WITH COLOMBIA

The Canadian Parliament on June 30, 2010, passed Bill C-2 to implement the Canada-Colombia Free Trade Agreement (FTA).³³ This completes Canada's domestic approval process and the agreement will come into force once Colombia ratifies it and the parties establish an effective date for the agreement.³⁴ Colombian Ambassador Carolina Barco has indicated that the approval process in Colombia will be moving quickly, but she could not predict whether the Canada-Colombia FTA will go into effect before the end of the year.³⁵ The agreement is currently being reviewed by the Colombian Supreme Court to ensure constitutionality.³⁶

A free trade agreement between the United States and Colombia was negotiated under the Bush administration and signed in November 2006, but it has not received U.S. Congressional approval due to democratic opposition³⁷ to the continued violence against labor and union leaders in Colombia.³⁸ Responding to this, Colombian Trade Minister Luis Guillermo Plata at the 40th annual Washington Conference on the Americas said that "in 2002, 196 union members were murdered compared with 28 in 2009."³⁹ Although he did not say the levels of violence were acceptable, he noted that there has been significant improvement.⁴⁰ Such violence is the basis of opposition to the Canada-Colombia FTA by groups like Amnesty International, who has joined with other civil society organizations in Canada in making the following assessment of the agreement:

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31. Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WT/DS344/AB/R (Apr. 30, 2008), available at [http://www.worldtradelaw.net/reports/wtoab/us-stainlessmexico\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-stainlessmexico(ab).pdf).
 32. Posting of Simon Lester to INT'L ECON. L. AND POL'Y BLOG, *Zeroing and the Role of Precedent*, (June 22, 2010, 2:57 PM), <http://worldtradelaw.typepad.com/ielpblog/2010/06/zeroing-and-the-role-of-precedent.html>.
 33. Peter Menyasz, *Canada's Parliament Passes Bill to Implement Canada-Colombia FTA*, 27 INT'L TRADE REP. (BNA) 1045 (Jul. 8, 2010).
 34. *Id.*
 35. *Barco Says Colombia to Focus Lobbying on FTA Benefits, Cost Of Delay*, INSIDE U.S. TRADE, July 23, 2010 [hereinafter *Barco Statements*].
 36. *Id.*
 37. See generally, Allen Unzelman, *UPDATE OF LATIN AMERICAN POLICIES AND EVENTS: MAY 2010 THROUGH JULY 2010*, 16 LAW & BUS. REV. AM. 101 (2010) (discussing current efforts to revive the U.S.-Colombian FTA under the Obama Administration).
 38. Menyasz, *supra* note 33.
 39. Rossella Brevetti, *Clinton Says Administration Committed to Stalled Trade Pacts But Faces Difficulties*, 27 INT'L TRADE REP. (BNA) 752 (2010).
 40. *Id.*

The Liberal and Conservative endorsement of the free trade agreement (FTA) between Colombia and Canada was linked to a controversial side agreement with the Government of Colombia. The final version of this side deal—which is significantly different from what independent human rights groups were calling for—allows both the Canadian and Colombian governments to write their own human rights reports on the impacts of the FTA.⁴¹

In an effort to show the United States the disadvantages to waiting to implement a FTA, Ambassador Barco has noted that once the Canada-Colombia FTA goes into effect it will result in a loss of market share by the United States in commodities such as agriculture, especially in the market for wheat.⁴² Industry sources have estimated that the United States could lose as much as fifty percent of its wheat exports during the initial months that the Canada-Colombia FTA is in force and potentially the entire Colombian wheat market in the amount of time it may take the United States to ratify its own FTA with Colombia.⁴³ “U.S. exports of agricultural products to Colombia totaled \$907 million in 2009, the 19th largest U.S. Ag export market.”⁴⁴ One of the leading categories was wheat at \$141 million in exports.⁴⁵ Ambassador Barco has compared the situation to the Canada-Chile FTA that took effect before the United States and Chile entered into a bilateral FTA.⁴⁶ A concern noted by Amnesty International is that economic pressure on the United States resulting from the passage of the Canada-Colombia FTA may prompt the U.S. Congress to compromise some of its concerns for labor and union rights by following suit and ratifying the United States-Colombia FTA without fully ensuring that fundamental labor rights will be fully protected in Colombia.⁴⁷

