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DR-CAFTA Labor Rights Issues

Mary Jane Bolle, Foreign Affairs, Defense, and Trade Division

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Abstract. The U.S.-Dominican Republic-Central America Free Trade Agreement (DRCAFTA, (P.L. 109-53, August 2, 2005) is the eighth free trade agreement to include labor protections. Implementation, scheduled for January 1, 2006, has been postponed because no DR-CAFTA country has completed internal legal and regulatory changes required, although several are close. Meanwhile, the countries' goods entering the United States will continue to receive preferential tariff treatment under the Generalized System of Preferences (GSP). Labor concerns focused on three main questions: (1) How strong are labor laws in DR-CAFTA countries? (2) Are those labor laws being adequately enforced? and (3) Does DR-CAFTA comply with the principal negotiating objectives for trade agreements outlined in the Trade Act of 2002?

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DR-CAFTA Labor Rights Issues

Mary Jane Bolle
Specialist in International Trade
Foreign Affairs, Defense, and Trade Division

Summary

The U.S.-Dominican Republic-Central America Free Trade Agreement (DR-CAFTA, (P.L. 109-53, August 2, 2005) is the eighth free trade agreement to include labor protections.¹ Implementation, scheduled for January 1, 2006, has been postponed because no DR-CAFTA country has completed internal legal and regulatory changes required, although several are close. Meanwhile, the countries' goods entering the United States will continue to receive preferential tariff treatment under the Generalized System of Preferences (GSP). Labor concerns focused on three main questions: (1) How strong are labor laws in DR-CAFTA countries?² (2) Are those labor laws being adequately enforced? and (3) Does DR-CAFTA comply with the *principal negotiating objectives* for trade agreements outlined in the *Trade Act of 2002*? This report will not be updated.

Background

Congress has linked labor protections to trade promotion vehicles for at least two decades, for two purposes: The first is to help “level the playing field” by protecting U.S. jobs and wages from what some consider unfair competition from low-wage foreign producers. The second is to help improve working conditions in developing countries. To this end, in a 1984 amendment to the Generalized System of Preferences (GSP), Congress prohibited preferential tariff treatment to developing countries “not taking steps to afford their workers internationally recognized worker rights.” This was extended to the Caribbean Basin Initiative (CBI), which covers all DR-CAFTA countries, in 1990.

In the 1984 GSP amendment, Congress defined “internationally recognized worker rights” [GSP Sec. 502(a)(4)] to include the following basic protections: (1) the right to associate, to form unions, and to bargain collectively; (2) a prohibition of forced or prison labor; (3) protections against child labor; and (4) minimum standards for wages, hours,

¹ The first seven are the *North American Free Trade Agreement* (NAFTA) and five U.S. bilateral trade agreements with Jordan, Chile, Singapore, Australia, Morocco, and Bahrain (proposed).

² DR-CAFTA countries are the Dominican Republic, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

and occupational safety and health. Meanwhile, the International Labor Organization (ILO) set out to promote a similar list of “core labor standards” which includes items (1) — (3) above, but substitutes for item (4), freedom from employment discrimination.

The first worker rights protections were in U.S. tariff preference laws. However, since 1993 the United States has also linked worker rights protections to free trade agreements (FTAs) using three basic models. The first model, The North American Free Trade Agreement (NAFTA, P.L. 103-182), includes worker rights provisions in a side agreement with sanctions limited to failure to enforce standards for occupational safety and health, child labor or minimum wages. The second model, the U.S.-Jordan FTA, placed labor provisions in the body of the agreement and made them subject to sanctions via the FTA’s dispute resolution procedures. The third model is reflected in DR-CAFTA and the other five FTAs since Jordan, which include worker rights provisions in the body of the agreement, but permit sanctions only if a country fails to enforce its own labor laws.

Commitments under DR-CAFTA are as follows: Each country pledges: (1) to “not fail to effectively enforce” its own labor laws in a manner affecting trade; (2) to strive to ensure that both ILO core labor principles and internationally recognized worker rights are recognized and protected by domestic law; (3) to strive to “not waive” or “derogate from” its own labor laws to encourage trade or investment; (4) to respect the sovereignty of the other countries; and (5) to establish mechanisms for cooperative activities and labor-related trade capacity building with the other countries. Of these shared commitments, only sustained failure to enforce one’s own labor laws is subject to binding dispute settlement and ultimately to fines or sanctions. The maximum fine in a particular dispute is set at \$15 million per year per violation, a sum of which may be directed towards remedying the labor violation. (See **Table 1** for more detail on labor provisions.)

