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Labor Rights Protections in CAFTA

A Human Rights Watch Briefing Paper

In January 2003, U.S.-Central America Free Trade Agreement (CAFTA) negotiations began among the United States, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. The final negotiating round is scheduled for early December 2003. CAFTA presents an important opportunity to raise labor standards throughout Central America. Free trade alone, however, cannot guarantee greater respect for workers' rights. Instead, meaningful protections for workers' human rights should be built into CAFTA.

This does not mean that CAFTA should require all trading partners to adopt uniform wage levels or guarantee precisely the same working conditions but, rather, as detailed below, to uphold their existing international obligations to protect core labor principles and address other worker's human rights in a manner consistent with their socioeconomic circumstances. CAFTA should require not only enforcement of local labor laws but that those laws meet international norms within a reasonable time period. It should establish a phase-in mechanism to ensure that countries do not enjoy full CAFTA benefits until they effectively implement their own labor legislation, including laws governing freedom of association. And it should provide a dispute settlement mechanism with teeth to effectively punish violators of the accord's labor rights provisions.

The labor rights provisions that the United States proposed for CAFTA in May 2003 are virtually identical to those in the U.S.-Chile Free Trade Agreement and similar to those in the U.S.-Singapore Free Trade Agreement, both of which fall far short of this standard. The only workers' rights requirement in those agreements is that countries enforce existing labor laws, even if those laws fail to meet international standards. The only labor rights-related provision the violation of which could lead to the invocation of dispute settlement mechanisms is 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."[1] If a trading partner violates this requirement, it

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1 U.S.-Chile Free Trade Agreement, art. 18:2(1)(a); U.S.-Singapore Free Trade Agreement, art. 17:2(1)(a).

can be fined. That fine is then paid into a general fund and given back to the violating party to pay for "appropriate labor . . . initiatives."[2] No safeguards exist to ensure that violating governments pursue genuinely new initiatives, let alone remedy the violations.

Beyond the commitment to enforce their labor laws, the parties to the U.S.-Chile and U.S.-Singapore accords pledge to "strive to ensure" that they do not "encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws" and to "strive to ensure" that domestic labor laws recognize and protect international labor standards.[3] None of these provisions is enforceable. The offending party does not face any meaningful consequences for violating these standards, as the accords do not contemplate the possibility of fines or sanctions in these cases.

These provisions are inadequate for the United States, Chile, and Singapore. They would be a disaster for Central America.

Adequacy of Labor Laws

Labor laws in Central America fail to adequately protect workers' human rights. CAFTA could be an opportunity to ensure that countries fulfill their international law obligations, discussed below, by amending their legislation to meet international standards. CAFTA should explicitly require domestic labor laws to meet international norms, and violation of this provision, as well as violation of all CAFTA's labor rights-related provisions, should carry the possibility of fines or sanctions. Ensuring that dispute settlement procedures be available to all commercial and labor rights provisions in a trade accord is not new. The U.S.-Jordan Free Trade Agreement that entered into force in December 2001 already adopts this parity principle.

Human Rights Watch recognizes that legal reforms do not happen overnight. Therefore, we recommend that CAFTA allow for a reasonable time period within which Central American countries must reform their labor laws if they are to continue to receive full benefits under the accord. Failure to meet the deadlines should be considered a violation of the accord and lead to the immediate invocation of dispute settlement mechanisms.

A relatively short timeline should be set for amending laws to ensure compliance with rights enumerated in the ILO Declaration on Fundamental Principles and Rights at

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2 U.S.-Chile Free Trade Agreement, art. 22.16; U.S.-Singapore Free Trade Agreement, art. 20.7.

