NÚMERO 252

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The effectiveness of trade based clauses in improving labor rights protections: The case of the CAFTA-DR labor clause

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JUNIO 2015

Acknowledgements

The authors thank Gilberto García, Geoffrey Scott Herzog, and especially Steven Wishart for sharing their views on the state of Labor rights in Central America and the Dominican Republic, and the staff of the AFL-CIO Center for International Labor Solidarity in Mexico City for facilitating interviews.

Abstract

Trade agreements specify the recourse for violations of trade rules on intellectual property, investors' rights, or commercial disputes, but the incorporation of social standards like labor guarantees to trade regimes represents an emerging area of trade policy. Is the linking of labor rights conditionality to trade agreements an effective avenue for the protection of worker's rights globally? How are they enforced by governments? By analyzing labor rights protections in Central American states before and after the ratification of the CAFTA-DR trade accord, including the cases filed for labor dispute resolution, we determine that trends in labor rights protections are not necessarily due to the CAFTA-DR agreement, or its dispute resolution mechanism for labor, but rather, changes in labor practices that respond to national-level party politics. Our analysis suggests that it is not clear that labor rights practices have improved considerably either in the region, or in any particular country, since CAFTA-DR has been in effect, and in some countries, we note the deterioration in labor rights standards.

Keywords: CAFTA-DR, labor rights, dispute resolution

Resumen

Los acuerdos comerciales especifican el recurso para resolver controversias por violaciones de las normas en áreas como la propiedad intelectual, los derechos de los inversionistas, o las disputas comerciales, pero la incorporación de "normas sociales" como garantías laborales en los regímenes comerciales internacionales representa un área emergente de la política comercial. Es la vinculación de los derechos laborales a los acuerdos comerciales una vía eficaz para la protección de los derechos de los trabajadores al nivel mundial? ¿Cómo se hacen cumplir las condiciones por parte de los gobiernos? Mediante el análisis de protección de los derechos laborales en los países centroamericanos antes y después de la ratificación del acuerdo comercial CAFTA-DR, y incluyendo los casos presentados para la resolución de conflictos laborales, determinamos que las tendencias en la protección de los derechos laborales no son necesariamente debido al acuerdo del CAFTA-DR, o su mecanismo de solución de controversias. Más bien, las mejorías en la protección de derechos laborales responden a la política a nivel nacional. Nuestro análisis sugiere que no está claro que las prácticas de derechos laborales han mejorado considerablemente –ya sea en la región o en un país determinado—después de que el CAFTA-DR entró en vigor, y en algunos países, observamos el deterioro de los estándares laborales.

Palabras clave: CAFTA-DR, derechos laborales, resolución de controversias

Introduction

Trade agreements already specify the recourse available for violations of trade rules on intellectual property, investors' rights, or commercial issues through dispute resolution, the core compliance mechanism featured in trade accords. The Pitincorporation of social standards like labor rights and environmental standards to the international trade agenda represents a new, emerging area of trade policy. In the U.S and the EU –still the two most important consumer markets in the world--, trade-based social clauses have been nearly universally appended to trade agreements since the mid-1990s, and negotiation authority itself is contingent on securing agreement with worker's rights protections in the U.S. (Hafner-Burton 2009; Weiss 2003). Many other industrialized states have also begun to incorporate versions of social charters into regional and bilateral agreements, each with a differing institutional design and enforcement approach (Bolle 2013a; Hafner-Burton 2009).

Protecting labor rights through trade-based mechanisms represents only one way to institutionalize worker protections in a context of economic globalization, yet it is a method that is gaining ground.[1] However, it is not yet clear as to the consequences that such clauses may have had on labor rights protections within countries. If we are interested in whether these clauses are effective tools for promoting labour rights enforcement, it is imperative to investigate two dimensions of efficacy: implementation and outcomes. *Implementation* refers to the process by which the rules of conditionality are applied to partner countries. *Outcomes* refers to the degree to which the labour mechanisms promote labour rights improvements in the countries that are subject to labour conditionality clauses. The questions that we seek to ask then are first, how are social clauses enforced among partner states? And second, is the linking of labor rights conditionality to trade agreements an effective avenue for the protection of worker´s rights globally? We look to the implementation of the labor rights clause attached to the CAFTA-DR to evaluate the first aspect of efficacy, and labor rights protections before and after CAFTA-DR was implemented to evaluate outcomes.

The CAFTA/DR agreement is an interesting case for helping us to shed light on these questions. First, domestic legislation in Central America and the Dominican Republic at the time of the ratification of the CAFTA-DR agreement was generally compliant with the ILO core conventions that make up the ILO 1998 Declaration on Fundamental Principles and Rights at Work (International Labor Organization, 2003)[2],

[1] A labor clause is attached to the Trans Pacific Partnership agreement, for example.

[2] Ironically, much of the effort to pressure these states into compliance with the ILO conventions also stemmed from a trade-based labour rights conditionality clause, the clause attached to the U.S. Generalized System of Preferences Program. Government responses to the GSP process, especially once petitions were filed and formal reviews began, are well

but there was a wide gap between labor law regulations and enforcement, in part because of the low level of economic development, and corresponding lack of state capacity to enforce the law in the labor sector. The CAFTA-DR enabling legislation thus included appropriations of over $140 million USD, disbursed through various US agencies[3], to implement a series of capacity building exercises and programs identified by the Ministries of Labor of the CAFTA-DR countries that would best support the six most important areas to enhance labor rights enforcement across the region. These programs, identified in the report *Building on Progress: Strengthening Compliance and Enhancing Capacity* (the "White Paper") envisioned oversight by the US agencies and the ILO, periodic reporting mechanisms, and a contracting system that allowed interested non-state actors to bid to implement the programs (Vice Ministers of Labor, 2005). This means that the question of capacity to implement and enforce ILO labor standards was actively integrated into the agreement, allowing us to bracket institutional capacity or levels of development in the assessment of labor rights adjudication. This allows us to focus on the question of the usefulness of the labor accord to address labor rights violations. We note that it is not clear that labor rights practices have improved across the region during the time that CAFTA-DR has been in effect, and in some countries, we note a deterioration in labor rights standards, particularly with respect to the right of association. Further, It is not clear that this variation is due to the CAFTA-DR agreement, its dispute resolution mechanism for labor, but rather, changes in labor practices that respond to the contingencies of domestic political trends. We discuss these findings in the paper for each of the countries in light of the few cases submitted to labor dispute resolution to date to illustrate these effects. We then assess the mechanisms of compliance in the labor clause and their strengths and weaknesses to speculate on the relationship between institutional design of this clause and labor outcomes.

The paper draws on qualitative reports from the U.S. Department of State Annual Human Rights Reports, the International Trade Union Confederation's Annual Survey of Violations of Trade Union Rights, and quantitative data from ILO databases, as well as reports from key non-governmental organizations active in promoting labor rights in the region. We also draw on in-depth, multiple-session interviews were conducted with field staff from three regional non-governmental organizations(NGOs).

We begin with an overview of the linkage of labor rights guarantees to international trade accords, and the specifics of the inclusion of those guarantees to trade policy in the United States. We then turn to the negotiation of the CAFTA-DR accord to briefly illustrate how the promotion of labor capacity in Central America became crucial to the ratification stage of the trade agreement, and describe the central features of the labor clause. After a brief overview of the institutions of the labor clause, its mechanisms and dispute process, we then discuss the overall

documented for El Salvador, Guatemala, the Dominican Republic and Honduras, as is the suspension of Nicaragua (Adams 1989; Amato 1990; Davis 1995; Douglass, Fergusson, and Klett 2004; Frundt 1998). Costa Rica was reviewed only once, in 1993, and was found to be in compliance with the labour statutes.

[3] Mainly the U.S. Department of State´s Bureau of Democracy Human Rights and Labor, the U.S. Department of Labor (U.S. DOL), and the U.S. Agency for International Development (U.S. AID).

performance of the CAFTA-DR agreement in light of changes in labor rights performance, both regionally and within each of the six partner countries from the period prior to ratification until 2013. We discuss which countries have improved labor rights protections and which have not over time, and assess which of these changes may be attributed to the CAFTA-DR mechanisms. We end with recommendations on how the experiences of these countries with labor rights mechanisms offered under the CAFTA-DR agreement can shed light on enhancing the design of enforcement mechanisms for future trade agreements.

