THE UNITED STATES-DOMINICAN REPUBLIC-CENTRAL AMERICA FREE TRADE AGREEMENT FALLS SHORT ON WORKERS' RIGHTS

Human Rights Watch Written Testimony
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Introduction

Human Rights Watch welcomes the opportunity to testify regarding workers' human rights under the proposed United States-Dominican Republic-Central America Free Trade Agreement (D.R.-CAFTA). 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 leverage to promote workers' rights, but only when meaningful, enforceable labor rights protections are built into the fabric of the accords. Unfortunately, D.R.-CAFTA does not contain such protections.

D.R.-CAFTA fails to require compliance with even the most basic internationally recognized labor rights norms and specifically fails to protect women workers against discrimination. The labor rights provisions even fall short of the existing workers' rights criteria contained in the unilateral trade preferences programs currently governing trade between the United States and Central America and the Caribbean. They also fall short of the labor rights provisions in the U.S.-Jordan Free Trade Agreement, entered into force in December 2001. If passed, D.R.-CAFTA will mark an unfortunate step backwards for the protection of workers' human rights in the context of U.S. trade.

While D.R.-CAFTA does create a Labor Cooperation and Capacity Building Mechanism—often cited to support assertions that the accord goes further on behalf of workers' rights than either the trade preference programs or the U.S.-Jordan agreement—there is no guarantee of sufficient funding and thus no guarantee that the mechanism will operate, much less perform this function. Even if fully funded, moreover, such cooperation and assistance cannot substitute for enforceable, meaningful labor rights protections.

Given the D.R.-CAFTA's weak labor rights protections, the U.S. Congress should reject the accord, making it clear that the accord will not pass Congress until it is renegotiated to adequately protect workers' human rights.

Failure to Protect International Labor Rights Standards

D.R.-CAFTA does not require that countries' labor laws comply with basic international norms that have been established under United Nations (U.N.) and International Labor Organization (ILO) conventions. Instead, the accord merely includes hortatory provisions recommending that D.R.-CAFTA parties "strive to ensure" such compliance and "strive to ensure" that they do not "encourage trade or investment by weakening or

reducing the protections afforded in domestic labor laws."[1] Even if a party violates these minimal provisions, it faces no meaningful consequences because the accord does not contemplate the possibility of fines or sanctions for such violations.

This standard falls short of the U.S.-Jordan Free Trade Agreement, which includes virtually identical provisions that require parties to "strive to ensure" that their laws meet international standards and "strive to ensure" that they do not waive or derogate from such laws, or even offer to do so, to encourage trade. Importantly, however, unlike D.R.-CAFTA, the U.S.-Jordan agreement provides that a party can be subject to the accord's dispute settlement mechanism and possible fines or sanctions for violating them. D.R.-CAFTA supporters have attempted to minimize this difference between D.R.-CAFTA and the U.S.-Jordan accord. For example, the United States Trade Representative (USTR) asserts that it is a "mischaracterization" to describe D.R.-CAFTA as "a step back from the 'Jordan standard' on labor rights."[2] Supporters of the accord claim that the "strive to" language that prefaces these commitments in both agreements creates provisions that are inherently so weak that they are, in all cases, virtually unenforceable. They argue that the possibility for fines or sanctions if these provisions are violated under the U.S.-Jordan Free Trade Agreement is meaningless in practice because violation is difficult, if not impossible, to prove.[3] This argument, however, does not stand up to scrutiny.

For example, under the U.S.-Jordan Free Trade Agreement, if a party weakened its labor law protections to attract trade, perhaps by eliminating a minimum age for employment or banning trade unions in export sectors, the agreement would be violated and the party could face possible fines or sanctions. Under D.R.-CAFTA, this is not the case.

The labor rights standard of D.R.-CAFTA also falls short of the workers' rights criteria of the unilateral trade preferences legislation currently governing trade between the United States and Central America and the Caribbean—the Generalized System of Preferences (GSP) and the Caribbean Basin Trade Partnership Act (CBTPA). Both laws contain workers' rights requirements that countries must meet to qualify as beneficiaries. CBTPA requires that when designating a country a beneficiary, the U.S. president take into account "the extent to which the country provides internationally recognized

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[1] D.R.-CAFTA, arts. 16.1, 16.2(2).

[2] USTR, *CAFTA Facts: The Facts About CAFTA's Labor Provisions: Answering The Allegations of CAFTA Critics*, February 2005, http://www.ustr.gov (retrieved April 8, 2005).

[3] See, e.g., Ibid.

worker rights."[4] GSP provides that no country shall be designated a beneficiary "if such country has not or is not taking steps to afford internationally recognized worker rights."[5]

These criteria have been interpreted as requiring both effective enforcement of national labor laws and that those laws meet international standards—and both are necessary if there is to be meaningful protection of internationally recognized worker rights. If D.R.-CAFTA enters into force, it will supersede GSP and CBPTA. As a result, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua will no longer face the possibility of heightened tariffs on their exports to the United States if their labor laws are shown to be inadequate or they weaken those laws still further.