Table 1. Labor Provisions Included in DR-CAFTA

Each Party (Chapter 16, Labor):

1. Shall not fail to effectively enforce its own labor laws in a manner affecting trade;
2. Shall strive to ensure that ILO labor principles and internationally recognized worker rights are recognized and protected by domestic law;
3. Shall strive to ensure it does not to “waive or derogate from” domestic labor law in order to encourage trade or investment;
4. Has the right to establish its own domestic labor standards and adopt or modify its labor laws;
5. Retains the right to exercise discretion in allocating enforcement resources;
6. May not undertake labor law enforcement in the others’ territories;
7. Shall ensure procedural guarantees for enforcement of the its labor laws;
8. Shall establish a Labor Affairs Council of cabinet-level or equivalent representatives, and an office in its labor ministry to serve as a point of contact for carrying out the Council’s work;
9. Shall be guided by a detailed mechanism for cooperative activities and trade capacity building.
10. May request consultations with another party on any matter under the labor chapter.

Sanctions and dispute settlement provisions for violations. (Chapter 20):

11. **Sanctions under DR-CAFTA labor provisions are authorized only for failure to effectively enforce one’s own labor laws through a sustained or recurring course of action or inaction in a manner affecting trade between the Parties.** An annual monetary assessment could be imposed for failure of the disputing parties to reach a resolution or failure of the defending country to observe the terms of the agreement.
12. **The maximum penalty for such sustained failure is \$15 million annually**, which shall be paid into a fund established by the DR-CAFTA Free Trade Commission and expended at its direction for appropriate labor initiatives in the defending country including efforts to improve or enhance labor law enforcement. If a country fails to pay the assessment, the complaining country can take other steps to secure enforcement, including suspending DR-CAFTA tariff benefits.

Connected with DR-CAFTA are three main issues discussed below. These stem from critics' perceptions that the countries have weak labor laws that are not adequately enforced, and their preference that all DR-CAFTA labor provisions and ILO core labor standards be fully enforceable.³ The four issues are: (1) How strong are labor laws in DR-CAFTA countries? (2) Are DR-CAFTA country laws being adequately enforced? and (3) Does DR-CAFTA comply with the principal negotiating objectives for trade agreements outlined in the Trade Act of 2002? Many arguments on both sides are derived from three studies, which are themselves controversial and subject to interpretation. They are the State Department's *Country Reports on Human Rights Practices*, the ILO's *Fundamental Principles and Rights at Work: A Labor Law Study*, and *The Labor Dimension in Central America and the Dominican Republic: Building on Progress*, prepared by the Vice-Ministers of Trade and Labor in DR-CAFTA countries with the Inter-American Development Bank (IDB).⁴

Issue #1: How Strong Are Labor Laws in DR-CAFTA Countries?⁵

The first issue relates to the DR-CAFTA requirement that each country shall strive to ensure that ILO labor provisions and internationally recognized worker rights are recognized and protected by domestic laws and regulations. Much of the debate focuses on how strong these labor laws are in DR-CAFTA countries, because if they are inadequate, critics argue, DR-CAFTA would only reinforce weak laws.

The Administration argues, based on the above reports, that DR-CAFTA country constitutions and laws *generally* reflect the eight core ILO conventions (two for each of the four core labor standards) that have been ratified by all DR-CAFTA countries except El Salvador, which has ratified six. The Administration also argues that within the last decade, all of the DR-CAFTA countries except Honduras have carried out major revisions

³ For discussion of other issues relating to DR-CAFTA, see CRS Report RL32322, *Central America and the Dominican Republic in the Context of the Free Trade Agreement (DR-CAFTA) with the United States* by K. Larry Storrs et al., and CRS Report RL31870, *The Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA)*, by J.F. Hornbeck.

⁴ *Country Reports on Human Rights Practices*, published annually by the U.S. State Department, reports on labor law provisions and enforcement by each country, and within countries by each of the basic worker rights. *Fundamental Principles and Rights at Work: A Labour Law Study (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua)*, prepared by the International Labour Office (ILO), 2003, examines CAFTA country promotion of core labor standards before the Dominican Republic was added. *The Labor Dimension in Central America and the Dominican Republic: Building on Progress: Strengthening Compliance and Enhancing Capacity*, was prepared by the Vice Ministers for Trade and Labor in DR-CAFTA countries under the sponsorship of the Inter-American Development Bank. This study examines implementation of the labor standards and trade capacity building in the DR-CAFTA countries.