3 U.S.-Chile Free Trade Agreement, arts. 18:1, 18:2(2); U.S.-Singapore Free Trade Agreement, arts. 17:1, 17:2(2).

Work, including freedom of association.[4] For example, a country could be given one year or eighteen months to implement such legal reforms. Under the ILO Declaration, all of the potential CAFTA countries have "to respect, to promote and to realize, in good faith" these principles because they are ILO members. Compliance with the ILO Declaration, as well as with other international human rights instruments to which these countries are states parties, discussed below, includes adopting domestic labor legislation that fully protects these core standards.[5] Therefore, CAFTA would impose no new obligation by compelling them to do so.

A longer timeline could be set for Central American countries to amend their laws to protect fully the non-core economic and social labor rights, defined in the U.S.-Chile and U.S.-Singapore accords as "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."[6] For example, a two- or three-year period could be specified for these reforms. The longer time period would accommodate differences among countries in levels of socio-economic development and available resources and would be consistent with the relevant United Nations and Organization of American States instruments governing these rights, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador" (Protocol of San Salvador). To facilitate such reforms, the United States should provide development assistance targeting the amendment and subsequent enforcement of the relevant labor laws in the affected countries.

Although some might see the recommended CAFTA provisions as an infringement of national sovereignty or as an unfair imposition of rich country standards on developing countries, neither is the case. All five Central American countries have already ratified international instruments that obligate them to protect both civil and political, as well as

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4 The right to freedom of association is protected in other international instruments as well, including the International Covenant on Civil and Political Rights, to which all potential CAFTA members are party, and the American Convention on Human Rights, ratified by the five Central American potential CAFTA countries. International Covenant on Civil and Political Rights, 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. 22(1); American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, November 22, 1969, art. 16(1).

5 According to the ILO Declaration on Fundamental Principles and Rights at Work, "all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions." International Labour Conference, ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 18, 1998.

6 U.S.-Chile Free Trade Agreement, art. 18:8(e); U.S.-Singapore Free Trade Agreement, art. 17:7(1)(e).

economic and social, labor rights, including the ICESCR, the Protocol of San Salvador, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. A CAFTA provision mandating that they do so would only reinforce this prior commitment. Requiring trading partners to amend legislation, often over time, as a condition for entering into free trade agreements, moreover, is not new for the United States in the commercial area. For example, according to the Office of the United States Trade Representative, the U.S.-Chile and/or U.S.-Singapore accords require the gradual elimination of a luxury tax on automobiles over four years; modification of legislation to open cross-border supply of key insurance sectors; lifting of a ban on new licenses for full-service banks within eighteen months; liberalization of registration and certification requirements of patent agents; elimination of capital ownership requirements for land surveying services; prohibition of the production of optical discs, such as CDs, DVDs, or software, without source identification codes, unless authorized by the copyright holder in writing; and enactment of a law regulating anti-competitive business conduct by January 2005.[7] Human Rights Watch believes that laws governing workers' human rights are as fundamental to free and fair trade as those governing businesses' and investors' rights. The United States has demanded that countries amend commercial legislation as a condition of free trade; it should do the same for labor laws.

Enforcement of Labor Laws

Bringing domestic labor legislation into compliance with international standards alone, of course, will not ensure that Central American workers can freely exercise their human rights. Enforcement of the law is also critical. Although, as noted above, the United States has proposed including in CAFTA, as in the U.S.-Chile and U.S.-Singapore accords, a provision requiring enforcement of domestic law, more is needed. Even if the requirement were sufficient to address ineffective enforcement in the United States, Chile, and Singapore, a question we do not address here, it is clearly inadequate for Central America, where the failure to enforce existing labor laws is egregious, systemic, and, in some cases, largely attributable to a lack of political will. As history has shown, tariff benefits, once granted, are difficult to withdraw.[8] Therefore, a transitional

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7 United States Trade Representative (USTR), *Trade Facts: Free Trade with Singapore: America's First Free Trade Agreement in Asia*, n.d., http://www.ustr.gov (retrieved July 13, 2003); USTR, *Trade Facts: Free Trade with Chile: Summary of the U.S.-Chile Free Trade Agreement*, n.d., http://www.ustr.gov (retrieved July 13, 2003).