In response to analyses such as the above, supporters of D.R.-CAFTA have asserted that labor laws in Central America and the Dominican Republic already meet international standards. As a result, they argue, the failure of D.R.-CAFTA to require the laws to comply with international norms is inconsequential. To substantiate their claims, they frequently and incorrectly cite ILO studies of the region's labor laws completed in 2003 and 2004. USTR has erroneously described these studies as showing that the countries' laws and constitutions "give effect to the ILO core labor standards."[6] The Central American D.R.-CAFTA countries and the Dominican Republic similarly have claimed that the studies show that their "constitutions and labor laws . . . are largely in conformity with the fundamental ILO obligations."[7]

Central American and Dominican labor laws, however, do not meet international standards. In fact, the 2003 and 2004 ILO studies also find no fewer than twenty-seven areas in which the laws fall short.[8] In addition, in arriving at the twenty-seven areas, the ILO studies excluded from their analysis Salvadoran laws governing freedom of association and collective bargaining, as El Salvador has not ratified the two principle ILO conventions governing these rights: ILO Convention 87 concerning Freedom of

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[4] 19 USC Sec. 2703(b)(5)(B)(iii), (iv).

[5] 19 USC Sec. 2462(c)(7).

[6] USTR, *CAFTA Facts: The Facts About CAFTA's Labor Provisions: Answering The Allegations of CAFTA Critics*, February 2005, http://www.ustr.gov (retrieved April 8, 2005); USTR, *CAFTA Facts: Labor Laws in Central America and the Dominican Republic: The International Labor Organization Report*, February 2005, http://www.ustr.gov (retrieved April 8, 2005).

[7] Working Group of the Vice Ministers Responsible for Trade and Labor in the Countries of Central America and the Dominican Republic, *The Labor Dimension in Central America and the Dominican Republic: Building on Progress: Strengthening Compliance and Enhancing Capacity*, April 2005, pp. viii, 2.

[8] Since the release of the studies over a year ago, only Nicaragua has enacted labor law reforms to address some of the identified weaknesses.

Association and Protection of the Right to Organise (ILO Convention 87) and ILO Convention 98 concerning the Right to Organise and Collective Bargaining (ILO Convention 98).[9]

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; and safeguards against anti-union dismissals and suspensions are weak and easily circumvented.[10] The Human Rights Watch report documented that the weak labor laws impede and often prevent workers from exercising their right to freedom of association. These laws have not been reformed since the report was released, and their negative impact on workers' human rights has not changed.

For example, in December 2004, forty-one workers at the Acajutla Port in El Salvador signed up to form a union. When the port operators employing the workers found out, they fired thirty-five of them. Because these fired workers have no right under Salvadoran law to their jobs back for anti-union dismissal, the new union dropped from forty-one to six members—far below the minimum of thirty-five required to form a union.[11] In January, the Ministry of Labor denied the union's registration petition for having too few supporters.[12]

White Paper on Labor from Central America and the Dominican Republic

On April 5, 2005, the trade and labor ministers of the five Central American D.R.-CAFTA countries and the Dominican Republic published a so-called white paper, titled, "The Labor Dimension in Central America and the Dominican Republic: Building on Progress: Strengthening Compliance and Enhancing Capacity." The study asserts that

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[9] The ILO studies were based on jurisprudence of the ILO Committee of Experts on the Application of Conventions and Recommendations. As the committee only comments on a country's application of those conventions and recommendations that it has ratified, the committee has not directly commented on El Salvador's compliance with the two key ILO conventions on workers' right to freedom of association and bargain collectively. Therefore, no analysis on whether El Salvador's domestic laws uphold these fundamental rights was included in the studies.

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

[11] The ILO has repeatedly found that El Salvador's law requiring a minimum of thirty-five workers to form a union violates international standards. See, e.g., ILO, *Complaint against the Government of El Salvador presented by Communications International (CI)*, Report No. 313, Case No. 1987, Vol. LXXXII, 1999, Series B, No. 1, para. 117(a).

[12] E-mail message from Gilberto García, director, Center for Labor Studies and Support (CEAL), to Human Rights Watch, February 19, 2005; e-mail messages from Victor Aguilar, director, Union Coordinator of Salvadoran Workers (CSTS), to Human Rights Watch, February 27 and April 2, 2005.

several labor law reform proposals have been developed in the region and makes additional recommendations for legislative changes to improve workers' rights protections. The study fails to address key weaknesses in countries' labor laws, however, including failing to suggest that El Salvador amend its labor laws to provide for reinstatement of illegally fired trade union leaders and members, as required by ILO Conventions 87 and 98.[13] Furthermore, under D.R.-CAFTA, if these countries fail to amend their labor laws as promised, they will face no consequences. Nor will they face any consequences if instead they choose to weaken workers' rights protections to attract trade.

