

Testimony Regarding the Central America Free Trade Agreement (CAFTA)
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The International Labor Rights Fund (ILRF) would like to thank the Committee on Ways and Means, US House of Representatives for the opportunity to present testimony related to the Central America Free Trade Agreement (CAFTA). ILRF is deeply concerned about ongoing labor rights violations in Central America. We believe the agreement will force the developing nations of Central America to compete against one another to attract limited new US investment by offering low wages and foregoing enforcement of labor and environmental laws.

A strong and enforceable labor chapter might have served to mitigate this “race to the bottom.” However, as currently written, the CAFTA labor chapter will not serve to deter labor rights abuses, nor will it effectively deter national governments from downgrading their existing labor laws. Thus, as currently written, CAFTA can only lead to further degeneration of the labor rights situation in Central America, with no effective mechanism available to counteract downward pressures.

Analysis of the CAFTA Labor Chapter Enforcement Mechanisms

Although the CAFTA labor chapter refers to the ILO Declaration on Fundamental Principles and Rights at Work, the agreement does not bind any of its Parties to ensuring that internationally recognized worker rights are incorporated into national laws, or that they are properly enforced. The language of the agreement is merely aspirational, directing parties to strive to improve their laws, but providing no effective reward or sanction for countries in this regard. Indeed there is no language in the agreement that would prevent or sanction countries from reforming their laws in such a manner as to abrogate the internationally recognized worker rights.

The agreement is thus a step backward from the earlier trade arrangements with each country under the Generalized System of Preferences (GSP) program. While imperfect, at least the GSP program does require beneficiaries to be able to demonstrate that they are taking steps to ensure that workers enjoy the internationally recognized rights to associate and bargain collectively, to abolish child labor, to abolish forced labor and to provide the right to decent wages and working conditions. In contrast, CAFTA merely requires countries to be enforcing their existing laws, however inadequate those laws may be.

Given the history of the Central America region, we find it disingenuous to suggest that these countries can be entrusted with enforcement of their own labor laws. ILRF and its partners throughout the region have conducted extensive research on labor law implementation in Central America, dating back to the late 1980s. During the past two decades ILRF has used this research to support GSP petitions related to Honduras, El

Salvador, Costa Rica and Guatemala. ILRF and its partners conducted new research on labor law enforcement in the region in 2003 and 2004, and found evidence of systematic failures to enforce labor laws in all Central American countries. The systematic problems identified included a lack of political will at the highest levels, corrupt and inefficient labor ministries and courts, and intimidation and harassment of workers who attempted to utilize legal channels to protect their rights. The language of the CAFTA labor chapter, which, as we have mentioned, is largely aspirational, ignores the realities of legal enforcement in these countries.

The single enforceable provision of the chapter, on labor law enforcement, does not give us reason to believe that governments will improve in this regard. The process for invoking a review of a country's compliance is too weak, opaque and limited to create real change in labor law enforcement. The CAFTA labor chapter effectively sets the fox to guard the henhouse, by creating a review process that can only be invoked by another government that is party to the agreement. Specifically, a review of one country's labor law enforcement can only be triggered if another CAFTA country files a request for such a review. Given that there is an extremely poor pattern of law enforcement throughout the region, it is extremely unlikely that any one country would file a complaint against another, for fear of retaliation. In short the very mechanism of the CAFTA labor chapter creates the preconditions for a conspiracy of silence among all parties to the agreement on the issue of labor law enforcement.

Civil society actors, in particular workers and their representative organizations have no means by which to affect this process. The process can only be triggered by a national government, and there is no mechanism created by which a civil society organization can petition its government to initiate such a review. Moreover, the agreement does not even provide the general public with information about the outcome of a review, should one ever take place. Thus there is no way that the general public in any of the CAFTA countries can ever know whether or not the review process, if ever invoked, actually resulted in any meaningful dialogue on the issues identified.