8 For example, the North American Free Trade Agreement's (NAFTA) labor side accord—the North American Agreement on Labor Cooperation (NAALC)—provides for the possibility of fines or sanctions against a party that fails to "promote compliance with and effectively enforce" laws governing occupational safety and health, child labor, or minimum employment standards. Complaints have been submitted under the accord alleging

mechanism that makes the phase in of tariff benefits conditional upon adequate labor law enforcement is essential to ensure that CAFTA countries do not enjoy full accord benefits while honoring in the breach the requirement that parties effectively enforce their labor laws.

To these ends, Human Rights Watch proposes that CAFTA include a transitional mechanism that makes the proposed trade benefit phase in scheme, discussed below, commensurate with the degree to which workers' human rights are protected. A useful model is the U.S.-Cambodia textile agreement, touted by United States Trade Representative Robert Zoellick as "an excellent example of the way trade agreements lead to economic growth and promote a great respect for workers' rights."[9] The U.S.-Cambodia textile agreement provides for a 6 percent minimum annual quota increase for Cambodia textile imports but allows the United States to raise quota limits up to an additional 18 percent if working conditions in that sector "substantially comply" with local labor laws and international standards.[10] A similar approach to U.S. market access under CAFTA should be adopted.[11]

It is likely that goods traded under CAFTA will fall into various tariff phase-out categories, ranging from immediate tariff elimination for goods in the first category to fifteen-year or indefinite phase out for those in the last. These scheduled reductions should not be automatic. Instead, the United States should conduct annual reviews to

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failure to uphold labor laws in these areas. Yet none has proceeded past even the first tier of the NAALC's three-tiered enforcement mechanism, which must be exhausted prior to the imposition of fines or sanctions.

9 Office of the USTR, *U.S.-Cambodian Textile Agreement Links Increasing Trade with Improving Workers' Rights*, January 7, 2001, http://www.ustr.gov/releases/2002/01/02-03.htm (retrieved May 23, 2003). The agreement was reached in January 1999 and extended through 2004.

10 U.S.-Cambodia Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products, art. 10(d). Based on these annual assessments, quotas for Cambodian textiles were raised an additional 9 percent for 2000, 2001, and 2002 and an additional 12 percent for 2003. Congressional Research Service, *Cambodia: Background and U.S. Relations*, August 21, 2002; Committee for the Implementation of Textile Agreements, *Announcement of Import Restraint Limits for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in Cambodia*, 67 Fed. Reg. 870 (Jan. 8, 2002); Committee for the Implementation of Textile Agreements, *Announcement of Import Restraint Limits for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in Cambodia*, 67 Fed. Reg. 72,921 (Dec. 9, 2002).

11 Alternative transitional mechanisms, modeled more loosely after the U.S.-Cambodia textile agreement, could also be considered. For example, an independent panel could be established to conduct the above-described annual reviews, comprised of individuals with experience in workers' human rights and not affiliated with any CAFTA party. Furthermore, the goal of the proposed transitional mechanism is to address ineffective labor law enforcement in throughout Central America. Other mechanisms could be proposed to address the well-documented inadequate labor law enforcement in the United States. See, e.g., Human Rights Watch, *Fingers to the Bone: United States Failure to Protect Child Farmworkers* (New York, NY: Human Rights Watch, June 2000); Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (New York, NY: Human Rights Watch, August 2000).

determine whether Central American countries have met established benchmarks for effectively enforcing labor laws in the traded sectors. Tariff reductions should be granted only once the countries meet those benchmarks. The reviews should be conducted and the reductions granted on a country by country and sector by sector basis, so that decisions to phase in or withhold tariff reductions are narrowly tailored to targeted the specific countries and sectors in question.

