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CAFTA's Weak Labor Rights Protections: Why the Present Accord Should be Opposed

A Human Rights Watch Briefing Paper

On February 20, 2004, President George W. Bush notified Congress of his intent to sign the U.S.-Central America Free Trade Agreement (CAFTA)—an accord that the United States recently negotiated with Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. According to U.S. law, the president must wait ninety days from the date of notification before signing the agreement and can send it to Congress for a vote any time thereafter.¹

Proponents of free trade often argue that, among its benefits, are improved worker well-being and enhanced respect for workers' rights. Human Rights Watch takes no position on free trade per se, but we take an active interest in workers' human rights. We believe that trade agreements can provide meaningful leverage to promote workers' rights, but only when meaningful, enforceable labor rights protections are built into the fabric of the accords.

The inherent link between labor rights and trade is well recognized. The Bipartisan Trade Promotion Authority or "Fast Track" authority, signed into law by President Bush on August 6, 2002, establishes among the overall negotiating objectives for all future free trade agreements to which the United States is party "to promote respect for worker rights."² Perhaps in recognition of this general objective, CAFTA's drafters included labor rights provisions. For the reasons set forth below, however, we conclude that those provisions are fundamentally flawed.

The substantially finalized version of CAFTA, made public on January 28, 2004, does not include adequate workers' rights protections. It fails to require compliance with even the most basic internationally recognized labor rights norms and specifically fails to

¹ Trade Act of 2002, Sec. 2105(a)(1)(A), (C). The Trade Act of 2002 requires the President to notify Congress at least ninety days prior to entering into a free trade agreement. Once Congress receives the accord, however, it cannot amend the text and can only vote to approve or reject it as submitted. See, e.g., The White House, *President Signs Trade Act of 2002: Remarks by the President at Signing of the Trade Act of 2002*, August 6, 2002, <http://www.whitehouse.gov> (retrieved February 26, 2004).

² Trade Act of 2002, Sec. 2102(a)(6).

protect women workers against discrimination. While the accord calls on countries to uphold their own labor laws, which may or may not be consistent with international standards, it provides a weak enforcement mechanism for that limited commitment. It also fails to require that parties' enforcement of their labor laws include procedural guarantees and provide for adequate remedies to redress any violations. Finally, while CAFTA creates a labor cooperation and capacity building mechanism, which some government officials have touted as a key tool to promote labor rights, there is no guarantee of funding and thus no guarantee that the mechanism will operate, much less perform this function.

As detailed below, current labor laws and practices in the region give serious reason for concern. CAFTA provides little meaningful incentive, however, for parties to improve protection for workers' human rights.

If the president seeks congressional approval of CAFTA in its present form, Congress should reject the accord, making clear that it will not support any CAFTA that fails to uphold workers' human rights. Instead, CAFTA should be renegotiated to include stronger provisions that effectively protect labor rights.³

Failure to Protect International Labor Rights Standards

CAFTA does not require that countries' domestic labor laws comply with basic international norms that have been established by United Nations (U.N.) and International Labor Organization (ILO) conventions. Instead, the accord merely establishes hortatory provisions recommending that CAFTA parties "strive to ensure" such compliance and that they not "encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws."⁴ A party violating these provisions faces no meaningful consequences because the accord does not contemplate the possibility of fines or sanctions for such violations.

Central America's labor laws currently fall far short of international standards. For example, in December 2003, Human Rights Watch reported that El Salvador's laws governing the right to freedom of association do not adequately protect this right. Worker suspension procedures can be and are manipulated to target union members; union registration is excessively burdensome; anti-union discrimination in hiring is not explicitly banned; and safeguards against anti-union dismissals and suspensions are weak and easily circumvented.⁵ CAFTA does not require that El Salvador or any other

³ In theory, CAFTA countries' executive branches could still agree to amend the negotiated text to include such protections. In practice, however, they show no political will to do so and have, instead, sent strong signals that CAFTA's labor-related provisions are final. As a result, two options remain for achieving stronger workers' rights protections in CAFTA: a new administration being inaugurated in one of the CAFTA countries that demands that the accord be renegotiated to include such provisions; the parties' legislatures rejecting the trade pact and sending it back for renegotiation, forcefully asserting that they will not pass any CAFTA with weak workers' rights protections.

⁴ U.S.-Central America Free Trade Agreement, arts. 16.1, 16.2(2).

⁵ See Human Rights Watch, *Deliberate Indifference: El Salvador's Failure to Protect Workers' Rights* (New York, NY: Human Rights Watch, December 2004).

CAFTA party remedy such shortcomings, nor does it prohibit countries from weakening domestic labor laws still further.

- A renegotiated CAFTA should explicitly require that parties' domestic labor laws meet international norms and should make violation of this requirement punishable with fines or sanctions.