In contrast, the existing GSP provides for a public review process. Any individual or organization can utilize this process, which is comparatively transparent and accessible, by filing a submission to the Office of the US Trade Representative. Throughout the past two decades a handful of organizations, including ILRF, the AFL-CIO, and Human Rights Watch have researched and filed lengthy petitions documenting labor rights abuses in GSP recipient countries. Although not all of these cases were successful, nevertheless, the cases obliged both the US administration and regimes in the targeted countries to respond, point by point, to allegations of abuse. In Malaysia in 1991, an ILRF petition succeeded in convincing the Malaysian government to recognize union rights in the electronics sector. A 1996 AFL-CIO petition on Thailand succeeded in pushing the Thai government to recognize the right of state enterprise workers to form trade unions. A 1997 petition against Cambodia, filed separately by both the AFL-CIO and ILRF, persuaded the Cambodian government to ratify a new Labor Code. This process, while admittedly limited in effectiveness, is at least superior to the CAFTA process in its relative public accessibility and transparency. The fact that the existing

GSP process will be replaced by the weaker CAFTA review mechanism will create further disincentives for the CAFTA governments regarding improvement of their labor laws and labor law implementation.

Failure to Guarantee Non-Discrimination

While the CAFTA labor chapter references the ILO Declaration on Fundamental Principles and Rights at Work, it fails to include any obligation of governments, even aspirational, with regard to the right to a workplace free from discrimination. This right is universally recognized as a core labor right and defined in ILO Conventions No. 100 and 111. We note that a large percentage of the workers expected to find employment in export-oriented sectors, such as the maquila industry, are women. Our research and that of our allies has found that these women workers are subject to discrimination through, among other problems, pregnancy testing as a precondition for employment, sexual harassment on the job, and non-provision of maternity leave benefits. In most instances they have limited legal recourse, and often are subject to social and economic pressures that make it in reality impossible to claim what legal protections they may have on paper.

We urge Congress to insist that CAFTA and any future trade agreements reference the essential right to a workplace free from discrimination. Such a clause would help bring the attention of developing countries throughout the world to the plight and problems of vulnerable women workers.

Downward Pressure on Labor Laws and Legal Enforcement in Central America

In December 2004, ILRF and ASEPROLA, a Costa Rican labor rights NGO, co-filed GSP petitions against five Central American countries. We found that, despite the US Trade Representative's public claims to the contrary, even during the period of CAFTA negotiations, Central American countries, preparing for competition with one another for limited US investment, were taking steps to downgrade their labor laws. USTR has not yet responded to the request for review of these countries' GSP privileges, and if CAFTA is ratified, then no such review will ever take place. We note below some instances, documented in these petitions, of legal reforms that would weaken worker protections in the region.

Costa Rica: During the CAFTA negotiations, the Costa Rican government has taken steps to weaken existing national labor protections. In early 2004 the government introduced a project to reform the country's labor code. In particular, proposed legislation would modify working hours through a year-long calendar of work shifts and the weekly accumulation of working hours, eliminating the standard eight-hour workday. The proposed legislation would also eliminate the rights to mixed and absolute overtime hours, as it would allow employers to increase work hours at times of high demand, and lessen work hours in times of low demand. When introducing this legislation to the Costa Rican parliament, the government argued that such flexibilization of working hours and overtime rules was necessary in order to allow Costa Rica to remain competitive with the other Central American countries once the CAFTA was ratified. Public pressure on

the Costa Rican government resulted in some modifications to the proposed legislation, which has not yet been introduced to the legislature.

El Salvador: The emergency law for economic reactivation (LERE), which was introduced to the Assembly in 1999, has continued during the period of CAFTA negotiations to work its way through the legislative process in El Salvador. If approved, LERE would modify salaries and working shifts, and increase the allowed length of a trial period for new workers and the use of fixed-term contracts. These changes affect benefits currently guaranteed by labor law, including vacations and social security. The current Labor Code includes indefinite contracts and a 30-day test period (during which time the contract can be terminated). LERE would make fixed-term contracts and 180-day test periods the norm, which means that the social security payments for these workers are not made for almost 6 months. This drastically increases job instability, making it easier for employers to make workers work overtime without extra pay, and to dismiss workers without paying penalties or benefits. El Salvador is also considering new legislative measures that would weaken existing health and safety regulations.