Linking trade and labor rights guarantees: Two arguments

The arguments supporting a linkage between trade and labor rights conditionality note that first, labor rights violations are accelerated by trade liberalization and second, that trade agreements provide stronger compliance mechanisms than those featured under the current labor rights or human rights regimes. First, trade is seen by some as one of the factors that may lead to weakening labor rights protection globally, and especially among developing countries. Empirical support for a race to the bottom thesis is mixed (Cingranelli and Tsai 2003; David Kucera 2002; Rodrik, Lawrence, and Whalley 1996) and different effects can be observed across time and country, as well as within different economic sectors, and with variation across particular labor rights and working conditions (Hafner-Burton 2005; Mosley 2008). While some studies find that participation in the global economy is positively correlated with respect for labor rights (Mosley 2010; Mosley and Uno 2007; Neumayer and de Soysa 2005; Cingranelli 2002; Kucera 2002; Richards, Gelleny, and Sacko 2001; Rodrik, Lawrence, and Whalley 1996), in other studies, the impact of trade openness, including in developing countries, is associated with increased poverty and inequality, and the erosion of domestic labor standards (Cingranelli and Tsai 2003; Mosley and Uno 2007; Rodrik 1997; Armbruster-Sandoval 2003; Frundt 1998, 1999; Gordon 2000; Klein 2000).

The second argument for linking trade and labor rights seeks to introduce the "hard" enforcement mechanisms of trade agreements to the "soft" standards of international labor rights regimes (Abbott and Snidal 2000; Graubart 2008; Hafner-Burton and Tsutsui 2005).[4] Because the "race to the bottom" --the result of competitive pressures for export markets that lead states to deregulate labor guarantees--is triggered by competition for trade and investment, trade agreements are increasingly seen as an appropriate arena for promoting common labor standards (Ross and Chan 2002). Trade based conditionality establishes common institutions and rules for all partners, thus establishing a level playing field to participate in international trade, and can potentially counteract a "race to the bottom".

[4] International law is commonly categorized by statutes that are binding upon states and include enforceable commitments referred to as "hard" law, and statutes that are non-binding, or non-enforceable, but aspirational or prescriptive, referred to as "soft law". Hard law instruments might include international treaties, while soft law instruments may include Resolutions, Declarations and other non-treaty legal mechanisms. For Abbott and Snidal (2000), what mainly distinguishes them is the degree of enforceability: hard law instruments are backed by mechanisms to compel state compliance, while soft law instruments are not.

International labor rights standards are already codified in the UN Declaration of Human Rights as well as the ILO conventions that establish "core rights", those labor rights that can be achieved by countries regardless of their level of development, as later defined by the 1998 ILO Declaration on Fundamental Principles and Rights at Work.[5] However, as soft standards, compliance with the international labor conventions is largely voluntary (Collingsworth 2002), limited to reporting and monitoring without an attendant apparatus for enforcement of the conventions (Teague 2002). Most international organizations are powerless to punish violations of their conventions, and third parties are powerless to force offending states to comply with their obligations.[6] The key advantage then of linking labor rights guarantees to trade accords is that trade agreements offer leverage by featuring "hard" mechanisms for compliance, compared to soft international labor rights enforcement regimes (Collingsworth 2002; Hafner-Burton 2005; Harvey 2001; Rodrik, Lawrence, and Whalley 1996).

Tying labor rights guarantees to trade thus shifts enforcement mechanisms from voluntary to binding, subject to dispute resolution just like more traditional trade issues (Ehrenberg 1996; Moorman 2001), and transforming soft law principles to hard law mechanisms, with sanctions for non-compliance by parties that make trading rules enforceable, and their transgressions sanctionable (Burtless 2001; Elliott 2000a; Rosen 1992).

The potential consequences that labor violations pose to altering or interrupting the trade relationship are sometimes important enough economically to encourage compliance. In aligning the interests of governments and business around labor rights protection and enforcement, labor clauses can push countries to promote and protect these rights. The empirical record indeed shows that trade-based mechanisms have helped to promote worker's protections within individual countries, where the threat to lose trade benefits operates as leverage on governments and employers to implement national laws.[7]

Of course, there is resistance to linking labor rights standards to trade agreements, and the most important organized resistance comes from the less-developed states, for which these types of social clauses were originally envisioned to support. Less-developed states worry that enhancing labor standards represents a cost that puts into danger its competitive advantage in labor-intensive sectors compared to other economies. These states consider the trade and labor linkage another barrier to

[5] These are the rights of freedom of association and right to collective bargaining, elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and elimination of discrimination in respect to employment and occupation. These are the rights associated with conventions 29, 87, 98, 100, 105, 111, 138 and 182, and states are to uphold them under the 1998 Declaration whether or not they have ratified them. See Brown, Deardorff and Stern (2000) for a review of the debate on defining labour rights.

[6] The limits to ILO enforcement are illustrated by the attempt to implement a boycott of imports from Myanmar in 2001 for forced labour practices. Nearly all ILO member states refused to participate, citing WTO rules on non-discrimination as the reason as to why they could not join the boycott (Olson 2001).

[7] For example, Douglass, Fergusson, and Klett (2004) note that during country reviews conducted under the auspices of the GSP program, violence against trade unionists abated in Guatemala, Haitian sugar workers saw an end to forced labour in the Dominican Republic, and child labour was nearly eliminated in Bangladesh. Frundt (1998) discusses the passage of new labour codes consistent with ILO standards under GSP reviews in Honduras, Guatemala, and the Dominican Republic.

market participation placed on them by wealthy states. A number of developing countries therefore reject linking of labor rights enforcement to trade agreements because they believe that industrialized economies will use these provisions as a form of hidden protectionism.[8] Evidence in this regard is weak however (IILS, 2013; Di Caprio 2005; Elliott 2000c).

The United States has fully adopted labor rights conditionality into its trade policy, and labor guarantees have become an enduring feature of U.S. trade law. Every bilateral and multilateral trade agreement signed by the United States since the North American Free Trade Agreement (NAFTA) of 1994 features a labor clause, and in the late 1990s and early 2000s, Presidential Trade Promotion Authority, "fast track" legislation, was itself conditioned on reaching trade negotiations that included some form of labor provisions (Compa and Vogt 2001; Weiss 2003).

All U.S. clauses include a dispute resolution mechanism for labor violations, though these channels have evolved over time over four areas, including which labor rights guarantees are included, the language of enforcement, the process by which labor rights allegations are filed and adjudicated, and the question of standing to bring a complaint to the participating trade partners.[9] While formally all labor clauses attached to bilateral agreements, and the CAFTA-DR accord, only allow for state-to-state filings on labor violations, in practice, any civil society group can petition the U.S. first to open an investigation into labor rights violations among any of its trading partners.

Labor rights conditionality in the CAFTA-DR

Late in 2001, five countries included in talks for the Free Trade Area of the Americas approached the United States about the possibility of a separate Central American agreement, but formal intent to begin negotiations was not filed with the U.S. Congress until October 1, 2002.[10] In contrast to the effort to include labor rights guarantees to NAFTA, negotiating authority for the CAFTA accord under the 2002 template already included space for a labor rights clause as a *"principal negotiating objective",* and so the question was not whether or not CAFTA would include a labor clause to pass ratification, but the form the clause would take (Erikson 2004).

Still, the question of labor rights enforcement remained a political barrier to ratification for the U.S. throughout the negotiation process with El Salvador, Nicaragua, Guatemala and Honduras.[11] Like the unions and NGOs who mobilized to

[8] This discussion goes back to the 1990s, when the trade-labor linkage was heavily discussed at the various WTO negotiation rounds. At the 1996 WTO Ministerial Meeting at Singapore, the issue of linking a labor clause to the WTO was blocked by a group of countries, including developing economies, who issued a statement to separate the roles of the WTO as a trade organization and the ILO as a labor organization charged with this task. The Singapore Declaration states that the ILO and the ILO alone is the proper venue for setting labor rights standards, and that further, *"We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question"* (WTO 1996).

[9] For a review of these changes, refer to Bolle (2013) on enforcement mechanisms and Weiss (2003) for adaptations over time.

[10] These countries were Guatemala, Honduras, El Salvador, Costa Rica, and Nicaragua. The Dominican Republic joined talks in 2003.

[11] Costa Rica and the Dominican Republic signaled intent to negotiate at the end of 2003, and joined the accord in 2004.

oppose the agreement, Members of Congress from both parties who opposed CAFTA-DR questioned whether the bill could guard against the weakening of national labor laws, or whether the countries of Central America could meet expected compliance standards given low levels of state capacity. These countries thus approached the ILO to prepare a series of studies to evaluate each country's congruity with international labor standards, to defend themselves against such charges, the results of which were published in a 2003 report, *Fundamental Principles and Rights at Work: A Labor Law Study (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua)*.