Failure to Protect Women Workers against Discrimination in Law or Practice

CAFTA requires countries to implement existing labor laws, providing 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.”⁶ Although CAFTA’s definition of “labor laws” includes statutes or regulations governing five explicitly enumerated “internationally recognized labor rights,”⁷ it excludes those laws related to the elimination of employment and workplace discrimination—one of the four core labor rights identified by the ILO Declaration on Fundamental Principles and Rights at Work.⁸ Therefore, under CAFTA, states are not required to ensure that their domestic anti-discrimination laws comport with international standards, nor even to enforce their existing laws. So, for example, Guatemala could continue to allow the widespread practice of illegal pregnancy-based discrimination in its export processing zones and still be in compliance with CAFTA.⁹

- A renegotiated CAFTA should define “labor laws” to include those statutes and regulations directly related to the elimination of discrimination with respect to employment and occupation, thereby requiring countries to enforce effectively their anti-discrimination labor laws.

Failure to Ensure Adequate Domestic Remedies

Under international law, everyone has a right to an effective remedy, determined by competent state authorities, for human rights violations.¹⁰ Using language very similar to the North American Agreement on Labor Cooperation (NAALC)—the labor side agreement to the North American Free Trade Agreement (NAFTA)—CAFTA

⁶ *Ibid.*, art. 16.2.

⁷ *Ibid.*, art. 16.8. CAFTA defines “labor laws” as those statutes or regulations “directly related to”: the right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labor; a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

⁸ International Labour Conference, ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 18, 1998.

⁹ See Human Rights Watch, *From the Household to the Factory: Sex Discrimination in the Guatemala Labor Force* (New York, NY: Human Rights Watch, January 2002).

¹⁰ International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171, December 16, 1966, art. 2; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR 3d Sess., pt. 1, at 71, U.N. Doc. A/810, December 10, 1948, art. 8.

encourages, but does not require, countries to adopt certain “procedural guarantees” for the enforcement of local labor laws. In particular, CAFTA establishes that parties shall ensure “appropriate access” to “fair, equitable, and transparent” tribunals to redress labor law violations.¹¹ These provisions are not enforceable, however, and if a country fails to uphold them, it does not face meaningful penalties under CAFTA.

Currently, labor courts in the region fall short of providing effective remedies for workers’ rights abuses. For example, CAFTA notes that “final decisions on the merits” in labor court proceedings should be “based on information or evidence in respect of which the parties were offered the opportunity to be heard.”¹² Human Rights Watch has documented, however, that the “opportunity to be heard” for workers seeking legal redress in El Salvador’s labor courts is often a legal fiction. Workers must present a minimum of two witnesses to support their cases, but co-workers are reluctant to testify out of fear of employer reprisals, and El Salvador lacks effective “whistle-blower” protection that could alleviate these fears. As a result, workers are frequently unable to meet their evidentiary burden and, unable to make their stories “heard” before the courts, are denied relief. Under CAFTA, parties are not required to address these or similar obstacles to justice for victims of human rights abuses in the workplace.

- A renegotiated CAFTA should ensure that failure to establish “procedural guarantees” for the enforcement of domestic labor laws is subject to dispute settlement procedures and the possibility of fines or sanctions.

Inadequate Incentives to Enforce Existing Labor Laws

CAFTA’s only enforceable labor rights provision requires countries to effectively implement existing labor laws, even if those laws—like many throughout Central America—fail to meet international standards. The accord allows for the invocation of a dispute settlement mechanism if a party violates this provision,¹³ but the mechanism is marred by loopholes that likely would substantially undermine its usefulness in many cases.

If a country fails to enforce its labor laws and CAFTA parties are unable to resolve the dispute—or if, after reaching a resolution, its terms are breached—an arbitral panel can impose a fine, collected annually until the violation is remedied. The annual fine is paid directly into a fund administered by a multilateral commission of cabinet-level government officials (Free Trade Commission or FTC). The complaining party can only suspend tariff benefits—up to the level of the fine assessed—if the fine is not paid.¹⁴

CAFTA establishes that the fine is to be “expended at the direction of the Commission” for “appropriate” labor initiatives in the violating country, yet contains no explicit

¹¹ U.S.-Central America Free Trade Agreement, art. 16.3.

¹² *Ibid.*, art. 16.3(3)(c).

¹³ *Ibid.*, art. 16.2(1).

¹⁴ *Ibid.*, art. 20.17(5).

safeguards to ensure that this occurs.¹⁵ Instead, in a footnote, CAFTA currently includes only a “Negotiators’ Note” that states:

The model rules of procedure should provide that the Commission will seek the views of interested parties in their territories on how funds should be expended in particular cases. The rules should also make clear that funds should be used to further the objectives of the Agreement.¹⁶

Furthermore, even if the funds are used for “appropriate” programs, there is no guarantee that the end result will be a net increase in spending on initiatives to protect workers’ human rights or remediation of the CAFTA breach that led to the fine. Nothing in CAFTA prevents a party from rebudgeting to account for a fine. Rather than adding the fine amount to the budget already allocated for labor-related programs, a violator can simply reduce that budget by the amount of the fine and shift those funds originally designated for such purposes to other areas. It can then use the fine to offset the reduced budget and thus maintain the same level of spending as before, resulting in no new resource allocation for labor law enforcement and little chance for improvement. Since tariff benefits can only be suspended if a party fails to pay a fine, not because it fails to address the violation, there is no way to compel remediation. Thus, a country can opt to pay a fine indefinitely and enjoy CAFTA benefits while systematically failing to enforce its labor laws.