Panama: There is some evidence that Panama has continued to weaken its labor law regime during the past two years when it has been involved with trade negotiations with the US. (While not a CAFTA country, Panama has been negotiating a separate bilateral agreement with the US, with discussions regarding the possibility that Panama would 'dock on' to CAFTA). In February 2002, a new regulation was passed that provides incentives to companies to hire "young workers" between the ages of 18 and 25. The incentives include temporary exoneration from certain legal protections for these workers. In particular, the regulations suspend the protections of certain articles of the Labor Code for such workers, in particular the protections for maternity benefits. Other reforms are in progress, although they have not yet been presented to the Panamanian parliament. These include an initiative to modify the Labor Code to eliminate minimum wages altogether, and a proposal to reform the country's social security benefits to increase the retirement age, quotas, and years of contribution to the system. The proposed social security reforms are expected to be presented to the Panamanian parliament in early 2005.

Honduras: In its petition, ILRF and ASEPROLA noted that the USTR has failed to implement the terms of a Memorandum of Understanding negotiated with the Honduran government as a result of a 1995 GSP complaint. The MOU, if implemented would have resulted in important changes to Honduran labor law and its labor inspections system. Rather, the CAFTA negotiations have tacitly discouraged the Honduran government from implementing those commitments and created perverse incentives for labor law reform. Currently, the Honduran Ministry of Labor, working with employers' groups, is promoting a project to modify the labor law with reforms that would generalize fixed-term contracts. It would also make the payment for severance payable only on an annual basis so that it would not be possible to create special funds with these monies. A policy of freezing salaries continues, and Honduran employers are increasingly delaying negotiations with workers.

Guatemala: In 2003, USTR accepted for review GSP petitions filed by ILRF and by the AFL-CIO to review Guatemala's country eligibility based on its failure to uphold internationally recognized worker rights. These petitions cited the judicial impunity with regard to threats and violence against trade unionists in Guatemala, the systematic failure of the government to enforce existing labor laws, and the need for further reforms to the country's labor laws in order to bring it into full compliance with international standards. The new ILRF/ASEPROLA petition states that the review has failed to bring about meaningful progress in these three areas. The labor code reforms passed in 2001 did not bring Guatemala's labor practices up to acceptable standards, and some of these reforms have been reversed by Guatemala's Constitutional Courts. A number of promised legislative reforms have never materialized.

A Better Alternative

ILRF strongly urges that any new trade agreement with Central America contain a strong, transparent and enforceable labor rights mechanism. Sustained economic development will elude a vast majority of the populations of the Central American countries without such a mechanism.

The key elements of a workable enforcement mechanism to apply upon the failure of a national enforcement system can be easily stated. First and foremost, any enforcement process must be democratic and transparent. A major criticism of the WTO enforcement panels is that they are closed to the public and operate in secrecy. CAFTA replicates this secretive model. All processes involving enforcement must be fully transparent, including a written public record of all proceedings and open hearings. There also needs to be a clear appeals process.

Second, access to the enforcement process must be available to all interested parties, not just the government signatories to the trade agreement. The key constituency here is the workers themselves, most of whom are not currently represented by a trade union. They must have direct access to an enforcement process. Also, other stakeholders, such as NGOs and labor organisations, must have access to the process.

Third, the enforcement process must make a distinction between violations that are attributable to private actors, including multinationals, and therefore require remedies more in the line of penalties, and those that are attributable to governments, and might be better addressed by trade sanctions. Penalties directed at companies, with the cooperation of the host government, will resolve most problems. This also leaves problem solving within the firm control of the individual governments and allows them to act to prevent any protectionist use of the enforcement process. If a country ultimately refuses to enforce its own laws, as per the commitment made in its own laws and the international standards, there must be a system of penalties to encourage compliance, with the ultimate sanction being exclusion from the benefits of the trade agreement.

Finally, in keeping with the ILO standards, a model labor clause in CAFTA or any other trade agreement must include language recognizing the right of workers to a workplace free from discrimination, as defined by ILO Conventions No. 100 and 111.