In an effort to generate compromise and draw support for the bill, the George W. Bush administration held discussions with the then-U.S. Trade Representative Rob Portman and Democratic Senator Jeff Bingaman during the ratification process to include a mandate for a series of safeguards and special funding for programs for the CAFTA-DR countries so that they could build the institutional capacity necessary to implement the trade accord, including the labor and environment provisions.[12] As part of this agreement, the Vice Ministers of Labor and Trade for each state established a working group to develop both a region-wide assessment of the six major challenges to labor rights enforcement and implementation, and establish an action plan to promote the capacity of the institutions of labor regulation in each state to combat the weaknesses identified in the resulting report, the "White Paper". The U.S. legislation on implementation was amended to include a requirement that the President report biennially to the Congress for 14 years on progress being made by the CAFTA-DR countries on implementing Chapter 16's Labor Cooperation and Capacity Building Mechanisms and the White Paper recommendations (Delpech 2013).[13]

The U.S.-Central America FTA was signed on 28 May 2004.[14] The implementation bill was signed on August 2, 2005, and waited for ratification from the Central American countries. CAFTA was ratified and came into force for El Salvador and the Dominican Republic in March of 2006, for Honduras and Nicaragua in April, for Guatemala in June, and much later for Costa Rica, in January of 2009.

[12] Capacity building was not limited to labour and environmental guarantees, but also included customs administration, rules of origin assessments, and other technical assistance to assist these countries in the management of the complexities of the commercial rules of the trade agreement itself. Funding in support of labour capacity building alone included appropriations from the U.S. Agency for International Development and U.S. Department of State for $57.34 million USD, projected for the period fiscal year 2005 to 2007 (Meeks 2010), with additional funds released yearly since then (see Delpech 2013). Apart from the Bill, the Bush Administration allocated an additional $40 million USD from discretionary funds for *"laborr and environmental enforcement capacity building assistance"* over three years (Meeks 2010: 26), plus $3 million USD to the International Labor Organization for reporting. In addition, the Dominican Republic, El Salvador and Guatemala were allocated $10 million USD annually for rural development assistance for five years, or until they qualified for development assistance from the U.S. Millennium Challenge Corporation programs (Meeks 2010: 27). El Salvador, Honduras and Nicaragua all currently qualify for Millennium aid.

[13] This is section 403 (a) of the U.S. CAFTA-DR Implementation Act, Pub L. No. 109-53, §403, 119 Statute 462, 496 19 U.S.C 4001, 4111(a) (2005).

[14] Fifty-four to 45 in the Senate in June, and 217 to 215 in the House of Representatives in July.

Labor dispute measures and case process

The labor clause for CAFTA (Cooperative Labor Consultations- the CLC) is listed in Chapter 16, and Annex 16.5, with dispute settlements for a class of labor rights violations found in the general Chapter for Dispute Settlement, Chapter 20. The agreement , commits countries to "*effectively enforce*" their national labor laws, and does not establish new, regional labor standards. CAFTA-DR also includes language to commit countries to "*strive to ensure*" that the 1998 ILO principles are recognized and protected in domestic law (Article 16.1.1), and that countries do not to *"waive or derogate from domestic labor law*" in order to encourage trade or investment (Article 16.2.2). [15]

The agreement establishes a number of new institutions for the management of Annex 16, including a Labor Affairs Council, made of cabinet level officials (or Ministers of Labor) who meet periodically to oversee the implementation of the activities of the Labor Cooperation and Capacity Building Mechanism, as well as a contact office within the labor ministry of each state to facilitate communication among them. Countries must also create a Labor Roster, a list of 28 individuals, both nationals and non-nationals, who, can serve as panelists in the event of calling an arbitration panel (CAFTA-DR 2004).

While the CAFTA-DR agreement stipulates that labor disputes can only be initiated by countries, in practice, all petitions filed for review to date have been submitted by civil society groups and passed to the OTLA in the U.S., housed in the U.S. Department of Labor.[16] Articles 16.6 and 16.7 state that only matters regarding the effective enforcement of domestic laws can be subject to full dispute resolution (under Article 20), while any other labor matter included in the CLC is open solely for government-to-government consultations. Also, Article 16.2.1.(a) specifically states that violations of labor standards included in Annex 16 must have an effect on trade to qualify for dispute resolution, through the insertion of the language *"in a manner affecting trade between the Parties"*. Though this requirement ultimately would be subject to interpretation under procedural rules on a case by case basis, no other labor side agreement makes requirements of submitters that labor rights violations had to be trade-related to qualify for a *review*, thus marking a clear departure from earlier procedures.[17] In short, the CLC narrowed the scope for citizen participation and dispute resolution in comparison to other clauses that came before it, in terms of

[15] These standards overlap the 1998 Fundamental Rights, and include the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labour, a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health (CAFTA-DR, 2004, Article 16.8). Notably absent is reference to the conventions on discrimination at the workplace.

[16] Once cases are filed and accepted for review however, the CLC provides for the Parties to seek advice or assistance to resolve the matter "from any person or body they deem appropriate" in Article 16.6.3, meaning that civil society actors can potentially play an important role in the resolution of labour disputes. Article 16.4.4 allows for advisory roles for the public on labour issues in general. The Labor Roster is of course a third area where civil society plays an important role in labour adjudication in the CAFTA-DR.

[17] While the GSP had no requirements to demonstrate trade-related aspects of labour rights violations, under the NAFTA labour clause, filers must demonstrate that violations have an effect on trade to invoke an Evaluations by Committee of Experts (ECE) panel under Article 23.3, or to ask for arbitration under Article 29.1 (NAALC 1993).

access to this channel as a method for protecting labor rights, and this could be one of the compounding factors that contributes to the very few number of cases submitted to date to the panels. The clause also reduces considerably the scope of redress by limiting full dispute resolution, including recourse to trade sanctions, to only those violations that are a result of the failure of the government to enforce its own laws.

The language of the agreement is largely in the tone of cooperation, an artifact of the recognition that the CAFTA-DR agreement is a multilateral trade agreement negotiated among sovereign states. In contrast to the GSP, which is the unilateral trade promotion initiative in which all of these states participated prior to the signing of this accord, in the CAFTA-DR the partner states have functionally equal bargaining power.[18] As such, the dispute process is largely based on a series of steps to arbitration that allow for consultation before dispute resolution. Any CAFTA-DR country may request state-to-state consultations with any other country about any issue contained in Labor Chapter 16 by submitting a written request to a labor office established by the CAFTA-DR accord. However, only the failure to effectively enforce domestic labor law (Article 16.2.1(a), as mentioned) is subject to the full set of remedies, including arbitration, fines and trade sanctions for non-compliance under the dispute resolution mechanisms of Chapter 20.

Once a consultations request is received, the office that receives it is to respond to the requesting party, but if consultations between offices is insufficient to resolve the labor issue at hand, the consulting party can request from all other parties that the Labor Council be convened, meaning the Ministers of Labor of the parties in question, or their designated representatives, within 60 days (CAFTA-DR 2004). If the discussions held here fail to resolve the labor issue satisfactorily, and the labor issues fall under the scope of Article 16.2.1 (a), the requesting party can invoke further consultations under Article 20.4 for Consultations, or Article 20.5, convening a Commission on Good Offices, Conciliation and Mediation, which are held under Chapter 20 (CAFTA-DR 2004). If the issues are still unresolved after pursuing these two avenues, the requesting party can invoke an arbitral panel under Article 20.6 after thirty days, with the members of the Labor Roster. If the Panel determines in its final report that the party that was subject to review violated Article 16.2.1(a), both parties are to work together to arrive at a mutually acceptable resolution that resolves the dispute. Finally, Article 20.17 allows the Panel to levy a fine on the offending party in the case of non-compliance, capped at $15million USD annually and adjusted for inflation (CAFTA-DR 2004), and paid each year to a fund managed by the Commission until the labor rights violation is remedied. Article 20.17.5 allows the complaining party to revoke trade benefits equal to the fine in the case of non-compliance at this stage.

[18] Because the GSP is managed solely by the United States, the US retained bargaining power over partners.

