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Central America and the U.S. Face Challenge—and Chance for Historic Breakthrough—on Workers' Rights

By Sandra Polaski

The negotiations between the United States and five Central American countries for a free trade agreement present an important, even unique, opportunity to build and buttress the rule of law, human rights, and democracy in Central America, as well as to invigorate the region economically. In fact, the deep integration that a free trade area would foster between the United States and Costa Rica, Guatemala, El Salvador, Honduras, and Nicaragua *requires* a strengthening of basic law and institutions in a region with a troubled history and a troubling present in terms of human rights and the rule of law.¹ Few informed observers—from U.S. trade representative Robert Zoellick to the State Department to many in Central America—doubt that serious deficiencies exist in the region. These deficiencies must be addressed if a trade agreement is to produce positive results.

Nowhere are the deficiencies of present-day Central America—and the opportunities for progress through a well-constructed free trade agreement—more apparent than in the area of workers' rights, labor law, and labor institutions.² Central America has been the scene of continuing abuses of workers' rights. These abuses include the ongoing suppression of workers' right to organize in export-processing zones, physical threats, beatings, kidnappings, and even assassinations of trade union leaders. Child labor is a serious problem, including in dangerous occupations. Employment discrimination against women and indigenous workers is rife. Given that a free trade agreement is meant to encourage greater investment in the region and an expansion of production for the U.S. market, these ongoing violations must be addressed at the outset. Otherwise, an agreement would further entrench and expand current systemic violations of workers' rights.

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A free trade agreement offers the opportunity to create political space in Central America for needed legislative reforms that have eluded government efforts until now. The terms of a trade agreement also can strengthen government enforcement of laws and provide incentives for the private sector to voluntarily comply with labor legislation.

BACKGROUND

Ongoing labor problems have been such a concern to the United States that Congress has fashioned policy instruments to deal with these abuses through current unilateral trade preference programs. The Generalized System of Preferences (GSP), the Caribbean Basin Economic Recovery Act (CBERA), and the Caribbean Basin Trade Partnership Act (CBTPA) all extend market access benefits unilaterally to the Central American countries on the condition that they respect workers' rights. In fact, 74 percent of Central American products entered the United States duty free in 2002 under these unilateral preference programs. The programs require that recipient countries accord the following internationally recognized workers' rights to their citizens: freedom of association; the right to collective bargaining; protections against child labor; freedom from forced labor; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. If countries fail to respect these rights, they run the risk of losing the trade preferences for some or all of their products.

These provisions have been invoked frequently with respect to these five Central American countries, both by the U.S. government and by private human rights and labor groups. At least eighteen

petitions alleging violation of these rights in Central America have been filed by private groups in recent years. Several petitions are currently pending. In eight separate instances, the U.S. government itself has initiated reviews of labor conditions in Central America or decided to continue reviews that originally were undertaken in response to petitions by the public. In each case, the reviews have been based on U.S. concerns over continuing rights violations in these countries.³

The GSP and other instruments have not solved the basic problem of the lack of rights and rule of law for workers in the region. But they have at least reversed the most egregious violations of rights and threats to lives and arguably have prevented many more such abuses by the very fact of their existence.

A free trade agreement with Central America would eliminate these existing policy instruments because it would replace the unilateral preference programs. At the same time, market access to the United States would be expanded. This would leave existing problems to fester and invite further abuse.

There is little chance that a free trade agreement will be negotiated that contains *no* labor provisions. The Trade Act of 2002 spells out chief negotiating objectives on labor, including several provisions similar to those contained in the U.S.–Jordan Free Trade Agreement. But unlike Jordan, which has reasonably good labor laws, relatively effective enforcement, and the overall rule of law, Central American countries have glaring weaknesses in their laws, inadequate enforcement, and judicial systems that fall short of any reasonable standard for the rule of law.

THE CHALLENGE

Therefore, the parties must fashion labor provisions in the U.S.–Central American free trade agreement that accomplish four indispensable goals. First, the agreement must ensure that trade benefits continue to be conditioned on adequate respect for workers’ rights, to avoid backsliding and to maintain the accountability of Central American governments that currently exists under the GSP and CBTPA. Second, the agreement must address the problem that existing laws are inadequate when measured against agreed-on international standards and ensure that laws are upgraded to such international norms. Third, the agreement must include provisions to strengthen labor law enforcement and to create the true rule of law with regard to the rights of workers. Fourth, the agreement must devise a way to verify that all of the above steps are being taken and maintained.