⁵ **Administration arguments** are taken from the U.S. Trade Representative (USTR) website at [<http://www.USTR.gov>:] *Labor Laws in Central America and the Dominican Republic: The ILO Report*. **Critics' arguments** are taken from: **paragraph 1**: April 4, 2005 letter to Acting U.S. Trade Representative Peter Allgier from four Members of the House Ways and Means Committee, (Representatives Cardin, Rangel, Becerra, and Levin and attachment. *U.S. State Department and International Labor Organization Reports Confirm Deficiencies in DR-CAFTA Labor Laws*, 10 p; **paragraph 2**: AFL-CIO Global Fairness 2004. *USTR Misleads Congress on DR-CAFTA Labor Provisions* (no date).

of labor codes; that Honduras is working on its revision; and that DR-CAFTA will help raise standards further. The Administration acknowledges, however, that there are some coverage gaps in worker rights legislation, as identified in the ILO report.

Critics, from their analysis of the ILO and State Department reports, argue that they have identified at least 20 issue areas where DR-CAFTA labor laws *fail* to comply with ILO core labor standards — especially the basic right to organize and bargain collectively. They claim that some laws contain onerous strike requirements; inadequate protection against anti-union discrimination; limitation on the number of unions; restrictions on union leadership; and procedural impediments to calling a strike.

Critics also argue that DR-CAFTA would not mandate needed labor law reforms, and that most of the labor reforms carried out by DR-CAFTA countries in the past decade were the direct result of pressure from the U.S. government, tied to the threat of sanctions for failure to respect internationally recognized worker rights under the GSP. In addition, they argue, DR-CAFTA does not actually prohibit (backed up by sanctions) any country from adopting weaker laws in order to attract trade and investment, and then enforcing those.

Issue #2: Are DR-CAFTA Country Laws Being Adequately Enforced?⁶

The second issue relates to the only sanctionable labor requirement in DR-CAFTA — that each country “shall not fail to effectively enforce” its own labor laws in the production of goods for trade. Generally speaking, both the Administration and critics of DR-CAFTA agree that the three studies referred to above find that DR-CAFTA countries have inadequate resources, and perhaps a weak political will to enforce their laws.

The Administration’s position, however, is that DR-CAFTA creates the strongest mechanism to make countries comply with FTA requirements of any trade agreement negotiated so far because it creates a three-track labor strategy specifically designed to address enforcement issues: *Track 1*, if a country fails to enforce its own labor laws, it is subject to monetary fines of up to \$15 million annually, or potential loss of trade benefits if a country fails to pay the fine. The Administration points out that relative to the economic size and level of income of DR-CAFTA partners, a fine of up to \$15 million per year per violation is not small. *Track 2* is voluntary labor law enforcement. The

⁶ **Administration arguments** are taken from USTR website: *CAFTA Facts: The Case for CAFTA*, and *CAFTA Facts: Real Results on Labor Rights*, and *The Facts About CAFTA’s Labor Provisions: Answering the Allegations of CAFTA Critics*. **Critics’ arguments** are taken from **paragraph 1:** *The Washington Post*. CAFTA’s Profit Motive, by Harold Meyerson, March 30, 2005. p. A-15; **paragraph 2:** *Inside U.S. Trade*. CAFTA Countries to Unveil Labor Initiative to Thwart Congressional Critics. December 17, 2004; and *Washington Trade Daily*. U.S.-CAFTA Chances Iffy. April 27, 2005; **paragraph 3:** AFL-CIO Global Fairness. *USTR Misleads Congress on CAFTA Labor Provisions*. No date; and U.S. Department of Labor. *Budget Justifications of Appropriation Estimates for Committee on Appropriations*, Administration requests for FY2001: \$167 mil.; FY2002: \$72 mil.; FY2003: \$55 mil.; FY2004: \$12 mil.; FY2005, \$31 mil.; and FY2006: \$12 mil.; and **paragraph 4:** Labor Advisory Committee for Trade Negotiations and Trade Policy. *The U.S.-Central America Free Trade Agreement*. March 19, 2004, p.9; and *The Dispatcher*. CAFTA: The NAFTA Nightmare Returns. March, 2005.

Administration argues that countries in the region have already taken numerous concrete steps to improve labor law enforcement, and are looking at additional specific recommendations from the IDB report to improve such enforcement. *Track 3* is U.S. assistance for labor cooperation and trade capacity building supported by a \$20 million appropriation for the region for FY2005 to promote “labor cooperation, capacity building for worker rights, and improvement in labor administration.” The Administration states it will work with the Inter-American Development Bank (IDB) and others to target these funds toward areas of greatest need.