Measuring the effectiveness of trade clauses in improving labor rights

Measuring labor rights in practice and across time is not an exact science. No single, universally agreed-upon method exists, either to measure compliance with international labor standards, or to define progress on a nation's ability to uphold labor rights. Ultimately, developing cross-national labor rights measures is a subjective process, as the actor developing quantitative coding brings their own perspective to the task, and the decisions about how to weigh different violations and assign values necessarily come down to value judgments of the coders Kucera (2004). Given these issues, many organizations and labor experts have developed systematic criteria and indicators for measuring labor rights which, when taken together, allow us to capture the state of labor rights in a given country and how it may change over time. Compa (2003) highlights three main sources that are particularly useful for cross national studies due to their relative uniformity, regularity in reporting, and comprehensiveness. These are the United States Department of State Annual Human Rights Reports, the reports of the Committee on Freedom of Association of the International Labor Organization, and the International Trade Union Confederation's Annual Survey of Violations of Trade Union Rights. Taking cues from Compa's 2003 study, we examine the levels of labor rights compliance before and after CAFTA-DR is ratified in the six countries by reviewing these sources, and supplemented them with additional sources, including reports of the Committee on Freedom of Association of the ILO (ILO CFA), relevant reports from human rights, business and civil society organizations such as the U.S./Labor Education in the Americas Project (U.S.LEAP), and the International Labor Rights Fund (ILRF), Human Rights Watch (HRW), the AFL-CIO Solidarity Centers, and others. We also conducted interviews with representatives from civil society organizations active in these countries, in order to obtain a sense of context of the local labor rights situation for each country.

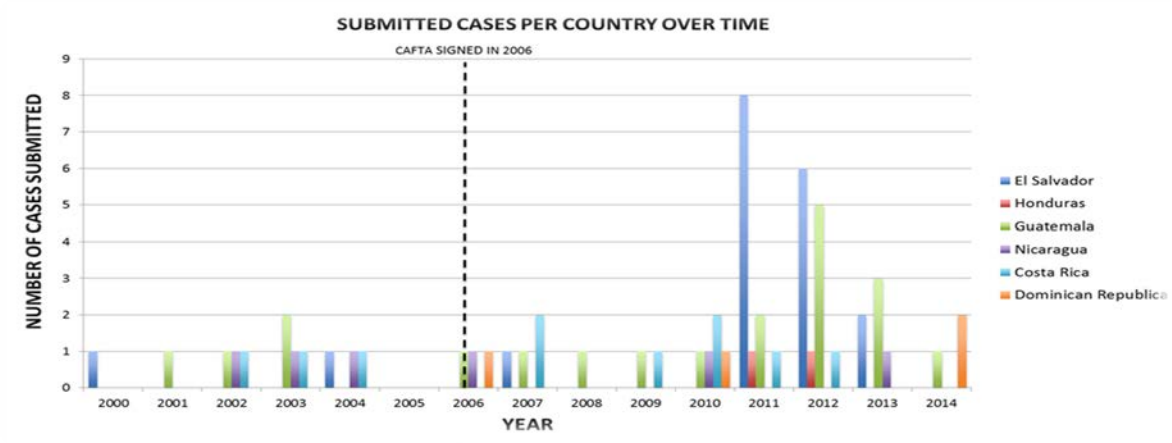
Six Country Studies

Overall, we do not find that labor rights practices have improved either in the region, or in any particular state, during the time that CAFTA-DR has been in effect, and in some instances labor rights protections have worsened, particularly in Guatemala and Honduras where trade unionists are confronting alarmingly high levels of violence. In the absence of other reliable quantitative cross-national data on labor rights violence that extends to the post-CAFTA period, we use here the number of complaints filed with the ILO CFA in the years before and after the implementation of the CAFTA-DR agreement to illustrate regional performance.[19] First, in Figure 2 below, we note that across the region, the number cases submitted to the ILO CFA

[19] While an increase in the number of cases may be due to either a greater number of violations on the part of a government, or a more active labour movement, this data assists in assessing the degree of labour rights compliance in a given country.

has increased in the years following the signing of the CAFTA-DR agreement.[20] The figure shows that in particular, El Salvador and Guatemala have had the most cases filed against them, and that a greater number of cases were filed after 2010.

FIGURE 1: CASES SUBMITTED TO THE ILO CFA BEFORE AND AFTER THE IMPLEMENTATION OF CAFTA



We do not definitively connect any improvement or deterioration in labor rights protection to the CAFTA agreement or its dispute resolution mechanism for labor *per se*, but as we discuss in the country studies below, changes to labor protections were largely due to domestic political changes in each country, usually a change in the orientation of the government. In short, governments that were already somewhat favorable to labor remained so after CAFTA-DR was implemented, and governments that faced strong opposition to recognizing and implementing labor rights from organized business interests, like in Guatemala and Honduras, saw labor rights worsen.

For the following cases we assess how the protection of labor rights has varied before and after the implementation of the CAFTA agreement. In particular, we look at the extent to which freedom of association and collective bargaining rights are upheld, considering these to be the most essential of the ILO Fundamental Rights at Work, for several reasons. First, rights to association are enabling rights, providing the organizational and bargaining power (collective rights) that allows other labor rights (individual rights) to be addressed. Second, freedom of association and collective bargaining are considered to be particularly important for trade unions and civil society organizations in the region. And third, the Working Group of Vice Ministers for Trade and Labor in the CAFTA-DR countries cited freedom of association as the most important priority for improvement in order to enhance labor standards in the region (Vice Ministers of Labor 2005a).

[20] Data compiled by the authors from ILO reports of all cases submitted to the ILO Committee on Freedom of Association, January 2000 through May, 2014. Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:20030:0::NO:::

Guatemala

Guatemala's history of labor rights compliance is poor and has been for decades, with a long history of repression against trade unions and other forms of collective organizing. In 2005, just before the implementation of CAFTA-DR, the United States Department of State Annual Human Rights Report notes that only 3% of the formal sector workforce was covered by a collective bargaining agreement, and only 65 collective bargaining agreements were registered, mostly in the public sector (USDOS 2006a). In the export processing zones (EPZs)in 2005, there were approximately 80,000 workers, yet only three legally recognized unions, two of which held collective bargaining agreements, while the third was at a closed factory. Forming an industry-wide union in Guatemala requires 50% of the workforce of the entire industry, a condition found by the ILO Committee of Experts to be one of the "*restrictions on the formation of organizations in full freedom*" (ITUC 2012). In the informal and agricultural sectors, child labor is common, as entire families worked to earn subsistence-level incomes (U.S. DOS 2006). In 2005, few strikes were organized, and none were legally recognized. Death threats and other forms of intimidation occurred, and the Special Prosecutor for Crimes against Unionists and Journalists accepted 42 new union-related cases during the year, thereby raising its total case load to more than 370, with no convictions reached by justice officials.

Since CAFTA-DR went into effect in 2006, there has been little noticeable improvement in labor rights compliance, and .the state of labor rights in Guatemala has not improved with the use of the CAFTA-DR labor rights provisions. A case against Guatemala was filed in 2008 to the U.S. OTLA by the AFL-CIO and six Guatemalan unions. The petition was built around labor rights violations in five specific cases, but all cases featured similar issues, which were generally violations of the duty to engage in collective bargaining, and the dismissal of workers and leaders for union activities (US Department of Labor 2013). The individual cases also listed additional violations included in Chapter 16 that would be eligible for Consultations, but not trade sanctions, including wage payments and coverage by the social security institute. The filers hoped to quality for review and trade sanctions under Article 16.2.1(a) by couching the extreme violence against unionists in Guatemala as a freedom of association issue, and framing the failure to enforce domestic law requirement as a general climate of fear that keeps unions form functioning, while at the same time citing inability of the Special Prosecutor for Crimes Against Journalists and Trade Unionists to investigate cases of murdered unionists.

The petition was taken under review by the U.S. office on June 12, 2008, which prompted a formal revision of the allegations contained within, including two visits to Guatemala by Department of Labor staff to collect documentation from the filers and the Government of Guatemala, and to conduct interviews with affected parties (Office of Trade and Labor Affairs 2009).[21] OTLA officials noted in the Report of Review

[21] Though the CLC process allows for parties to gather information in any way they see relevant, and site visits are not proscribed, the CLC states that for the dispute process to begin, the members of the Committee must meet and vote to

issued on January 16, 2009, that while the review uncovered support for the claims listed in the petition, the Government of Guatemala was making progress on addressing them internally, and demonstrated a willingness to cooperate with the United States to strengthen the Labor Inspectorate and judicial system, as well as technical assistance for compliance with labor law (Office of Trade and Labor Affairs 2009). On the issue of violence, the OTLA noted that many of the cases were pending, and that it was not clear that murders of unionists were not related to the high rates of crime in Guatemala (Office of Trade and Labor Affairs 2009: 31).