The trade negotiations with the Central American countries will be the most challenging that the United States has faced with regard to labor rights. The four critical goals listed above may seem difficult to achieve in these negotiations. However, this paper presents a proposal for the labor provisions of the agreement that would enable the parties to meet each goal. This proposal builds on lessons that have been learned through other trade agreements that the United States has negotiated in recent years. Both the United States and its developing-country partners have gained experience through the implementation of those agreements. Although accomplishing the four goals will be a challenge, it is fortunate that there has been a wealth of experimentation that now can guide the U.S.–Central American negotiations.

PROPOSAL FOR A SOLUTION

This section offers an overall framework for an agreement that can achieve the four crucial labor goals outlined above. It also offers suggestions as to what labor obligations or commitments should be required of the parties; how the dispute settlement mechanism should work; and other proposals regarding transparency, oversight and the role of the public.

Framework

The framework for an agreement on labor rights must begin with the establishment of a transitional period before full free trade would be phased in. Of course, such a phase-in of tariff reductions and other liberalizations is the norm under free trade agreements and will undoubtedly be a part of the structure of this proposed agreement. But a U.S.–Central American Free Trade Agreement (CAFTA) must include a specific provision that the benefits of the agreement can be accelerated—or delayed—for each Central American country and each sector within those countries on the basis of whether the country and sector have met the agreement’s obligations with respect to workers’ rights.

Four factors argue for establishing a transitional period that can be accelerated or delayed depending on the performance of each country and each sector in promoting labor rights. First, this approach will replace the conditionality of current unilateral preference programs such as the GSP with an equally potent incentive for countries and firms to comply with the labor terms of the agreement. Thus the United States will not sacrifice an existing lever for progress on labor rights without substituting an equally effective instrument. Second, having the transitional period will create healthy competition between countries to actually carry out the

promised reforms of labor legislation, enforcement, and the rule of law, because each country can accelerate its enjoyment of valuable trade advantages by doing so. Third, the approach will align the incentives of the private sector with those of the public sector, because neither the government nor firms can gain trade privileges without the cooperation and support of the other. Fourth, the failure of firms in a particular sector to comply with their obligations will not halt or delay the benefits for other sectors that have met their obligations. To illustrate, if agribusiness firms refused to abide by labor laws but apparel firms demonstrated compliance, the apparel sector would receive accelerated benefits and not be held back by any intransigent sector.

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How long should such a transitional period run? As a rule of thumb, the fifteen-year phase-in of the North American Free Trade Agreement (NAFTA) or the twelve-year phase-in of the recently negotiated U.S.–Chile Free Trade Agreement are probably useful guides. Countries and sectors that chose to fulfill the labor terms of the agreement could enjoy benefits promptly, perhaps as soon as one year after the agreement enters into force, thus providing a very substantial incentive for compliance. Conversely, countries and sectors that refused to shoulder their obligations would have to face the prospect of a continuing denial of benefits.

Such a system will require credible, neutral oversight to determine the actual degree of compliance by different sectors in each country. Although this might sound like a very large undertaking, a similar system has already been created with remarkable success and efficiency under another U.S. trade agreement: the U.S.–Cambodia Textile Agreement. This agreement established that Cambodia can receive the incentive of additional apparel quota if it meets its obligations under the agreement to protect the rights of workers and enforce its labor laws in the textile and apparel sector. The agreement obviously required oversight, as would CAFTA.

In the case of the U.S.–Cambodian agreement, the parties agreed to ask the International Labor Organization (ILO) to monitor the factories in the sector and report its findings to the parties as a basis for decisions on any quota increase. The ILO agreed to undertake a monitoring program and established a credible, efficient, and transparent system. ILO monitors (most hired locally) inspect factories, report the results to factory managers and to the two governments, and allow a reasonable period for remediation. After the remediation period, a second inspection is conducted, and a report is issued as to whether the factory is in compliance.

