

# DR-CAFTA: The Siren Song for Improved Labor Standards for Haitians in the Dominican Republic

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## Introduction

**H**AITI AND THE DOMINICAN REPUBLIC share a common border on the small island of Hispaniola, as well as a long history of unrest and distrust.<sup>1</sup> While the populations of both countries are roughly equal, Haiti is approximately half the size of the Dominican Republic, and is troubled by extreme poverty and political upheaval.<sup>2</sup> These factors have motivated Haitians to migrate to the Dominican Republic in search of work.<sup>3</sup> Today, Haitians comprise sixty percent of the Dominican Republic's agricultural work force and much of its construction work force.<sup>4</sup>

While some Haitians in the Dominican Republic have migrated illegally, others are the native born children of migrants, and still

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1. See HUMAN RIGHTS WATCH, "ILLEGAL PEOPLE": HAITIANS AND DOMINICO-HAITIANS IN THE DOMINICAN REPUBLIC (2002) [hereinafter *ILLEGAL PEOPLE*], <http://www.unhcr.org/refworld/docid/3cf2429a4.html>.

2. *Id.* The CIA World Factbook cites Haiti's size as 27,750 square kilometers with a population of 9,035,536, while it cites the Dominican Republic as having 48,670 square kilometers and a population of 9,650,054. U.S. CIA, THE CIA WORLD FACTBOOK 2009, <https://www.cia.gov/library/publications/the-world-factbook/index.html>.

3. See *ILLEGAL PEOPLE*, *supra* note 1.

4. Elizabeth Eames Roebling, *Haiti-Dominican Republic: Neighbors, But Not Friends*, HAITIANALYSIS.COM, <http://www.haitianalysis.com/international-relations/haiti-dominican-republic-neighbours-but-not-friends> (last visited Mar. 20, 2010).

others are victims of human trafficking.<sup>5</sup> Regardless of their backgrounds, people of Haitian descent in the Dominican Republic are subject to racism, xenophobia, and an unfriendly socio-political structure that systematically denies them their labor and immigration rights.<sup>6</sup> The Dominican Republic's immigration and labor policies—and its poor enforcement of these laws—undermine the rights of Haitian workers in the Dominican Republic and perpetuate cycles of poverty.

The most recent and far-reaching change in way the Dominican Republic does business occurred with the enactment of the Dominican Republic–Central America–United States Free Trade Agreement (“DR-CAFTA” or the “Agreement”). The DR-CAFTA establishes free trade between the United States, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.<sup>7</sup> Signed on August 5, 2004, it represents the first free trade agreement between the United States and a group of small developing countries.<sup>8</sup> The U.S. Trade Representative (“USTR”) anticipated that the Agreement will create “new economic opportunities by eliminating tariffs, opening markets, reducing barriers to services, promoting transparency, and establishing state-of-the-art rules for 21st century commerce.”<sup>9</sup> The USTR hopes that, by lowering tariffs and reducing other trade barriers, trade and investment will be facilitated between the parties, thus furthering “regional integration.”<sup>10</sup> But as trade and investment expand in the region, many are worried that workers' rights will be ignored in the push towards economic expansion.<sup>11</sup> This could be

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5. U.S. DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: DOMINICAN REPUBLIC (2009) [hereinafter 2008 HUMAN RIGHTS REPORT], <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119157.htm>.

6. *See id.*

7. Dominican Republic-Central America-United States Free Trade Agreement, H.R. DOC. 109-36 (2005) [hereinafter DR-CAFTA].

8. U.S. Trade Representative, CAFTA-DR (Dominican Republic-Central America FTA), <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> (last visited Mar. 20, 2009).

9. *Id.*

10. *Id.*

11. HUMAN RIGHTS WATCH, THE UNITED STATES-DOMINICAN REPUBLICAN-CENTRAL AMERICA FREE TRADE AGREEMENT FALLS SHORT ON WORKERS' RIGHTS (2005) [hereinafter DR-CAFTA FALLS SHORT] (submitted as written testimony for *Implementation of the Dominican Republic-Central America Free Trade Agreement: Hearing Before the H. Comm. on Ways & Means*, 109th Sess. (2005)), available at <http://www.hrw.org/legacy/backgrounder/arms/hearing0405/hearing0405.pdf>; see also Press Release, Rep. Nancy Pelosi, Pelosi Statement in Opposition to CAFTA (May 28, 2004), <http://www.house.gov/pelosi/press//releases/May04/CAFTA052804.html>.

particularly damaging to the Haitian labor force, which is already exploited under Dominican law.

