Failure by design: did the US choose to lose the Guatemala labour dispute?

“This decision drives home the fact that US trade deals do not protect workers’. That assessment – from Celeste Drake, Trade Policy Specialist at the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) – is timely indeed. Discussions about the future of labour provisions in free trade agreements (FTAs) are currently intensifying on both sides on the Atlantic. The decision in question is the long awaited Final Report of the arbitral Panel in the dispute concerning Guatemala’s breach of the labour clause in the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR). It is the only attempt to date to enforce an FTA labour clause through dispute settlement – the only case to ever proceed to beyond consultation to dispute settlement, and now the only decision ever issued by an arbitral panel. Published in June – more than nine years after Guatemalan unions and the AFL-CIO first submitted their complaint to the US Trade Representative (USTR) – the Report’s 288 pages are likely to prove significant.

In short, the Panel found Guatemala’s conduct not to have breached its obligations under Article 16.2.1(a) of CAFTA-DR. Following the experience of this onerous labour provision, it might be fair to assume that the Article will never be invoked again. According to Drake, ‘this failure is by design — labor chapters were not meant to work efficiently or effectively’. Indeed, Article 16.2.1(a) seems drafted to confound application. In order to constitute a breach of the Article, Guatemala’s failure to effectively enforce labour laws must have been (i) through a sustained or recurring course of action or inaction and (ii) in a manner affecting trade between the Parties. Satisfying these qualifying provisions of Article 16.2.1(a) – deemed by the Panel to be ‘cumulative in nature’ – proved insurmountable.

However the failure of the case cannot be blamed purely on critical flaws in the architecture of the labour provision. Arguably, a breach of the Article might have been found had the US simply deigned to mention in its complaint the widespread violence perpetrated against trade unionists in Guatemala. Its failure to do so is perplexing.

The US complaint

In its Initial Written Submission to the Panel in November 2014, the US argued that Guatemala had failed to effectively enforce its labour laws in three main respects.

The Panel made short shrift of two of these claims. On the issue of Guatemala’s failure to register unions, the US cited three cases, only one of which had occurred before the US submitted its initial request for the establishment of the arbitral Panel in 2011. Therefore the claim was deemed to be outside the scope of the terms of reference and beyond the Panel’s jurisdiction. The other US claims regarding labour inspections did not fare much better. The Panel found only one case in which Guatemala had failed to effectively enforce its labour laws – and this was deemed a ‘discrete instance’.

So the Panel’s decision focuses largely on the US’ claim that Guatemala failed ‘to secure compliance with court orders requiring employers to reinstate and compensate workers wrongfully dismissed for union activities, and to pay a fine for their retaliatory action’. And the Panel did find with respect to 74 workers at eight worksites that Guatemala had indeed neglected the enforcement of its labour laws. But it was unable to find that this failure amounted to a breach of the Article.

Four shipping companies, three garment manufacturers and a rubber plantation

With reference to ILO principles, the Panel recognised the importance of protecting workers from reprisals for exercising their trade union rights on the basis ‘that retaliatory dismissals are serious violations that can be expected to thwart freedom of association and the rights to organize and bargain collectively’.

The cases at the eight worksites cited were likely sufficient to constitute ‘sustained or recurring course of action or inaction’. The Panel found that the ‘precise, mandatory nature of the actions required to be taken’ (in respect of enforcement) under the Labour Code suggested a ‘pattern of significant shortfall between the labor courts’ mandate and performance’. However the Panel also noted that the number of cases was ‘small enough’ as to make the finding of a course of (in)action ‘difficult to discern’. Therefore the Panel decided to simply ‘accept on an argüendo basis’ that these instances fulfilled the first leg of Article 16.2.1(a). It would not be determinative, because the second leg of the provision could not be satisfied.

The Panel did find that Guatemala had neglected the enforcement of its labour laws, but not that it had breached its obligations under CAFTA-DR.
It is however conceivable that the Panel might have drawn a different conclusion if the US had mentioned widespread violence perpetrated against trade unionists in Guatemala in its complaint.