In the end, the OTLA made a number of suggestions on how Guatemala could improve its technical capacity in order to address the violations, and agreed to work with the government to implement them, and so did not recommend consultations at the time (Office of Trade and Labor Affairs 2009: vi). However, when Guatemala failed to make progress on enforcing labor laws following the review, USTR Kirk and Labor Secretary Solis sent a letter to their counterparts in Guatemala requesting Consultations, the first step of dispute resolution under Chapter 20 regulations (Kirk and Solis 2010). According to the USTR, Consultations were held twice in Guatemala during 2010, in September and December. When Consultations did not lead to measurable improvements, the U.S. moved to consider convening an arbitral panel, and the USTR requested a meeting of the Commission on May16, 2011, which was granted, and held on June 7, 2011 (USTR 2011). At the request of the Government of Guatemala, the USTR desisted on convening the arbitral panel and instead negotiated an 18-point *"Enforcement Plan"* in 2013 which detailed improvements in labor rights enforcement that Guatemala would need to make within one year, or face panel arbitration.[22]

The government of Guatemala has not generally complied with implementing the 18 benchmarks listed in the plan.[23] On September 18th, 2014, seventeen months after the Enforcement Plan was negotiated, six years after the initial complaint was filed, and after two extensions (USTR 2014a; USTR 2014b), the USTR announced that it would finally proceed with the dispute settlement process. Meanwhile, there has been little meaningful action taken to address Guatemala's lack of progress on the 18 point plan. For example, one point of the Enforcement Plan requires an expedited labor courts process, yet employers are still ignoring court-ordered reinstatements of workers fired for union activity, and the Guatemalan government has not enforced these rulings.[24] Interestingly enough, U.S. apparel brands and domestic business associations have also asked the U.S. government to move forward on resolving the complaint, citing growing concerns over Guatemala's deteriorating international image as a destination for foreign direct investment (US LEAP 2012).

allow it. None of the documentation we have on file shows that this was done, rather, that the dispute process was initiated and continued in a bilateral manner between the U.S. and Guatemala.

[22] It is important to note here that none of the 18 points in the action plan addresses the violence against trade unionists, one of the major violations of labour rights in Guatemala today.

[23] According to U.S. LEAP, the Guatemalan business sector CACIF opposes the measures in the agreement (US LEAP 2012).

[24] *ibid.*

Freedom of association rights have remained problematic in many ways. U.S.DOS reported in 2013 that employers routinely resisted union formation attempts, retaliating against workers who tried to exercise their rights with termination, harassment, blacklisting of union organizers, and threats of factory closures (USDOS 2013d).[25] Within the growing call center industry, employers have relied heavily on subcontractors or other triangular employment relations to evade unionization, effectively dividing larger worksites into several smaller companies, making it difficult to reach the 20-worker threshold needed to register a plant union (USDOS 2013d).

However, it is rising levels of violence since 2007, that form the most serious patterns of labor violations in Guatemala, and is the issue that the CAFTA-DR enforcement mechanisms could therefore most usefully address (ITUC 2012).[26] Trade unionists have been murdered in every industry, including the banana industry and other agricultural sectors, the maquila sector, and the public sector.[27]Death threats, attempted murders, kidnappings, break-ins, torture and other violent actions create a climate of fear and insecurity for trade unionists and currently make the exercise of freedom of association a life-threatening activity in Guatemala. While Guatemala created the previously-mentioned Special Prosecutor for Crimes against Journalists and Trade Unionists in 2001, this office is underfunded, and with only 5 staff members, to date has made no prosecutions (USDOS 2013d).

Despite reforms to the country's legal code before the negotiation of CAFTA-DR, there are still grave inadequacies in how the legal system operates in practice. Inspectors are few in number, and have often told workers that they are unable to carry out inspections unless workers cover their transportation and expenses.[28] Employers often deny inspectors access to worksites, and inspectors rarely request police support to ensure an inspection as permitted by law (ITUC 2012). If violations are found through the inspection process, Guatemalan law does not currently allow inspectors to sanction an employer.[29] Instead, a labor violation enters the labor court system, which is significantly underfunded and backlogged. Though the system receives an estimated 13,000 cases per year, there are only 22 judges (ITUC 2012). A study completed in 2012 found that there was an estimated a backlog of 23,444 cases pending since 2005, and fewer than half the cases received between January and June of 2012 resulted in any sentence, with the rest still pending (MSICG 2012). As such, justice may be delayed so long as to be inconsequential for the workers affected.

[25] Union density is now less than 2% of the formal sector (ITUC 2012).

[26] Interview, Steven Wishart, Country Program Director for the Central America Office, AFL-CIO Centre for International Labor Solidarity, Mexico City, Mexico, July 7, 2014.

[27] Since 2007, according to the AFL-CIO Solidarity Center, there have been at least 65 assassinations of trade unionists and numerous attempted murders and threats of violence (AFL-CIO Solidarity Center 2014a).

[28] *ibid.*

[29] After a GSP complaint filed in 2001, Guatemala gave the labour inspectorate the power of sanction in response to the GSP review process, but this was challenged legally by an employer in 2003, and rescinded. Wishart interview, July 7 2014.

Employers are criticized for abusing the appeals process, allowing cases that are heard to extend on for many years, exacerbating the problem.[30]

In our assessment, labor rights protection has deteriorated in Guatemala, in large part because the Guatemalan government has been notably resistant to address its labor rights enforcement issues, either before or after the implementation of CAFTA-DR. The labor rights mechanism has proven inadequate thus far in pressuring the Guatemalan government to meet its commitments. In particular, the U.S. government's apparent reluctance to take the CAFTA-DR mechanism to its final stage of arbitration is an important factor here, as panel arbitration marks the first step into dispute resolution that can alter the trade relationship between Guatemala and the U.S., as it imposes economic costs on Guatemala for non-compliance with its own labor laws. This Panel arbitration also exemplifies the potential for using the CLC clause to publicize labor violations more widely internationally as a way to pressure states to conform to their obligations under the CAFTA-DR agreement.

The CAFTA-DR complaint was filed six years ago, and the U.S. government then allowed additional extensions and interim steps outside of the CAFTA-DR process, including the Enforcement Plan, instead of bringing the Guatemalan government to arbitration within the timeline that the CLC allows. While taking a sovereign government to arbitration is a dramatic step, the U.S. government has moved very slowly to pursue this part of the mechanism, leaving the economic leverage over states implied by arbitration in this case with little political impact. It will be interesting to observe what changes acting on Guatemala now will brings in terms of altering the political will of the Guatemalan government to enact labor reforms.

Honduras

Honduras has traditionally had one of the strongest labor movements in the region, particularly in the nation's banana industry. However, outside this sector, labor rights are precarious. In 2005, the U.S.DOS reported that only 8% of the non-agricultural workforce was unionized, and 13% of the approximately 133,000 workers who worked in the nation's export processing zones were organized (USDOS 2005d). In the maquila industry, there were serious problems with the enforcement of labor laws and employer compliance with court orders. The blacklisting of union activists is an ongoing issue for freedom of association: the Labor Ministry made it common practice to sell the names of workers engaged in union organizing to employers, leading to firings, discrimination in hiring, and reprisals against union activists (USDOS 2005d).

The labor situation changed significantly after 2009, when a military coup replaced President Manuel Zelaya Rosales with Roberto Micheletti, who was until then the President of the Honduran Congress. While levels of crime and violence were high before the coup, they grew in the weeks afterwards, with generalized repression

[30] The ITUC gives the example of the coffee workers at Finca Santa Cecilia who have been trying for over 12 years to have the legal minimum wage enforced at their worksite (ITUC 2012).

against those who protested against the coup, including many union leaders. Trade union offices were raided, union leaders were arrested, and workers were pressured to participate in marches supporting coup leaders (Radio Progreso Honduras 2009). The breakdown of the rule of law and resulting lack of respect for human rights contributed to a decline in labor rights compliance, a situation not improved after President Porfirio Lobo took office in 2010 (AFL-CIO 2012a).

In 2010 the new government passed a decree, the National Hourly Employment Program (PRONEH), which was the object of one of two FOA cases submitted to the ILO after CAFTA-DR's implementation, as it legalized the expanded use of outsourcing and subcontractors. . By 2013, the U.S.DOS reported continued problems with blacklisting, anti-union discrimination and a lack of enforcement of labor laws in the export processing zones (USDOS 2013e). Freedom of association remains a concern. While collective bargaining agreements exist, they are often disregarded by employers without penalty (ITUC 2012). While the number of workplace inspections more than doubled, from 5,226 in 2012 to 12,071 in 2013, the value of penalties for sanctions remains low, and inspectors retain little legal ability to enforce sanctions, which compromises Honduras' ability to improve working conditions (USDOS 2013e).

The ILO CAS noted in 2013 that while various ILO missions had offered technical support to reform labor codes, increase sanctions, and improve the effectiveness of the labor courts, the Honduran government has not taken steps to implement such reforms, and has failed to report on its commitments to the ILO in recent years (ILO CAS 2013). The ILO's report also addressed the lack of freedom of association and collective bargaining for many public sector workers, singling out the case of the teachers unions, where 23 union leaders had been removed from office, and over 1000 teachers had been suspended for participating in union meetings (ILO CAS 2013).