For example, if Central American textiles were scheduled to enter the United States duty free after five years—phasing in the benefit by granting a 20 percent annual reduction—and an annual labor law enforcement review revealed a failure to effectively enforce labor legislation in that sector, the tariff reduction for that year would be totally or partially denied. The degree to which the reduction would be denied could depend on the pervasiveness and duration of and reasons for the failure to enforce the law, as well as the enforcement level that could reasonably be expected given a party's resource limitations.[12]

The United States should annually solicit and weigh relevant comments from the general public in its annual labor law enforcement evaluations, as it did in the 1999 and 2000 U.S.-Cambodia textile agreement reviews.[13] Such a procedure would be similar to the existing petition process under the Generalized System of Preferences (GSP), which provides for the annual review of beneficiary countries' GSP eligibility. GSP is unilateral U.S. trade legislation granting duty-free treatment to designated products from "developing countries," including the five Central American CAFTA countries, if certain criteria are met, including taking "steps to afford internationally recognized worker rights to workers in the country."[14] GSP and its annual review and petition process will be overridden by CAFTA when it comes in to force.

This approach to labor law enforcement creates a positive incentive to encourage respect for workers' human rights. It grants tariff reductions commensurate to the speed with which countries improve labor conditions. It likely would turn the "race to the bottom" on its head as Central American countries strive for improved labor practices in

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12 These factors are also enumerated for consideration when calculating an appropriate fine for ineffective labor law enforcement under the U.S.-Chile and U.S.-Singapore Free Trade Agreements. U.S.-Chile Free Trade Agreement, art. 22.16; U.S.-Singapore Free Trade Agreement, art. 20.7.

13 See Committee for the Implementation of Textile Agreements, *Request for Public Comments on Cambodian Labor Law and Standards Pursuant to the U.S.-Cambodia Bilateral Textile Agreement*, 64 Fed. Reg. 60,428 (Nov. 5, 1999); Committee for the Implementation of Textile Agreements, *Request for Public Comments on Cambodian Labor Law and Standards Pursuant to the U.S.-Cambodia Bilateral Textile Agreement*, 65 Fed. Reg. 65,845 (Nov. 2, 2000).

14 See 19 USC 2462(b)(2)(G).

exchange for faster and greater access to U.S. markets. It would combat the "free rider problem," denying benefits to countries only going through the motions and rewarding those making a good-faith effort to improve. And it would avoid the oft-criticized broad-brush approach of sanctioning a country for the ills of one sector, since problem sectors would be denied tariff reductions, while better-performing sectors would enjoy them.

Effective Dispute Settlement Mechanisms

The positive impact that the adoption of the above-proposed provisions could have on workers' human rights would be seriously undermined by an inadequate enforcement mechanism, such as the one proposed for CAFTA's requirement that parties uphold their labor laws. That mechanism is different from and significantly weaker than the mechanism available should a party violate CAFTA's commercial obligations under the current proposal. This must be remedied.

If a commercial provision is breached and parties are unable to resolve the dispute or if, having done so, the resolution's terms are not upheld, the complaining party can suspend tariff benefits equal to the injury suffered.[15] To prevent these sanctions, the offending party may agree to pay an annual fine until the violation is eliminated. That fine is typically equal to 50 percent of the injury. The fine is paid to the complaining country, unless a multilateral commission of high-level government officials (the Free Trade Commission) determines that it should go into a fund and be used to remedy the violation.

If a country fails to enforce its labor laws and the 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.[16] The fine cannot exceed U.S.$15 million annually and, in all cases, is paid directly into a fund, administered by the Free Trade Commission. Those funds are supposed to be spent for

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15 U.S.-Chile Free Trade Agreement, arts. 22.14, 22.15; U.S.-Singapore Free Trade Agreement, arts. 20.5, 20.6.