The approach to Article 16.2.1(a) adopted by the Panel was that conduct could be considered ‘in a manner affecting trade between the Parties’ if it confers some competitive advantage on an employer or employers engaged in trade between the Parties.\(^5\)

The panelists emphatically rejected Guatemala’s assertion that the ambit of the Article should require claimants to evidence an effect on prices or quantities traded internationally. Failures to enforce labour laws may affect costs, but do not necessarily result in lower prices or altered trade flows since cost savings need not be passed on to customers and ‘may instead be retained as increased profits’. More importantly perhaps, the Panel recognised that establishing a causal link between a failure to enforce laws and an effect on prices or trade flows ‘would often be so fraught with difficulty as to make proof of trade effects impossible’\(^6\).

In application, the Panel insisted however that ‘a complainant must demonstrate that labor cost effects reasonably expected in light of the record evidence are sufficient to confer some competitive advantage’\(^7\). Ultimately, the Panel was able to find only one such instance, and concluded pithily that ‘[o]ne is by definition not recurring’. Therefore ‘a single instance of failure to effectively enforce labor laws in a manner affecting trade within a larger course of action otherwise arising in a context not affecting trade’ cannot be deemed to constitute a breach of a Parties’ Article 16.2.1(a) obligations\(^8\).

**When the right to organise is ‘necessarily substantially impaired’**

In its discussion on the garment sector, the Panel did recognise that when employers enjoy impunity for retaliatory dismissals against union organisers, workers may be dissuaded from organising and their bargaining power reduced, conferring a competitive advantage on the employer. This was deemed a question of fact; such an effect does not flow automatically as a consequence of every failure to effectively enforce labour laws in relation to freedom of association and collective bargaining. A complainant will therefore generally be ‘required to introduce evidence of the extent and duration of effects of the failure to enforce on the ability of workers to exercise their rights to organize’, for example by way of ‘first-hand evidence from those involved in seeking to organize the union or to bargain collectively’\(^9\).

The Panel’s Report points repeatedly to an evidentiary deficit in the US case. Trade data presented by the US failed to show that some of the companies named in complaint were exporting to CAFTA-DR countries. The record evidence did not always show that the relevant labour cost effects were so significant that the reduction of the workers’ bargaining power by non-enforcement would confer any advantage on their employers. Moreover, the Panel was not given evidence that all dismissals of workers for organising had an impact on the ability of any other workers to organise a union.

On this last point, the Panel suggested that it could ‘in the absence of evidence – infer the existence of such an impact if, in the circumstances in which the failure in question took place, it necessarily substantially impaired the capacity of the employer’s workforce to organize a union or bargain collectively, thus conferring some competitive advantage on the employer’\(^10\). The Panel also noted that ‘there may nonetheless be circumstances in which the consequences of a failure to remedy serious violations would be so evident on the face of the failure that further proof would not be necessary, and a Panel could conclude that the failure was in a manner affecting trade’\(^11\).

**The consequences of a failure to mention violence**

Commenting on the decision, Celeste Drake concludes that ‘until [US] trade agreements make clear that threats and violence to intimidate workers is a trade violation, promises about protecting labor rights are not worth the paper they are written on’.

Arguably however, it was not the agreement that failed to make this clear. The substance of the US complaint barely scraped the surface of the most egregious violations of trade union rights reported in Guatemala in recent years. The situation is hardly unknown: the ITUC consistently ranks Guatemala among the worst violators of workers’ rights internationally. According to the AFL-CIO, eighty-three trade unionists have been murdered in the country since CAFTA-DR came into force – the majority of these remain uninvestigated and unsolved. Among those murdered were seven members of the Guatemalan Izabal Banana Workers’ Union (SITRABI), one of the Guatemalan unions who co-signed the complaint to the USTR in 2008\(^12\).

But the systematic use of violence against trade unionists was never mentioned in the US’ complaint. The AFL-CIO challenged the USTR in April 2015 after its officials allegedly insisted in private discussions that such violence constituted a ‘rule of law’ issue, beyond the scope of the agreement and to be dealt with diplomatically by the State Department\(^13\).

The USTR later backtracked on the ‘rule of law’ argument, but still failed to mention the incidents in the proceedings. One can only hypothesise whether the Panel might have drawn a different conclusion had the US made these incidents part of their initial complaint; the Report makes no reference to any acts of violence. But it seems conceivable that precisely the very serious violations that the US failed to mention may have sufficed to overcome an evidentiary burden about freedom of association, competitive advantage and effects on trade, which
the US case as stated ultimately failed to satisfy. At the points mentioned above, the reasoning in the Panel’s Report seems to invite such a conclusion.