However, it is the breakdown of the rule of law since 2009 and rising levels of violence against trade unionists since then that has become the greatest concern for unions and civil society organizations in Honduras. The International Labor Rights Fund (ILRF) noted an increased risk for union leaders and other activists who had supported Zelaya, as those who had mobilized against the coup were met with repression and persecution (ILRF 2009). More recently, the ITUC has drawn attention to the criminalization of social protest and activism in Honduras, and noted a growing number of threats against unionists in both the maquila industry and the public sector, targeting the teachers' union in particular (ITUC 2012). In 2014, the Solidarity Center reported that since 2009 there have been 31 trade unionists and 57 rural workers murdered, many death threats to unionists, and that freedom of association is sharply curtailed by a serious climate of violence for unionists and their families AFL-CIO Solidarity Center 2014b).

Given the grave level of threats to the physical security of union activists, and concurrent lack of legal protection, Honduran unions and the AFL-CIO filed a CAFTA-DR complaint to the Office of Trade and Labor Affairs in the U.S. in March of 2012, with the support of 25 Honduran trade unions and one Honduran women's' rights

NGO (AFL-CIO 2012).[31] Unions and other civil society organizations were able to see the CAFTA-DR complaint process unfold in Guatemala, and used the experience to make strategic revisions to their petition between 2009, when they first entertained the idea of filing a CAFTA-DR complaint, and 2012 when they submitted it. By redrafting the petition with a case-driven framing, they hoped to ensure that the CAFTA-DR process would address not only the rights that were allegedly violated in the specific cases, but also respond to the systemic labor rights issues, in particular, the high levels of violence.[32] For example, the petition includes a number of cases in several industries, including maquilas, ports, the banana industry and other agricultural sectors, and includes a general section on violence against trade unionists. Each of the labor standards included in the CAFTA-DR Labor Chapter are listed in the complaint, but the violations across the nineteen individual cases that are featured in the submission include violations of freedom of association, union motivated dismissals, and anti-union violence.

The petition was submitted to the US OTLA, and accepted for review on May 14, 2014 (Federal Register 2012a), which prompted a formal review, and the OTLA conducted a fact-finding mission from July 9 to 21, 2012. Following the CAFTA-DR timelines as outlined in Chapter 16 of the agreement, the United States government should have investigated the claims in the petition and released a final report within 6 months from the filing date, but the USTR extended the time to complete the report, citing the complexity of the submission received and the need to review the extensive amounts of information received from the filers (Federal Register 2012).

According to civil society organizations, the Lobo Administration was already under intense international scrutiny after the coup and related events, and was initially responsive to the issues raised in the complaint. The administration expressed a willingness to meet with unions and civil society organizations. The issues raised in the CLC complaint thus were initially the subject of a regular series of potentially productive meetings between the Lobo government and Honduran unions, in which the unions presented a series policy recommendations, and the government provided a detailed response of actions and steps to be taken. However, meetings ceased after the election of a new government in January 2014, and unions and their supporters argue that the lack of a report and follow-up from the U.S government has allowed the issues of the case to drop as a priority for the new administration.[33] A report was only recently completed and released to the public on February 27, 2015, requesting that the government of Honduras convene with the Labor Council to discuss freedom of association issues and failure to uphold the law within the labor inspectorate.

Meanwhile, individual and collective labor rights have deteriorated considerably in recent years, due to legal and structural issues, but principally due to high levels of violence. While trade unions have sought to use the CAFTA-DR mechanism to

[31] A version of the complaint was drafted and was nearly filed in early 2009, but the unions found it difficult to see how the complaint process could function in the confusion after coup (among other things, the United States government did not recognize the interim Micheletti administration) and so they made the decision to wait. Wishart interview, July 7, 2014.

[32] *ibid.*

[33] Wishart interview, August 25th, 2014.

confront these issues, much like in Guatemala, disregard for the negotiated timelines of the process may again signal reluctance on the part of the United States to take labor rights cases through the available channels under the process.

Overall, the protection of labor rights in Honduras is approaching levels of non-compliance to rival Guatemala in terms of violence and lack of enforcement of labor laws. In many ways, this reflects the general breakdown of the rule of law across the country in the years following the 2009 coup. In the same way that improvements in labor rights compliance in El Salvador and Nicaragua may be attributed to domestic political events rather than the CAFTA-DR agreement, in this case the deterioration in Honduras is also a result of domestic political upheaval. However, the CAFTA-DR labor rights provisions have not served as a tool to counter anti-union violence in Honduras. This may be due in part to a lack of capacity to address the problem from the Honduran government, but is equally likely to reflect a lack of political will from United States government to use the CLC to push the issue.

The Dominican Republic

In the Dominican Republic, the protection of labor rights and freedom of association has been a challenge before and after the implementation of the CAFTA-DR agreement. In 2005, trade union density was approximately 8% of the workforce overall, while among the approximately 175,000 workers in the export processing zones, there were only four collective bargaining agreements in effect (USDOS 2005b). The U.S.DOS also noted that anti-union reprisals were a concern across the country, particularly in the export processing zones, while enforcement of labor laws were hampered by a lack of training among inspectors and allegations of political patronage and corruption. In the agricultural sector, working conditions were poor, especially in the sugar cane industry (USDOS 2005b).

The CAFTA-DR mechanism has been used once in the Dominican case. It was filed on December 22, 2011, by an individual, Father Christopher Hartley, a British-Spanish Catholic missionary priest who worked among Haitian sugar cane workers in the Dominican Republic from 1997 to 2006, and the petition discusses labor rights violations in this sector (Hartley 2011).[34] OTLA investigated the case and released a report on 27 September 2013, finding labor law violations regarding poor working conditions and child labor. The report also noted major concerns regarding the protection of freedom of association and collective bargaining, and important deficiencies in how labor inspections are carried out by the Dominican Labor Ministry (Office of Trade and Labor Affairs 2013).

Following the report, the US government funded a $10 million USD project to combat child labor in the sugar industry, implemented by Catholic Relief Services and

[34] The petition itself is based on reports from the USDOS 2010 Human Rights Report filed on the Dominican Republic, and plans for an audit of four companies to be carried out by BonSucro, a codes of conduct auditor for the sugar industry. Finally, the petition does not make a specific argument to meet either the failure to enforce or trade related thresholds stipulated in Chapter 16.

Father Hartley's former parish (ILAB 2013).[35] While this funding initiative is a positive result of the CAFTA-DR complaint process in many ways, trade union allies note that the petition also served to direct attention away from other equally important labor rights concerns across the Dominican Republic, such as freedom of association, and has not addressed either the legal and structural deficiencies in the Dominican labor justice system.

However, labor rights compliance has not notably improved in the Dominican Republic since the implementation of the CAFTA-DR agreement, with the pattern of anti-union reprisals and poor enforcement of labor law remaining similar after the implementation as before. Of the 550 factories in the export processing zones, there are now 35 trade unions, but just six collective bargaining agreements, as few unions are able to reach the 51% of membership threshold required for a union to initiate bargaining with the employer, a requirement challenged by the ILO as excessive (CEACR 2013).[36] Anti-union activities have not diminished, and have included the dismissal of union activists and the use of union avoidance practices, such as using *"yellow"* or employer-dominated unions, or sub-contracting workers to evade worker-led unionization (CEACR 2013; U.S.DOS 2013b).

Deficiencies in the enforcement of labor laws also continue, with employers frequently ignoring or appealing the sanctions imposed by labor inspectors, thereby requiring that cases enter the labor courts system, which remains so slow as to be ineffective for the workers involved (CEACR 2013). Given the persistence of these issues, trade unions have filed four complaints with the ILO CFA since the implementation of CAFTA-DR, whereas prior to 2006 there were none, as shown in Figure 2. That cases are being filed now with the Committee on Freedom of Association suggests that there is a renewed interest, or at least awareness, in using additional mechanisms to push for the resolution of the domestic legal challenges at other levels of governance.

Costa Rica

Costa Rica is a stable democracy, generally more peaceful than its Central American neighbors. Despite this, its record on labor rights compliance is uneven, and the presence of solidarity associations is one of the main concerns of the labor movement. These associations, typically organized by an employer, are legally recognized as alternative workers' organizations, and may offer membership benefits, such as credit union programs, matching-fund savings accounts, and low-interest loans (USDOS 2005a). While legally they may not bargain with employers, trade unions

[35] Interview, Geoffrey Scott Herzog, Country Program Director for the Dominican Republic, AFL-CIO Solidarity Center, Mexico City, Mexico, August 25, 2014. At the same time, as late as the summer of 2013, $43 million USD had still been earmarked for child labour initiatives and unspent (Delpech 2013).

