



## SOUTH ASIA INTERNATIONAL ECONOMIC LAW NETWORK (SAIELN)

SEPTEMBER 25, 2018 (TUESDAY), 11:00 AM

CRIT Conference Hall, 8<sup>th</sup> Floor, NAFED House, Mathura Road, Siddhartha Enclave,  
New Delhi - 110024

### **Case discussion on 'In the matter of Guatemala – Issues Relating to the Obligations under Article 16.2.1 (a) of the CAFTA-DR' dispute and its implications**

The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) is a Free Trade Agreement (FTA) between the United States (US) and six Central American countries which includes provisions to regulate social issues such as labor and environment. FTAs contain dispute settlement provisions, but these have hardly been used. However, the adjudication of a dispute under the CAFTA-DR is an instance of utilising the dispute settlement provisions under an FTA.

The final report of the arbitral panel in the dispute concerning Guatemala's breach of the labour clause in the CAFTA-DR was released on 14 June 2017. This dispute offers insights on the interplay between trade and labour issues incorporated under FTAs. This dispute could be indicative of an emerging trend to utilize dispute settlement under FTAs to enforce social issues.

#### **Summary of the Dispute**

Under the CAFTA-DR, the US requested consultations with Guatemala in July 2010. This was followed by a request for the establishment of an arbitral panel in August 2011.

At issue in this proceeding were claims by the US that Guatemala had breached its obligation under Article 16.2.1(a) of the CAFTA-DR, which reads as follows:

*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, after the date of entry into force of this Agreement.*

In particular, the US pointed to Guatemala's failure to 'compel compliance with court orders to reinstate and compensate workers unlawfully dismissed in the course of union organizing activities,' as well as its failure to 'conduct proper investigations in response to *bona fide* complaints of employers' violations of laws related to acceptable conditions of work' and for 'not conducting inspections properly so as to determine whether an employer has violated Guatemalan labor laws or failing to impose penalties upon discovering violations' (para 219, Panel Report).

The Panel found that the US had proven that at certain worksites, Guatemala had effectively failed to enforce its labour laws by failing to secure compliance with court orders. However, these instances did not constitute a course of inaction that was in a manner affecting trade.

On the issue of whether the failure to enforce labour law 'affects trade', the Panel decided in favour of Guatemala. In its view, the argument of the US would require the Panel to stray too far from the ordinary meaning of "affecting trade" in so far that it necessarily implies that 'all failures to effectively enforce such laws would be in a manner affecting trade to the extent that they affected employers engaged in trade'. Instead, the Panel insisted that the language of Article 16.2.1 (a) must be interpreted to mean that the disputed actions "must change conditions of competition by conferring a competitive advantage upon an employer engaged in trade" and, thus, such



competitive advantage must be demonstrated as being reasonably expected in the circumstance (Paras 479-480, Panel Report).

Thus, while the US was successful in demonstrating that the Guatemalan government had failed to enforce its labour laws on a number of occasions and at a number of enforcement sites, the US ultimately failed to prove that these actions affected trade between the two countries, and thus lost the dispute.

### **Drawing lessons from the CAFTA-DR Dispute**

This is the first instance in which a labour law complaint has been adjudicated under an FTA. This decision indicates that the use of FTA arbitration to enforce labour law transnationally comes with significant limitations. This could lead to a change in the design and structure of labor provisions within FTAs. Another broader issue would be the appropriateness of using the dispute settlement mechanisms of trade agreements to resolve issues related to labour.

This discussion session of the South Asia International Economic Law Network (SAIELN) proposes to engage on the legal nuances of this decision and its consequent impact on the inclusion of labour issues within trade agreements.

### **Programme**

**Chair:** Prof. (Dr.) James J. Nedumpara, Professor & Head, Centre for Trade and Investment Law

**Case Presentation:** Ms. Sparsha Janardhan, Research Fellow, Centre for Trade and Investment Law

#### **Discussants:**

- Mr. Adarsh Ramanujan, Independent Counsel, New Delhi
- Dr. Prabhakar Singh, Associate Professor and Assistant Dean (Research and Publications) and Executive Director, Centre for International Legal Studies, Jindal Global Law School
- Ms. Shiny Pradeep, Assistant Professor (Legal), Centre for Trade and Investment Law

#### **Floor Discussion**

#### **Tea and Coffee**



## Location



## About Us

The Centre for Trade and Investment Law (CTIL) was established in 2016 by the Ministry of Commerce and Industry, Government of India at the Indian Institute of Foreign Trade. CTIL's primary objective is to provide sound and rigorous analysis of legal issues pertaining to international trade and investment law to the Government of India and other governmental agencies. CTIL will eventually be a part of the Centre for Research in International Trade (CRIT), which is being established by the Ministry of Commerce and Industry. CTIL aims to create a dedicated pool of legal experts who could provide technical inputs for enhancing India's participation in international trade and investment negotiations and dispute settlement.



The South Asia International Economic Law Network (SAIELN) is an international non-partisan and non-profit organisation which aims to create a network of academics and practitioners seeking to promote the development of academic research in international economic law in South Asia region. The network also aims to foster, engage and encourage academic understanding of international economic law in South Asian context.