Failure to Protect Women Workers against Discrimination in Law or Practice

A key shortcoming of D.R.-CAFTA is its failure to address workplace discrimination. D.R.-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."[14] Although D.R.-CAFTA's definition of "labor laws" includes statutes or regulations governing five explicitly enumerated "internationally recognized labor rights,"[15] it excludes those laws related to the elimination of employment and workplace discrimination—one of the core labor rights identified by the ILO Declaration on Fundamental Principles and Rights at Work.[16] Therefore, under D.R.-CAFTA, states are not required to ensure that their domestic anti-discrimination laws comport with international standards, nor even to enforce their existing laws.

Discrimination is not a hypothetical concern for workers in the Central American D.R.-CAFTA countries and the Dominican Republic. These countries have a history of pregnancy-based discrimination and sexual harassment, particularly in their free trade zones. For example, as recent Human Rights Watch research has established, pregnancy-based discrimination is widespread in the Dominican Republic. Nearly two

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[13] See International Labour Conference, 1994, *Freedom of association and collective bargaining: Protection against acts of anti-union discrimination, Report of the Committee of Experts on the Application of Conventions and Recommendations*, 81st Session, Geneva, 1994, Report III (Part 4B), paras. 214, 219-221.

[14] D.R.-CAFTA, art. 16.2.

[15] 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.

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

thirds of the thirty-two women free trade zone workers with whom we spoke reported being subjected to mandatory pregnancy testing as a condition for access to work or maintaining their jobs. An official from a private laboratory in northern D.R. explained to us that he is contracted by companies in nearby free trade zones to carry out post-hire pregnancy testing on workers so that, in his words, the companies can "see if they can fire them."[17]

According to the 2004 edition of the State Department's "Country Reports on Human Rights Practices," the Dominican Republic is not alone in turning a blind eye to widespread sex discrimination. The reports note pregnancy-based discrimination and/or sexual harassment as a problem in four of the five Central American D.R.-CAFTA countries, as well as the Dominican Republic, with Costa Rica as the only country for which the problem is not cited. Under the current D.R.-CAFTA, these countries could continue to fail to address systematic sex discrimination and face no consequences.

Underfunded Labor Cooperation and Capacity Building Mechanism

D.R.-CAFTA creates a Labor Cooperation and Capacity Building Mechanism that is tasked with undertaking cooperative, capacity building, and technical assistance activities among its responsibilities.[18] 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]

While no substitute for strong, enforceable labor rights provisions, these goals are laudable. D.R.-CAFTA, however, does not guarantee that the new mechanism will have sufficient resources and, if recent experience is any guide, it could well end up woefully underfunded and thus ineffective.

This may have already started to happen. The Bush administration's proposal for its fiscal year (FY) 2006 budget would slash funding for just such programs. The FY 2006 budget proposes U.S.$12 million for the U.S. Department of Labor's Bureau of

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[17] Human Rights Watch, *Pregnancy-Based Sex Discrimination in the Dominican Republic's Free Trade Zones: Implications for the U.S.-Central America Free Trade Agreement (CAFTA)*, April 2004.

[18] D.R.-CAFTA, 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).

International Labor Affairs (ILAB). ILAB is the U.S. government agency that, among other duties, "provides international technical assistance in support of U.S. foreign labor policy objectives."[20] The FY 2006 budget proposal constitutes an 87 percent cut from ILAB's FY 2005 budget of roughly $94 million. Over the past three years, moreover, ILAB's budget for technical assistance programs addressing issues like workplace health and safety, workers' right to freedom of association and collective bargaining, and employment discrimination has been slashed. It has been cut from $37 million in FY 2003 to $2.5 million in FY 2004 to $0 in FY 2005. If the FY 2006 proposal for ILAB is passed, it is likely that these kinds of programs will again receive no funding, as operating expenses alone for the agency are over $10 million, and other activities, including congressionally mandated reporting, will in all likelihood consume the rest.[21] Under these circumstances, it is difficult to believe that the Labor Cooperation and Capacity Building Mechanism will have adequate funding to fulfill its responsibilities effectively. The Administration may be praising a mechanism that will prove useless because starved of resources.

Conclusion

D.R.-CAFTA should include strong, enforceable labor rights protections to compel countries to create a free trade area in which the rights of workers producing goods for export are upheld. It does not. Under D.R.-CAFTA, parties have little or no incentive to strengthen their deficient labor laws, refrain from weakening them to attract trade, or protect women workers from discrimination. Congress, therefore, should reject the accord and send a strong message that it will withhold its support until D.R.-CAFTA's labor rights provisions are improved.

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[20] U.S. Department of Labor, Bureau of International Labor Affairs (ILAB), http://www.dol.gov/ilab/ (retrieved April 8, 2005).

[21] The FY 2005 budget allocated $20 million to the U.S. Department of State, rather than ILAB, for environmental and labor trade capacity building assistance in the five Central American D.R.-CAFTA countries and the Dominican Republic. This amount was stricken from the FY 2006 budget proposal.