This system has provided the information needed by the parties to the U.S.–Cambodian trade agreement to make decisions on incentives. The parties also take other factors into account, such as progress on labor legislation and the rule of law with respect to labor rights. The monitoring program is funded jointly by the U.S. government, the Cambodian government, and the Cambodian textile and apparel sector; the United States provides about 70 percent of the funding, and the other parties provide about 15 percent each. A tripartite committee—consisting of representatives of the

Cambodian government, textile and apparel firms, and trade unions representing the workers—oversees the program. The striking improvements in working conditions and compliance with law that have been achieved in this sector suggest that this has been one of the most successful and cost-effective programs to promote worker rights abroad that the US Government has ever funded. The agreement and the monitoring program were deemed so successful by both governments that when the initial agreement expired in 2001 it was renewed for three more years—with an expanded potential quota bonus for further progress on labor rights.

This U.S.–Cambodian model would be well suited for adaptation in CAFTA. All the governments involved are members of the ILO. The ILO could draw upon the signal experience it gained in Cambodia to construct a similarly well-run program in Central America. U.S. firms that import products from Cambodia have been impressed favorably by the ILO program, the improvements it has induced in the factories from which they buy, and the protection it provides for their own reputations. Because many of the same firms import from Central America, their familiarity with the approach would help ease the introduction of such a program in that region.

Obligations

What labor obligations should be included in CAFTA? The United States has developed two relevant models for labor obligations in the context of trade arrangements. Both should be applied in this proposed agreement.

The first model operates in the GSP and CBTPA programs, which require that beneficiary countries afford protection for internationally recognized workers' rights, as defined above. This model encompasses the enforcement of existing

labor laws and, where the labor laws are deficient compared with international norms, it has also been used to require improvements in labor legislation.

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Typically, the United States has looked to the ILO experts to determine whether a country's labor laws meet international norms. ILO experts have judged that all five of the Central American countries involved in these negotiations have deficiencies in their basic labor laws.

Therefore, it is essential that the five countries be obligated to reform their labor laws to correct these shortcomings. This should be a threshold obligation of the agreement. In requiring legal reform, the United States would follow a pattern it has already established in negotiations over intellectual property rights, where it has insisted on legal improvements to further protect those rights.⁴ Similarly, the United States must insist on improved protections for labor rights, given the inadequacy of current laws.

The second model pioneered by the United States requires that its trading partners effectively enforce their labor laws. This model was employed in the labor side agreement to NAFTA, and is one aspect of the approach in the U.S.–Jordan free trade agreement. Once Central American labor laws are amended to meet international norms, there must be an ongoing obligation to enforce them, as there is with other trading partners.

Dispute Settlement

The Trade Act of 2002 instructs U.S. trade negotiators to subject labor provisions of trade agreements to the same dispute settlement procedures as other disputes arising under the agreements, with equivalent remedies. CAFTA should follow that guidance. Such dispute settlement procedures would take effect once a country and a sector had been determined to be in compliance with the terms of the agreement and had been extended full free trade benefits on the basis of the criteria and monitoring procedures discussed above.

Dispute settlement panels should comprise experts on international labor norms and comparative domestic labor laws. Time frames for dispute settlement should be identical to those for commercial disputes. Possible penalties for noncompliance with panel rulings should cover the same range as penalties for noncompliance with rulings in commercial disputes, with the specific provisions tailored to provide meaningful remedies for nonenforcement of labor laws.

Transparency, Oversight, and Public Petitions

CAFTA will replace the current U.S. system of unilateral trade preferences for the Central American countries. That system includes the ability of the public and affected workers to raise concerns directly to the U.S. government when labor rights are violated. This mechanism has been used repeatedly under the GSP and CBTPA programs, as discussed above, leading to the resolution of some egregious problems and arguably forestalling worse or more frequent abuses. Therefore, a new free trade agreement between these parties must replicate that important public oversight mechanism.

The specific mechanism could vary, but elements of a model can be found in the North American Agreement on Labor Cooperation (NAALC)⁵ and the existing GSP system. At a minimum, any public petition mechanism should provide a specific, standing venue for the submission of petitions or requests for review. Any individual or organization in any of the countries that is a party to the agreement should be able to file a petition or request in any of the other countries, as is the case under NAALC. Upon receipt of such a filing, the United States and other governments should guarantee a thorough, unbiased review of the allegations in the petition within a defined period of time, certainly no more than six months. The mechanism should guarantee the right, at a minimum, to a public hearing on the allegations.