Under this scheme, the threat of an annual fine will likely only result in improved labor law enforcement if it is sufficiently large relative to the offender’s existing Labor Ministry spending. For example, with a proposed 2004 Labor Ministry budget of over U.S.\$80 million, Costa Rica, faced with a U.S.\$15 million fine (the maximum allowed under current CAFTA terms), could cut the Labor Ministry’s budget to roughly U.S.\$65 million, use the fine to restore funding for labor-related programs to original levels, and shift the U.S.\$15 million cut from the Labor Ministry to other national priorities. In this case, the impact of the CAFTA fine would be negligible, and the possibility of another would provide little incentive for Costa Rica to remedy the CAFTA breach. In contrast, facing U.S.\$15 million fines, Nicaragua, with a Labor Ministry budget of just over U.S.\$3 million, and El Salvador, with a Labor Ministry budget of roughly U.S.\$5.5 million, would be unable to negate the fines’ impact on their national budgets through fund shifting. In such cases, a fine’s impact would be greater, the possibility of another fine likely unpleasant, and—if the fine funds were directed to truly “appropriate” initiatives—the CAFTA breach could be at least partially addressed.

- CAFTA’s renegotiated text should explicitly require that fines collected for failure to enforce national labor laws be disbursed only for initiatives that directly address the CAFTA violation.
- To guarantee that the mechanism to enforce CAFTA’s only binding labor rights provision can deter violations, a renegotiated CAFTA should ensure that, if the

¹⁵ Ibid., art. 20.17(4).

¹⁶ Ibid., art. 20.17(4), fn 13.

offending party fails to use fine funds to remedy the breach, it is penalized to the same degree that it would be had it violated a commercial provision. This would lead to a net financial loss for continued CAFTA violations because the repeat offender would either face tariff benefit suspension or have to pay subsequent fines to the injured state party.¹⁷

Underfunded Labor Cooperation and Capacity Building Mechanism

CAFTA creates a Labor Cooperation and Capacity Building Mechanism, which among other responsibilities, is tasked with undertaking cooperative, capacity building, and technical assistance activities.¹⁸ The Office of the United States Trade Representative (USTR) has referred to this as “a groundbreaking mechanism to promote labor rights through specialized consultations and targeted training programs” and a tool “to improve labor laws and enforcement and build the capacity of Central American nations to monitor and enforce labor rights.”¹⁹

These goals cannot be accomplished without adequate funding. However, CAFTA does not guarantee this mechanism sufficient resources. As a result, the mechanism could be woefully underfunded and thus ineffective. This may have already started to happen. For example the Bush administration’s proposal for its fiscal year (FY) 2005 budget would slash funding for just such programs. The FY 2005 budget proposes U.S.\$18 million for international labor rights programs around the world, an 82 percent drop from the U.S.\$99.5 million Congress appropriated for FY 2004. If CAFTA goes into effect in FY 2005, sufficient funding of its Labor Cooperation and Capacity Building Mechanism can occur only if the U.S. Congress transfers money from elsewhere in the budget.

- A renegotiated CAFTA should include language to ensure adequate funding for its Labor Cooperation and Capacity Building Mechanism or, at a minimum, a “Negotiators’ Note” establishing that CAFTA’s model rules of procedure—to be established by the Free Trade Commission before CAFTA enters into force—will do so.

Conclusion

Under CAFTA as currently drafted, parties have little or no incentive to strengthen their deficient labor laws, ensure adequate remedy for workers’ rights abuses, protect women workers from discrimination, or improve domestic labor law enforcement. CAFTA should include strong, enforceable labor rights protections to compel countries to take such steps and create a free trade area in which the rights of workers producing goods for export are upheld. It does not. The accord, therefore, should be renegotiated to

¹⁷ In the case of a commercial violation, the complaining party can suspend tariff benefits equal to the injury suffered. To prevent sanctions, the offending party may agree to pay an annual fine to the complaining country—typically equal to 50 percent of the injury—until the violation is eliminated. *Ibid.*, art. 20.16.

¹⁸ *Ibid.*, Annex 16.5.

¹⁹ USTR, *Free Trade with Central America: Summary of the U.S.-Central America Free Trade Agreement*, December 17, 2003, <http://www.ustr.gov> (retrieved February 23, 2004); USTR, *U.S. & Central American Countries Conclude Historic Free Trade Agreement*, December 17, 2003, <http://www.ustr.gov> (retrieved February 23, 2004).

include better protections for workers' human rights. If Congress is asked to approve this version of CAFTA, it should refuse, sending a strong message that it will withhold its support until the accord's labor rights provisions are improved.