[36] In a recent case, the union representing workers at the Frito-Lay factory requested the commencement of collective bargaining, which was contested by the employer. The U.S.DOS reports that the company allegedly undermined the union by firing some union members, while reclassifying subcontracted workers as direct employees, to prevent the union from obtaining the absolute majority required to compel collective bargaining (USDOS 2013c).

allege that solidarity associations effectively supplant union organizing and bargaining. Union density is low, partly due to competition for worker representation between trade unions and solidarity associations. In 2005, union density was 9% of the workforce, with approximately 167,000 workers being members of trade unions, while nearly twice the number of union members were members of solidarity associations, about 330,000 workers (USDOS 2005a).[37]

In 2007, the ITUC published a report for the WTO which found that trade unionists were *"dismissed, intimidated and harassed, and workers are strongly discouraged from even joining a trade union"* (ITUC 2007). The ITUC found that solidarity associations were gradually replacing trade unions, and the report noted that unions were almost non-existent in the export processing zones. The ITUC noted additional concerns in the public sector: since 2005, certain clauses of collective bargaining agreements negotiated in the public sector were annulled on 16 occasions by the nation's constitutional court for being *"disproportionate and irrational*", and accordingly understood as a serious violation of the right to collective bargaining (ITUC 2007).After the implementation of the CAFTA-DR agreement in 2009, these labor rights concerns in Costa Rica persisted. The problem of government interference in trade union affairs, particularly in the public sector, remains an impediment to freedom of association.

Conflicts over worker representation by a registered trade union and an employer-controlled solidarity association are featured in the CAFTA-DR labor dispute that was filed in 2010. In this case, the Costa Rican government and the port authority JAPDEVA initially sought to privatize Port Limón, a plan opposed by the union SINTRAJAP. The JAPDEVA port authority's management held a parallel general assembly, which approved the removal of the elected leadership of SINTRAJAP, and appointed a new set of leaders, who then approved the privatization plan.

This challenge to freedom of association led the union representing workers at Port Limón to file a CAFTA-DR petition in 2010, with the support of the American International Longshoreman Workers Union (ILWU) and the Costa Rican Association of Public and Private Employees (ANEP) (ASEPROLA 2010). As the unions drafted the CAFTA complaint, they also availed themselves of the domestic legal system. Therefore, shortly after SINTRAJAP, ANEP and ILWU filed the petition, the case was heard at the Costa Rican Supreme Court, where it was resolved in favor of the union. The court ruled that the port management had overstepped its authority, and dissolved the privatization agreement. Once the Costa Rican legal system addressed this particular case, and lacking additional cases to draw on, the unions withdrew the CAFTA-DR petition.

Today, trade union density stands at 10%, but direct agreements and solidarity associations continue to outnumber worker-controlled trade unions and collective bargaining agreements (US DOS 2013a). While initiatives such as minimum wage compliance campaigns point towards the improvement of certain basic rights for

[37] In 2005, seven new direct agreements were registered at the Labor Ministry along with 19 new collective bargaining agreements (USDOS 2005a).

decent work, collective rights such as freedom of association and collective bargaining remain endangered.

In all, the degree of labor rights compliance in Costa Rica remained largely unchanged before and after the implementation of CAFTA. This reflects the interest and capacity on part of governmental actors to enforce certain labor regulations around wages and benefits, while at the same time neglecting other serious labor rights violations, such as the systematic displacement of trade unions by solidarity associations.

The Costa Rica case demonstrates that domestic processes are already available to unions and their allies in countries that have legal systems which function reasonably well. However, in countries with labor justice systems that are inefficient, like in Guatemala and Honduras, it is especially important that the supranational channels like the CLC clause provide a second layer of compliance with labor rights guarantees coded in domestic laws.

Nicaragua

In Nicaragua, the labor rights situation was problematic before CAFTA-DR went into effect in 2006. Less than 10% of the formal workforce was unionized, and there were significant issues with the enforcement of labor laws, as noted by the ILO's Committee of Experts in 2005. While the number of registered trade unions in the export processing zones grew with time from 27 unions in 2005, to 60 in 2007, their total membership did not, remaining at less than 10% of the approximately 85,000 workers in the EPZs (U.S. DOS 2005e). Moreover, few of these unions had the power to bargain collectively, no new collective bargaining agreements were signed in 2005, and existing ones were often not enforced, issues also cited by the ILO Committee of Experts (U.S.DOS 2005).

After CAFTA-DR was implemented, trade unions initially reported a worsening of conditions in the export processing zones as employer reprisals in response to union activity grew (USDOS 2006b). However, in late 2006, following the election of the Frente Sandinista de Liberación Nacional (FSLN), labor rights compliance in this sector began to gradually improve. Identifying the EPZs as a key component of Nicaragua's development strategy, the government created a special Vice Minister of Labor for Free Trade Zone Issues in 2012 along with a tripartite commission tasked with resolving labor issues in the EPZs (MINTRAB 2012). By 2013, the maquila zones had 51 unions with 35 collective bargaining agreements, representing 40% of the workforce, a substantial improvement in the freedom of association and its protection in this area.[38]

However, trade unions and civil society observers note that the additional interest in this industry has also brought the risk of greater government intervention in trade union activities. Unions which have sought to coordinate with international

[38] Wishart interview, July 7, 2014.

organizations in developing organizing strategies in EPZs have faced government opposition.[39] Moreover, while labor rights compliance in the sector has largely improved under the Sandinistas, in the public sector, the violation of freedom of association has been increasing. The U.S. DOS reported in 2013 that since the FSLN administration took office, there has been growing pressure on public sector trade unions and workers to align themselves with the current government.[40] While Nicaraguan unions have infrequently used the ILO mechanisms, before or after the CAFTA-DR came into effect, two of the three cases brought before the ILO CFA since CAFTA-DR was implemented are related to these issues in the public sector.

These political dynamics are also playing a role in preventing unions from engaging the labor clause. At least one union confederation in the public sector has approached the AFL-CIO to support them in filing a CAFTA-DR complaint about government interference in union management.[41] However, given the fractious nature of the labor movement in Nicaragua, the American trade union federation pushed for broader support among the Nicaraguan confederations before filing any cases.[42] Without support from the larger union confederation, the small Nicaraguan confederation does not have the technical capacity to file a case on its own. [43]

The labor dispute mechanisms remain untested so far for the Nicaraguan case, as the mechanism has proven difficult to use in practice in a highly divisive and partisan setting. Furthermore, it is difficult for one confederation alone to file a complaint without broad national support, and it is difficult for international confederations to support one organization over the opposition of others. While we saw in Costa Rica that a complaint was filed over a single union case, the union did have the support of a major national federation, ANEP, and their American union partner the ILWU was of the same industry and in the same global union federation. Missing similar circumstances in Nicaragua, it has proven complicated to engage the mechanism strategically where the labor movement is politically fragmented. In all, while collective bargaining and labor law enforcement improved, particularly in the export processing zones, interference in the exercise of freedom of association is developing into a labor rights issue in Nicaragua. Similar to El Salvador discussed below, a change in the orientation of the government to one that is more labor-friendly is responsible for the positive changes, rather than the implementation of CAFTA-DR.

El Salvador

In El Salvador, the labor rights situation before CAFTA-DR went into effect in 2006 was poor. The U.S.DOS report of 2005 noted that threats of violence against

[39] *ibid.*
[40] The 2013 report cites that 26,691 workers were fired for politically motivated reasons, and 175 public sector unions have been illegally disbanded by the FSLN (U.S. DOS 2013f).
[41] Wishart interview, July 7, 2014.
[42] *ibid.*
[43] The Cases against Guatemala and Honduras were filed by local unions in conjunction with the AFL-CIO, while the Costa Rican case was filed by ASEPROLA, all of whom had previous experience filing cases under the GSP clause (Nolan García 2011c).

trade unionists did occur, and most notably, a visiting North American trade union leader, Jose Gilberto Soto, was assassinated that year (USDOS 2005c). Trade union density declined rapidly in 2005, from nearly 30% of the formal sector workforce in 2004, to 9.1% in 2005. At the end of 2005 there were 174 registered unions, with 252 collective bargaining agreements in effect. In the maquila sector, there were 14 trade unions registered for approximately 240 factories, no collective bargaining agreements, and employers using blacklists and retaliatory practices to discourage union activity in this sector. In the public sector, there were also important limitations on the right of public workers to collectively bargain. The excessive legal formalities in registering a trade union and a lack of enforcement of the labor codes, was found to have merit by the ILO CFA (U.S DOS 2005c).