Where the claims of a public submission are deemed to have merit, the issues raised should be referred for intergovernmental consultations to attempt to remedy the problems, as has been the practice under NAALC. If these consultations fail to produce a meaningful remedy for the problems within a defined time frame, the problem should be referred to a dispute settlement panel under the terms outlined above in the discussion of dispute settlement.

This procedure will ensure that those who have the best information about violations of labor rights—the workers themselves—have meaningful input into government oversight processes. This provides both healthy transparency for the implementation of the labor provisions of the agreement and reinforcement for the efforts of Central American governments that may be committed to full enforcement of labor laws but strapped for adequate resources.

SUCCEEDING WHERE OTHER EFFORTS HAVE FAILED

Improving labor laws to meet international standards, enforcing those laws, and strengthening the rule of law in general have proven to be difficult tasks in Central America. The legacy of long-standing undemocratic traditions and interest groups in some of the countries, along with the aftermath of civil wars, have combined to leave the region lagging in both economic and democratic development.

The CAFTA negotiations present an excellent opportunity to make real progress in correcting these deficiencies and putting Central America on a course for sustained development in the coming decades. The prospect of full access to the U.S. market offers great leverage to induce reform from both governments and private-sector actors in Central America. Conversely, if this opportunity is wasted, it is hard to see how labor rights and the rule of law will be realized in the region in the foreseeable future.

The proposal presented in this paper offers a roadmap for dealing with challenges that have been intractable until now. A key reason that this approach can succeed where Central American governments alone have not is that it aligns private sector incentives with public interests regarding good governance and rule of law. Under this proposal, the sooner firms comply with labor laws and provide acceptable treatment for workers, the sooner they will enjoy the benefits of full access to the U.S. market. This linkage of commercial rewards to firm behavior has been one of the key elements in the success of the U.S.–Cambodia Textile Agreement, and it can succeed in Central America as well. The successful, workable Cambodian model should be replicated in CAFTA.

Real progress on labor rights and the rule of law in Central America demands a regional approach. Central American governments, in explaining the repeated failures of the rule of labor law in the region, have said that if they were to enforce their laws effectively, firms would simply move across the border to a neighboring country that did not. The

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proposal offered here reverses that dynamic by creating competition for successful labor law enforcement. If the country next door fails to enforce its laws or to meet international standards, access to the U.S. market will be delayed. Timely rewards will flow to countries that comply with their legal obligations, and those that do not will lose customers and investment.

This proposal also benefits from using elements of other agreements and models that are already functioning effectively. These regimes can be examined. The governments involved can confer with one another. Private-sector actors, including firms and workers' organizations, can discuss experiences with their counterparts. The sharing of best practices by those who have already implemented the different aspects of these procedures can also help Central America move quickly up the learning curve. This will expedite the realization of the rewards that are possible through CAFTA, both in market access and in the more fundamental rewards of good governance and the wide enjoyment of the benefits of trade. ■

¹ See U.S. Department of State, *2001 Country Reports on Human Rights Practices*, <http://www.state.gov/g/drl/rls/hrrpt/2001/>; reports for previous years are available at http://www.state.gov/www/global/human_rights/hrp_reports_mainhp.html. These authoritative reports describe serious problems with human rights abuses and inefficient or corrupt judiciaries in four of the five countries and continuing problems of somewhat lesser severity in Costa Rica.

² See U.S. Department of State, *2000 Country Reports on Human Rights Practices* and *2001 Country Reports on Human Rights Practices*, section 6, “Worker Rights.”

³ Sources include the “Public Worker Rights Summaries” prepared by the U.S. government interagency GSP subcommittee and issued by the U.S. trade representative (USTR) from 1988 to 1995 and USTR press releases.

⁴ In his October 1, 2002, letter of notification to Congress of the administration’s intent to enter into free trade negotiations with Central America, USTR Zoellick wrote that the negotiations would be used to address “inadequate protection of intellectual property rights” in those countries’ laws. Specifically, he wrote that the United States would seek levels of patent protection in line with U.S. practices and provisions for strengthened legal enforcement, including through criminal penalties and compensation of rights holders.

⁵ NAALC is the labor side agreement to NAFTA.

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