IV. U.S. HOUSE PASSES TRADE BILL WITHOUT FTA BAN

The U.S. House of Representatives passed the Emergency Trade Deficit Commission Act (ETDCA) on July 28, 2010.⁴⁸ This is one of several bills approved by the House under its “Make It in America Agenda.”⁴⁹

41. Press Release, Joint Statement of Civil Society Leaders, Canada-Colombia Human Rights Deal “Empty” (June 14, 2010), *available at* <http://www.amnesty.ca/files/Press%20release%20Canada-Colombia%20Human%20Rights%20Deal%20Empty-%20June%2014th%20english.pdf> [hereinafter Joint Statement of Civil Society Leaders].

42. *Barco Statements*, *supra* note 35.

43. *Id.*

44. Colombia, Office of the United States Trade Representative, <http://www.ustr.gov/countries-regions/americas/colombia> (last visited Aug. 8, 2010).

45. *Id.*

46. *Barco Statements*, *supra* note 35.

47. *Joint Statement of Civil Society Leaders*, *supra* note 41.

48. Amy Tsui, *House Passes Trade Deficit Bill, Without FTA Ban, as Part of Manufacturing Agenda*, 27 INT’L TRADE REP. (BNA) 1176 (Aug. 5, 2010).

49. *House Approves Trade Deficit Commission Bill As Part Of Manufacturing Agenda*, INSIDE U.S. TRADE, July 30, 2010 [hereinafter *House Bill Approval Under Manufacturing Agenda*].

The Act establishes a trade deficit commission for making recommendations to Congress and the President on how to address current trade imbalances.⁵⁰ One change to the bill is that the Commission will no longer be “responsible for developing a comprehensive trade policy plan, by examining the economic policies, trade, tax, and investment laws, and other legal incentives and restrictions that are relevant to reducing the United States trade deficit.”⁵¹ Instead, the focus will now be on “examining the nature, causes, and consequences of the [U.S.] trade deficit and providing recommendations on how to address and reduce structural trade imbalances. . . in order to promote sustainable economic growth that provides broad-based income and employment gains.”⁵² A second change from the bill as introduced concerns the elimination of a provision that would have placed a moratorium on the submission of FTA implementing legislation by the President to Congress until after the commission finalized its plan to address the trade deficit.⁵³ It has been reported that this provision was taken out of the bill to retain Republican as well as some Democrat support and because it could have caused an issue with the United States-Korea FTA that the Obama administration⁵⁴ is currently lobbying to enact.⁵⁵

The bill was supported by some Republicans though the creation of an emergency commission is being criticized. House Ways and Means Ranking Member Dave Camp (R-MI) made the following statement following the vote: “this legislation. . . is an attempt to help U.S. manufacturers. But let’s be clear—another commission, especially one that is wrongly premised on the notion that we should apologize for or even avoid trade—is hardly what private sector job creators need.”⁵⁶ Trade Subcommittee Ranking Member Kevin Brady (R-TX) stated, “[t]he best way to shrink the trade deficit. . . is to. . . open the world to more U.S. products and services. [] If they are serious, Democrats and the White House can start by taking up and passing the pending trade agreements with South Korea, Panama and Colombia.”⁵⁷

50. Tsui, *supra* note 48.

51. Emergency Trade Deficit Commission Act, H.R. 1875, 111th Cong. § 4 (as introduced in H.R., Apr. 2, 2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=F:h1875ih.txt.pdf.

52. Emergency Trade Deficit Commission Act, H.R. 1875, 111th Cong. § 3 (as passed by H.R., July 28, 2010), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=F:h1875eh.txt.pdf.

53. *House Bill Approval Under Manufacturing Agenda*, *supra* note 49.

54. *See generally*, Len Bracken, *USTR Kirk Stresses Market Opportunities In Making Case for Trade Deals to Public*, 27 INT’L TRADE REP. (BNA) 1172 (2010) (for background on the current efforts by the Obama administration to finalize pending free-trade deals).