The USTR—recognizing the link between labor rights and trade—has added labor protections to every free trade agreement (“FTA”) since 1993.<sup>12</sup> In addition, the President, under the Bipartisan Trade Promotion Authority, or “fast track” authority, is required to consider “respect for worker rights” as a negotiating objective in all U.S. FTAs.<sup>13</sup> In some ways, DR-CAFTA appears to promote the improvement of labor rights among the member states. For example, labor rights are included within the main body of the Agreement, rather than in a side agreement.<sup>14</sup> By comparison, the North American Free Trade Agreement<sup>15</sup> (“NAFTA”) did not include labor protections in the main body—they were contained in a side agreement drafted as an afterthought.<sup>16</sup> Some also argue that it encourages states to enforce their laws, and builds the Dominican Republic’s ability to monitor and enforce labor rights,<sup>17</sup> which arguably shows signs of international progress towards enforcing important labor concerns through trade agreements.<sup>18</sup> However, a closer examination reveals that the alluring promises of DR-CAFTA are not progressive, but are instead limited by flimsy standards and weak enforcement provisions that leave parties with no obligation to improve or even enforce their own labor standards. In a country with few labor protections, DR-CAFTA may increase industrial production and demand for labor, without necessarily protecting workers’ rights. This calls into question whether this Agreement is a functional way to enforce or improve labor rights in contracting states.

Part I provides a background to the anti-Haitian sentiment in the Dominican Republic and explores the arguments for and against the

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12. MARY JANE BOLLE, CONGRESSIONAL REPORTING SERVICES, DR-CAFTA LABOR RIGHTS ISSUES 1–2 (2006).

13. Trade Act of 2002, Pub. L. No. 107-210, §§ 2102(a)(6), 2102 (b)(11)(A), 116 Stat. 933, 994, 1000 (codified as amended at 19 U.S.C. §§ 3802(a)(6), 3802 (b)(11) (2006)).

14. DR-CAFTA, *supra* 7, art. 16.

15. 43 I.L.M. 1488 (2004).

16. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289, § 605 (1993) [hereinafter NAFTA]. NAFTA was implemented by the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified as amended at 19 U.S.C. §§ 3301–3473 (2000)).

17. U.S. Trade Representative, Trade Facts: Adding Dominican Republic to CAFTA (2004) [hereinafter Adding DR to CAFTA], available at [http://web.archive.org/web/20071008112222/www.ustr.gov/Document\\_Library/Fact\\_Sheets/2004/Section\\_Index.html](http://web.archive.org/web/20071008112222/www.ustr.gov/Document_Library/Fact_Sheets/2004/Section_Index.html).

18. DANIEL GRISWOLD & DANIEL IKENSON, THE CASE FOR CAFTA: CONSOLIDATING CENTRAL AMERICA’S FREEDOM REVOLUTION 12 (2004), available at <http://www.free-trade.org/pubs/briefs/tbp-021.pdf>.

DR-CAFTA labor provisions. Part II compares NAFTA, the Jordan Free Trade Agreement (“Jordan FTA”), and DR-CAFTA to demonstrate DR-CAFTA does not advance labor rights. Part III looks to the realities of NAFTA and the Jordan FTA, and the effects that previous FTAs have had on laborers. Part IV discusses Dominican laws, workers’ rights violations, and the potential for labor rights enforcement through DR-CAFTA.