16 Like in the NAALC and the U.S.-Jordan, U.S.-Chile, and U.S.-Singapore Free Trade Agreements, the methodology for calculating the fine is not explicitly set forth. Instead, factors are enumerated for the arbitral panel to "take into account" These factors include the bilateral trade effects of the violation; the pervasiveness and duration of and reasons for the violation; the level of enforcement that could be reasonably expected given the party's resource constraints; efforts made to remedy the non-enforcement after the arbitral panel's final report identifying the problem; and any other relevant factors. U.S.-Chile Free Trade Agreement, art. 22.16; U.S.-Singapore Free Trade Agreement, art. 20.7

"appropriate" labor initiatives.[17] The complaining party can only suspend tariff benefits "as necessary to collect the assessment" if the fine is not paid.[18]

Human Rights Watch believes that equivalent dispute settlement mechanisms and remedies should be available and accessible, under identical terms, for the enforcement of commercial and labor provisions, as both are equally fundamental to free and fair trade. The CAFTA proposal described above falls far short of this ideal.

The most critical disparity between the two proposed CAFTA dispute settlement mechanisms is the requirement that all fines assessed for failure to enforce labor laws be deposited into a fund and redirected back to the offending party. This requirement could be exploited to eliminate entirely the punitive effect of any imposed fine. Unless its loopholes are closed, this requirement could seriously undermine, if not entirely negate, the mechanism's usefulness in deterring and punishing accord violations.

Nothing in the proposed mechanism to address a party's failure to enforce its labor laws would prevent a fined party from rebudgeting to account for the fine. Rather than adding the fine amount to the budget already allocated for labor-related initiatives, the violator could simply shift funds originally designated for such programs to other areas. As a result, spending on workers' rights would not increase. 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 remedies through the proposed mechanism.[19] Thus, a country could opt to pay a fine indefinitely and enjoy CAFTA benefits while systematically failing to protect workers' human rights. This must be fixed.

Entirely eliminating the option of redirecting fines back to the offending party's labor rights-related programs is not the answer. In some cases, a country may not be allocating adequate resources for programs that promote workers' rights. In those situations, respect for workers' rights could improve if the fine were actually funneled to relevant national programs. Instead, this loophole should be closed by ensuring that, if a violation is not addressed within a specified time period after fine payments are redirected back to the offending country, that country is penalized to the same degree it would have been punished had it violated a commercial provision. There are two viable options to ensure that such a net loss is imposed on the violating party: 1) after the first fine assessment, all subsequent collections of the annual fine are paid to the injured state party; or 2) the violator faces suspension of tariff benefits.

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17 U.S.-Chile Free Trade Agreement, art. 22.16; U.S.-Singapore Free Trade Agreement, art. 20.7.

18 Ibid.

19 Ibid.

These ideas are not new. The former is based loosely on the proposed dispute settlement mechanism for violations of CAFTA's commercial provisions, discussed above. The latter is based on the North American Free Trade Agreement's labor side accord—the North American Agreement on Labor Cooperation (NAALC). Under the NAALC, tariff benefits can be suspended not only when a party fails to pay an assessed fine but also when, after a fine is assessed, a party fails to implement an action plan to remedy the identified violation.[20] The adoption of one of these proposals is essential to prevent indefinite recidivism.

Furthermore, when a party fails to uphold workers' rights because of a lack of political will, rather than inadequate resources, the fine should not be redirected to the violating party. Increased funding for labor rights-related programs would likely not lead to improvements because the underlying problem—ambivalent or even obstructionist government officials—would not be addressed. In these situations, the fine should be paid to the complaining party, just as has been proposed to punish violators of CAFTA's commercial provisions. The Free Trade Commission should determine, on a case-by-case basis, when "the circumstances warrant" this alternative course of action.

Conclusion

Absent reforms to the proposed CAFTA labor rights provisions along the lines recommended above, Central American countries will have no reason under CAFTA to strengthen their deficient labor laws and little incentive to improve their practices. They could end up enjoying ever-greater tariff benefits, while the abuse of Central American workers' human rights persists. Instead, CAFTA should include strong, enforceable labor rights protections to create a free trade area in which the rights of workers producing goods for export are upheld.

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20 North American Agreement on Labor Cooperation, arts. 39-41.