55. *Id.*

56. Press Release, Committee on Ways & Means Republicans, Camp, Brady Statements on Trade Deficit Commission (H.R. 1875) (July 28, 2010), *available at* <http://republicans.waysandmeans.house.gov/News/DocumentSingle.aspx?DocumentID=201198>.

57. *Id.*

V. CAFTA-DR ATTACK ON ENVIRONMENTAL POLICIES IN EL SALVADOR

Preliminary objections were heard on May 31 and June 1, 2010 in the (pending) case of *Pac Rim Cayman LLC v. Republic of El Salvador* at the World Bank's International Centre for Settlement and Investment Disputes (ICSID) in Washington D.C.⁵⁸ The tribunal, siding with the claimant, dismissed the preliminary objections of the Salvadorian government in the case and will allow further arbitration proceedings.⁵⁹ The case concerns the mining of gold with cyanide ore processing in the basin of the Rio Lempa, El Salvador's largest river.⁶⁰ Pacific Rim Mining Corp., a firm based in Canada with mining interests in El Salvador, was never able to complete the steps necessary to obtaining an operating permit for the project at issue in this case, in part due to the political controversy surrounding the potential hazardous environmental impact to the freshwater in the area.⁶¹ According to reports, in 2007 a wholly-owned subsidiary of the Canadian firm reincorporated from the Cayman Islands to Nevada in order to have legal standing under CAFTA-DR-provisions in Chapter 10 of the agreement enable foreign investors of one signatory country to bring a case before an international tribunal against another signatory country whose actions or laws have a negative effect on expected profits.⁶² The ease with which a company was able to obtain standing and effectively forum shop, as well as the potential environmental impact of the companies mining operations, has generated considerable commentary. As one observer has noted, "1.5 million people-nearly a quarter of the country's population-lack access to clean water. If gold processing chemicals contaminate the Rio Lempa, thousands of Salvadorans will be directly affected."⁶³

This case has served to illustrate the impact that expansive investor provisions of free trade agreements such as CAFTA-DR can have on the effectiveness of policies, environmental and otherwise, of sovereign nations that are signatories to such agreements. The same investor provisions "are included in all three of the Bush-signed but unapproved trade

58. *United States: Trade Agreement Attack on Environmental Policy Poses Complications for Obama Administration*, TENDERSINFO, May 27, 2010 [hereinafter *Trade Agreement Attack Poses Complications for Obama*], available at <http://www.citizenstrade.org/pipermail/ctcfield/2010-May/014479.html>.

59. *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID (W. Bank) ARB/09/12, ¶¶ 255-58 (2010), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowDoc&docId=DC1652_En&caseId=C661.

60. *Trade Agreement Attack Poses Complications for Obama*, *supra* note 58.

61. *Pac Rim CAFTA Challenge of Salvadoran Environmental, Mining Safety Policies Given Go-Ahead by Tribunal*, TARGETED NEWS SERVICE, Aug. 3, 2010 [hereinafter *Pac Rim CAFTA Challenge of Salvadoran Policies*], available at <http://justinvestment.org/2010/08/pac-rim-cafta-challenge-of-salvadoran-environmental-mining-safety-policies-given-go-ahead-by-tribunal/>.

62. *Trade Agreement Attack Poses Complications for Obama*, *supra* note 58.

63. Krista Scheffey, *Pacific Rim v. El Salvador and the Perils of Free Trade in the Americas*, Council on Hemispheric Affairs, Aug. 1, 2010, available at <http://www.truth-out.org/pacific-rim-v-el-salvador-and-perils-free-trade-americas61916>.

agreements with Panama, Colombia and Korea that the Obama administration inherited.”⁶⁴ The implications of the outcome of this case on the United States can be seen by considering that “[t]here are currently 85 Korean-owned multinational companies with about 270 establishments in the United States that would be newly empowered under the Korea FTA to challenge U.S. policies in foreign tribunals if the pact went into effect.”⁶⁵

64. *Pac Rim CAFTA Challenge of Salvadoran Policies*, *supra* note 61.

65. *Id.*

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