## I. Background

### A. Haitians in the Dominican Republic

Up to one million Haitians live in the Dominican Republic;<sup>19</sup> most are undocumented.<sup>20</sup> The Dominican Republic confers citizenship based on *jus soli*,<sup>21</sup> the idea of basing nationality on birthplace.<sup>22</sup> However, citizenship is not granted to children of people deemed “in transit.”<sup>23</sup> A crucial 2004 immigration law re-defined all nonresidents as people “in transit,” thus denying their rights to Dominican nationality.<sup>24</sup> Children of Haitian migrants born in the Dominican Republic fall under this “in transit” category and are systematically denied Dominican citizenship.<sup>25</sup> Without any claim to citizenship, they are effectively stateless people. Furthermore, Haitians face difficulties in obtaining birth certificates, which hinders their opportunities to pursue an education.<sup>26</sup> This denial of nationality, documentation, and education has created an underclass, one that subjugates the Haitian population and perpetuates cycles of poverty and exploitation. In addition, their irregular legal status means that Haitian workers are at

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19. REFUGEES INT’L, DOMINICAN REPUBLIC, HAITI, AND THE UNITED STATES: PROTECT RIGHTS, REDUCE STATELESSNESS (2007), available at <http://www.refintl.org/policy/field-report/dominican-republic-haiti-and-united-states-protect-rights-reduce-statelessness>.

20. *Id.*

21. Republica Dominicana Constitucion de 2002 tit. III, sec. 1, art. 11(1).

22. BLACK’S LAW DICTIONARY 942 (9th ed. 2009).

23. Republica Dominicana Constitucion de 2002 tit. III, sec. 1, art. 11(1).

24. Ley General para las Migraciones (General Migration Law), art. 36, para. 10 (2004) (DR). The Dominican government has stated this migration law provides that children born on Dominican soil to Haitian parents can no longer become Dominican nationals. Amnesty Int’l, *Dominican Republic: Submission to the UN Universal Periodic Review, Sixth Session of the UPR Working Group of the Human Rights Council*, AI Index AMR 27/002/2009, Apr. 20, 2009. In addition, if a mother cannot prove her migratory status after giving birth in the Dominican Republic, her child is given a pink birth certificate instead of the normal white one. Children with pink certificates cannot register for nationality. Amnesty Int’l, *Dominican Republic: A Life in Transit—The Plight of Haitian Migrants and Dominicans of Haitian Descent*, AI Index AMR 27/001/07, Mar. 21, 2007, at 18 [hereinafter Amnesty Int’l].

25. Amnesty Int’l, *supra* note 24, at 17.

26. *Id.* at 23–24.

particular risk of exploitation in the expanded work force foreseen by DR-CAFTA.<sup>27</sup>

Many Dominicans justify this class structure by pointing to the perceived differences between Dominicans and Haitians. Although both countries share a history of slavery and colonization, Dominicans, since independence, have identified themselves as “Hispanic” and Haitians as “black.”<sup>28</sup> The sub-director for Haitian Affairs in the Dominican Migration Department recently insisted that Haitians are easily identified because they are “poorer,” have “rougher skin,” and are “much blacker” than Dominicans.<sup>29</sup> This division has manifested violently in the past. Gen. Raphael Trujillo, a Dominican dictator in the early-twentieth century, took pride in his racism against Haitians.<sup>30</sup> In 1937, he ordered the Dominican army to kill all Haitians found outside the sugar plantations.<sup>31</sup> An estimated 20,000 to 25,000 unarmed Haitians were massacred.<sup>32</sup> Still, the Haitian government continued to contract with Dominican authorities to recruit cane cutters for a per capita fee.<sup>33</sup> The Dominican sugar industry relies heavily on Haitian labor to this day,<sup>34</sup> and is a beneficiary of DR-CAFTA.<sup>35</sup>

## B. The Debate over DR-CAFTA

Proponents of DR-CAFTA are confident that its labor provisions will protect workers. In March 2004, the USTR stated that the DR-CAFTA would go “beyond Chile and Singapore FTAs to create a three-part strategy on worker rights that will ensure effective enforcement of domestic labor laws, establish a cooperative program to improve labor laws and enforcement, and build the capacity of the Dominican Republic to monitor and enforce labor rights.”<sup>36</sup> Others added that all parties to the DR-CAFTA would be able to maintain or raise their domestic standards through the promotion of trade.<sup>37</sup>

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27. *Id.* at 9.