After CAFTA-DR was implemented, many of the same problems remained until 2009, with the election of the Mauricio Funes administration, and the appointment of Dr. Victoria Marina Velasquez de Aviles as the new Secretary of Labor. This administration significantly improved legal enforcement - by the end of its first year, 91 new unions had been registered, and the number of inspectors had been increased by 26% to 260 (Anner 2011). The value of fines was increased, and they were applied with greater frequency. In 2013, the Ministry of Labor received 47 complaints of violations of freedom of association, and imposed 1,614 fines totaling $397,152 (U.S. DOS 2013c). Under Funes, the Salvadoran government took steps to improve labor market institutions, raising the national minimum wage, and broadening coverage of indemnization regulations and other reforms.[44]

However, pressure from employer associations through the nation's Congress led the Funes administration to later remove Velasquez de Aviles in 2011, slowing the pace of reforms.[45] Trade unions allege that the government does not consistently enforce labor rights for public workers, maquila workers, subcontracted workers and other segments of the workforce (U.S. DOS 2013b). The administration passed a new law supporting public-private partnerships in 2013, which encourages the privatization of some public services (CEAL 2011). In the face of these challenges, trade unions have filed a number of FOA complaints with the ILO. As Figure 2 shows, there have been 17 new cases filed against El Salvador at the CFA since CAFTA-DR was enacted, and 16 of those cases have been filed since 2011.[46]

On balance, labor rights protections have improved in El Salvador, albeit unevenly. Most notably, freedom of association and the ability to register new unions has significantly grown, as well as the Labor Ministry's political will and capacity to enforce labor laws. However, these advances have been more closely related to a change in the government than to the CAFTA-DR channels. The electoral transition from a right-leaning government to a leftist one, and the domestic challenge this poses

[44] Wishart interview, July 7, 2014.

[45] Interview, Gilberto García, Asociación Centro de Estudios y Apoyo Laboral (CEAL), over Skype in San Salvador, El Salvador, August 25, 2014.

[46] Data compiled by the authors from ILO reports of all cases submitted to the ILO Committee on Freedom of Association, January 2000 through May, 2014. Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:20030:0::NO:::

to the relatively anti-labor Congress and employer sector provides a more likely source for these changes.

Finally, there have been no cases filed to date on El Salvador at the CAFTA-DR CLC mechanism. However, civil society organizations report that like in Nicaragua, trade unions have been unsure about how to effectively use the CAFTA-DR provisions to challenge the behavior of a government that the majority of them supported in federal elections, meaning that we may see cases on El Salvador in the future.[47]

[47] Wishart interview, July 7, 2014.

Conclusions

In this paper we investigated whether the labor mechanisms attached to the CAFTA-DR trade agreement were effective at improving labor rights protection and enforcement in the Central American region. In revisiting cross national measures of labor rights progress, and in investigating labor rights protections in each country, our analysis suggests that it is not clear that labor rights practices have improved considerably either in the region, or in any particular country, during the time that CAFTA-DR has been in effect. In some countries, we noted a significant deterioration, especially in the protection of the right of association and collective bargaining. In Guatemala in particular, an inadequately functioning legal system and rising violence levels have had a chilling effect on union activity.

Second, we noted that neither improvements in labor rights protections in some countries, nor their corrosion in others, are necessarily due to the CAFTA-DR agreement, its dispute resolution mechanism for labor, or the capacity building programs. Rather, domestic political processes were more likely to have an impact on the quality of labor rights enforcement. For example, in the cases of Nicaragua and El Salvador, the election of labor-friendly governments have brought about changes in Labor Ministries and labor institutions which have improved labor law enforcement, and allowed workers to more easily form unions and bargaining collectively. In the case of Honduras, the 2009 coup led to a breakdown in the rule of law, rising violence and eroding labor rights protections. In Guatemala, conditions have also worsened due to resistance from a conservative business sector confronting a weak state that is alternately unable and unwilling to protect workers in a labor-hostile environment. Finally, in the cases of Costa Rica and the Dominican Republic, the preferences of national governments to avoid genuine worker organizations – in Costa Rica, through solidarity associations and direct bargaining, and in the Dominican Republic, through anti-union dismissals and lax labor law enforcement – are the domestic political factors that were not substantially altered by the CAFTA-DR agreement.

We reviewed the cases filed under the labor petition process to understand the role that the dispute channel plays in pressuring governments to continue to effectively enforce their labor laws We remain skeptical of the role that this channel may play in promoting labor rights enforcement. The small number of cases that have been filed in eight years shows that within these countries, unions and labor advocates are simply not using this dispute channel as an area to press for labor rights enforcement, even though our case studies clearly show that labor rights are under siege. Our analysis also discussed in the context of the Nicaragua case that ultimately was not filed that the capacity to build and submit a case may be prerequisite to access the CAFTA dispute resolution mechanism.[48] Without external support, smaller unions,

[48] The cases against Guatemala and Honduras were filed by local unions in conjunction with the AFL-CIO, while the Costa Rican case was filed by ASEPROLA, all of whom had previous experience filing cases under the GSP

like the Nicaraguan confederation, may find the process of building and filing a case daunting, and thus may only have access to domestic channels. Unions may be unlikely to consider the use of the CAFTA-DR against administrations that they nominally supported politically, as the El Salvador case suggested.

The most important overall consideration is whether filing a case will lead to any benefits, especially given the slow advance of the Guatemala and Honduras petitions. In Costa Rica, the issues raised in the petition were ultimately resolved in the domestic labor court system, which raises the question on what filing at the CLC adds to domestic processes in the few countries where judicial systems can be engaged. However, since the inability of countries to implement labor law is a consistent aspect of the labor rights violations we discuss here, and the inefficiencies of labor justice systems to provide redress to workers in the face of these deficiencies remains a serious challenge region-wide, it is important that the CLC process provide an additional arena for labor rights violations to be addressed. Further, only in Guatemala did we find preliminary evidence that the labor clause could be used as a mechanism to publicize labor rights abuses more widely outside of the domestic context to then bring pressure on states to improve labor rights protections.

For the few cases where the mechanism has been used, we note that the lack of political will, first on the part of the government of the United States to follow through on the case process, but also on the part of the governments of the Central American countries to meet their obligations in that process, does not portend well for the future functioning of the CLC. Our analysis showed that non-state actors developed strategic approaches to constructing cases to increase the chances for reviews that address wider concerns. For example, in Guatemala, trade unions and their North American counterparts had learned from filing multiple earlier GSP petitions to include a range of specific cases and incidents where labor rights violations occurred, to prevent the government from simply addressing one case and neglecting to address the larger labor rights climate in that country. Therefore, when trade unions in Honduras and the United States developed the CAFTA-DR complaint, not only was a broad selection of cases included in the 2012 version, there was also a section added addressing the problem of violence directed at trade unionists, which surged after the 2009 coup. However, this strategy may have backfired, because the response from the U.S.DOL has been to not release the final report until recently, citing the complexity of investigating the cases and issues.[49] In the interim, the Honduran government, who initially was receptive to consultation, has allowed dialogue on the labor rights issues to wane after a change in administration.[50] In the Guatemalan case, the lack of political will to follow the CLC procedure instead comes from the U.S. government. In that case, the United States has on more than one occasion stated it will take Guatemala to arbitration, and then allowed for interim

clause (Nolan García 2011c).

[49] The language is "an extension of time is required to complete its review due to: The scope of the submission, which covers seventeen distinct fact patterns in three different economic sectors and in three different regions of Honduras" (Federal Register 2012: 66870).

[50] Wishart interview, July 7, 2014.

steps and extra time prior to taking action, allowing the complaint process to last now into its sixth year with little progress, while the labor rights situation in that country continues to deteriorate. While recent announcements by the USTR are encouraging, it remains to be seen what concrete action will be taken in the near future.

In both cases, the U.S. government has shown a reluctance to bring up the issue of violence in discussions, a pattern recreated from the GSP process (Nolan García 2011c). In Guatemala, despite the gravity of this issue for the unions mentioned in the CAFTA-DR submission, the problem of trade union violence is not included in the 18-point Enforcement Plan, nor in the USTR's recent comments. For Honduras, violence against unionists is a separate section of the petition, and still awaiting dialogue and resolution.

The CAFTA-DR tool is only as effective as a government's willingness to use it, and the United States government has appeared reluctant to allow a case to reach any stage past consultations in of the CAFTA-DR process. If both sides appear unwilling to use the mechanism to resolve labor rights issues, it will send the signal to other Central American countries that they are free to violate labor rights at home, and the United States --or the other Central American countries-- will allow them to do so and still benefit from the trade accord. Once combined with political indifference, the trade based mechanisms can fall apart and cease to function altogether.

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