Indeed, the proposition that Guatemala’s failure to prevent impunity for such violence does not amount to a failure to enforce its labour laws does not hold up to scrutiny. Article 10 of Guatemala’s Labour Code – on which the US based a large part of its complaint – explicitly prohibits any kind of reprisal against workers which is aimed at hindering the exercise of workers’ rights under the Code or the Constitution (which enshrines the right to freedom of association). Following a recent workshop organised by the Friedrich Ebert Stiftung, I had opportunity to ask Kevin Banks – the chair of the US-Guatemala Panel – whether he thought allegations of failure to enforce laws against acts of violence against trade unionists could have been raised in the proceedings and what impact such cases may have had. Banks said that, subject to more fully considering any arguments to the contrary, he could see no reason evident on the face of the Agreement why such laws would not be considered “labour laws” for the purposes of the CAFTA-DR - that is, as “laws directly related to the right of association and the right to organise and bargain collectively”. He further suggested that if cases of failure to enforce laws against violence against trade unionists were admissible and proven, these “would likely colour the interpretation of evidence of related failures to enforce labour laws”.

Could the climate of violence and impunity in Guatemala have been deemed sufficiently pervasive as to serve as a general deterrent to workers from exercising their trade union rights? That would seem to be consistent with the ILO’s Committee on Freedom of Association, which has clearly stated that where there is a climate of violence, including the murder or disappearance of trade union leaders, the failure to hold guilty parties accountable ‘creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights’.

The US’ Initial Written Submission seems however to preclude any such general interpretation of the obligations under Article 16.2.1(a). The Submission states specifically that the provision does not apply to enforcement failures that have no effect on trade between the parties, such as labor enforcement issues relating to government workers or civil servants whose work does not involve the production of goods or the provision of services entering cross-border commerce. This might hold true for 74 cases of unfair dismissal. But enforcement failures which concern acts of violence and murder of trade unionists on this scale are failures of such severity that they arguably affect trade regardless of whether the particular victims’ work involves ‘the production of goods or the provision of services entering cross-border commerce’. It is hard to imagine that such levels of violence would ever not serve as a general deterrent to workers from exercising their union rights in other (or even all) areas of the national economy, thus reducing workers’ bargaining power and conferring a competitive advantage on all employers – including those engaged in trade and cross-border commerce.

**Lessons and future challenges**

The outcome of the Guatemala complaint is likely going to be seen as a test case for labour chapters in FTAs. As the demand for labour provisions with ‘teeth’ grows ever louder in debates over the future of US and EU trade policy, those advocating for stronger labour protections in FTAs will not want to see CAFTA-DR’s narrowly drafted provision replicated in any future agreements. The Panel Report highlights another important lesson: this is what can happen when the initiation of labour disputes under FTAs is left to state parties themselves.

But the practical challenges of designing adequate labour provisions are becoming widely apparent. In an article written prior to his appointment to the Panel, Banks argued that adversarial state-state confrontations over compliance with labour clauses are not necessarily a suitable strategy for pursuing meaningful systemic change on labour rights at all: ‘There is little reason to believe that international adjudication, where confronted with contentious matters raising significant and complex social policy problems, is likely to exert sufficient independent influence to reshape national interests or to proactively deter non-compliance with core labor standards. It most cases it is probably more likely to impede than to foster proactive cooperation, given the zero sum logic of litigated dispute resolution.’

Is it then time to make a categorical distinction about which kinds of violations are ‘beyond’ cooperation? Perhaps it is more suitable for trading partners to commit only to consultation and cooperation to improve their legal and institutional capacity to promote labour standards. But when the lives and liberty of workers are at stake? The Guatemala case which did not happen – the one which concerned a culture of impunity for egregious labour and human rights abuses, widespread violence, intimidation and murder – is clearly of a fundamentally different character to the case which did, which concerned a failure of the legal institutional apparatus (an unreliable labour court system, a dysfunctional inspectorate). And the case the US did not make is precisely the kind for which such litigation – and sanctions – seems warranted.

... Notes on page 28 ...
8. Ibid., para. 585.
11. Ibid., at 43–44 (emphasis added).
12. See, for example, Human Rights Watch, A Strange Case: Violations of Workers’ Freedom of Association in the United States by European Multinational Corporations (2010), Available at: http://www.hrw.org/reports/2010/09/02/strange-case-0
14. Ibid., at 69.