The Administration also argues that the enforcement is enhanced by the dispute settlement mechanism under DR-CAFTA, which is more targeted and thus likely to be more effective, than that which exists under GSP or CBI, where the remedy is suspension of benefits until the problem is resolved. Under DR-CAFTA, they point out, if the country is failing to effectively enforce its labor laws, the government would pay a stiff fine which will recur until the situation is remedied, and those fines could be directed toward solving the specific problem identified in the dispute.

On the other hand, critics argue that DR-CAFTA is technically less stringent than GSP, CBI, and other trade preference laws which go beyond asking whether a country is *enforcing its own labor laws*, and look to whether partners are actually *taking steps to afford their workers* “internationally recognized worker rights.” They also argue there is no *specific* DR-CAFTA requirement that fines be directed to solving the enforcement problem.

Critics maintain that if DR-CAFTA laws do not adequately meet ILO standards, efforts to better enforce these laws would merely strengthen enforcement of “bad” laws. They argue that DR-CAFTA could be re-negotiated to address these concerns.

Critics also assert that the administration has consistently reduced budget requests for the Department of Labor’s Bureau of International Labor Affairs (DOL-ILAB), which has funded many of the technical labor assistance programs. Critics further argue that the Administration is shifting funding for trade capacity building away from a *worker rights* focus to programs only tangentially related to worker rights — programs focusing on worker training, productivity, and corporate codes of conduct, which are not designed to improve labor standards.

Finally, critics argue that the potential maximum fine of \$15 million per year per violation — a sum that the offending party essentially pays to itself — is “so low that the fines will have little if any deterrence effect,” and may simply be offset by shifting other funds away from labor programs.

Issue #3: Does DR-CAFTA Comply with the *Principal Negotiating Objectives of the Trade Act of 2002*?⁷

The Trade Act of 2002 extended Presidential “fast track” trade promotion authority to negotiate trade agreements which Congress must then consider without amendment and under limited debate. That legislation (P.L. 107-210, Sec. 2102) set out enforceable “*principal negotiating objectives*” to guide the Administration as it forges trade agreements. At issue is whether DR-CAFTA complies with those objectives.

The Administration’s position is that DR-CAFTA fully meets the *labor* objectives set out by Congress in the Trade Act of 2002 which include (1) to ensure that a party to a U.S. trade agreement “does not fail to effectively enforce its labor laws;” (2) to recognize that parties to a trade agreement retain the right to make decisions regarding the allocation of resources to enforcement; and (3) to strengthen the capacity of trading partners to promote respect for core labor standards.

Critics argue that while DR-CAFTA may meet the *labor* negotiating objectives of the Trade Act of 2002, it does not meet negotiating objectives for *dispute settlement and enforcement* which instruct negotiators to seek provisions in trade agreements that “treat U.S. principal negotiating objectives equally” with respect to: (a) the ability to resort to dispute settlement; (b) the availability of equivalent dispute settlement procedures; and (c) the availability of equivalent remedies. Critics point out that while virtually all provisions in non-labor (and non-environment) chapters of DR-CAFTA are eligible for dispute settlement procedures and possible sanctions, only one provision in the *labor* chapter is so eligible: the provision that each country “shall not fail to enforce its own labor laws in a manner affecting trade.” Therefore, critics argue, under DR-CAFTA U.S. principal negotiating objectives for *labor* are not treated equally with principal negotiating objectives for such subjects as trade barriers, trade in services, foreign investment, intellectual property, etc., and as a result violate the principal negotiating objectives of the Trade Act of 2002.

Congressional Action

On June 30, 2005, the Senate passed S. 1307, the *Dominican Republic-Central America-United States Free Trade Agreement Implementation Act*, by a vote of 54 to 45. Contributing to the passage was a June 28 letter from U.S. Trade Representative Rob Portman to Senator Bingaman (D-NM and Member of the Senate Finance Committee), indicating that the Administration would propose and support the earmarking of \$40 million in appropriations for each of four years: FY2006-FY2009, for labor and environmental enforcement capacity-building in CAFTA-DR signatory countries. Of this, \$3 million annually would go to the ILO to fund a “transparent public report” every six months on ILO findings of progress by DR-CAFTA governments in their efforts to improve labor law enforcement and working conditions. On July 28 the House passed H.R. 3045, with the same language, by a vote of 217 to 215. H.R. 2045 became law as P.L. 109-53 on August 2, 2005.

⁷ **Administration arguments** are taken from USTR. *The Facts About CAFTA’s Labor Provisions*. op. cit. **Critics’ arguments** are taken from AFL-CIO Global Fairness 2004. *USTR Misleads Congress on CAFTA Labor Provisions*. (No date.) p. 1.