28. *ILLEGAL PEOPLE*, *supra* note 1.

29. *Id.*

30. *Id.*

31. *Id.*

32. MICHELE WUCKER, *WHY THE COCKS FIGHT: DOMINICANS, HAITIANS, AND THE STRUGGLE FOR HISPANIOLA* 14, 44 (1999).

33. *See* *ILLEGAL PEOPLE*, *supra* note 1.

34. *Id.*

35. U.S. Trade Representative, *Trade Facts: Fact Sheet on Sugar in CAFTA-DR* (2005) (Within the first year of signing, the Dominican Republic was projected to increase its sugar market access by 1.2% of U.S. production.).

36. *Adding DR to CAFTA*, *supra* note 17.

37. *GRISWOLD & IKENSON*, *supra* note 18 at 11.

On the other hand, Peter Allgeier, the acting USTR, testified to Congress that the need to improve domestic labor laws in Central America was a chief problem in the region for the USTR—one that required “more attention and resources.”<sup>38</sup> Critics of the DR-CAFTA labor provisions agree domestic standards are a chief concern.<sup>39</sup> They argue that DR-CAFTA does not give labor rights the attention and resources they need because it fails to require compliance with basic international norms.<sup>40</sup> Specifically, there are twenty-seven identified areas where labor standards fall short in the region, including the right to strike, that will not be improved by the Agreement.<sup>41</sup>

## II. A Comparison of NAFTA, Jordan FTA, and DR-CAFTA

The United States has linked labor protections to FTAs since 1993.<sup>42</sup> This began with NAFTA, which includes workers’ rights in a side agreement called the North American Agreement on Labor Cooperation (“NAALC”).<sup>43</sup> Subsequent agreements include the multi-lateral DR-CAFTA, and bilateral agreements with Jordan, Chile, Singapore, Australia, Morocco, Bahrain, Israel, Oman, and Peru.<sup>44</sup> In 2004, when Congress was debating the DR-CAFTA, the United States had employed three different models for drafting labor rights provisions: (1) the 1993 NAFTA provisions were drafted as a side agreement, and sanctions were allowed for only some of the standards; (2) the 2001 Jordan FTA placed the provisions within the main body of the text and subjected them to sanctions via the FTA’s dispute resolution mechanism; and (3) the 2004 DR-CAFTA and the five FTAs enacted between the DR-CAFTA and the Jordan FTA also placed the labor provisions in the body of the text,<sup>45</sup> however, the dispute resolution mechanism is separate from the mechanism that is used for economic

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38. *United States-Central America-Dominican Republic Free Trade Agreement: Hearing Before the S. Comm. on Finance*, 109th Sess. 6–7 (2005) [hereinafter *DR-CAFTA Hearing Before S. Comm. on Finance*].

39. DR-CAFTA FALLS SHORT, *supra* note 11, at 2–3 (stating that DR-CAFTA is a step backward from the U.S.-Jordan FTA).

40. *Id.*

41. *Id.* at 4–5.

42. BOLLE, *supra* note 12, at 1–2.

43. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 13, 1993, 32 I.L.M. 1499 (1993) [hereinafter NAALC].

44. U.S. Trade Representative, Free Trade Agreements, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited Mar. 20, 2010).

45. BOLLE, *supra* note 12, at 2.

violations and only allows penalties if a country fails to enforce its own laws.<sup>46</sup>

The fact that the DR-CAFTA includes labor provisions within the main body of the Agreement shows a level of commitment to the provisions that might be lacking when they are drafted as a side agreement—an afterthought. Much of the power of the Jordan FTA's labor provisions is because labor violations are treated with the same enforcement mechanism as an economic violation.<sup>47</sup> This is where DR-CAFTA's commitment starts to break down; because violations of domestic labor laws are not given the same sanctions as violations of the economic provisions, enforcement of them becomes less of a priority to member states.<sup>48</sup> A comparison of DR-CAFTA with its predecessors reveals that DR-CAFTA protects fewer labor rights than the NAALC and has a much weaker dispute resolution mechanism than the Jordan FTA. As a result, DR-CAFTA cannot be seen to advance labor rights protection.

#### A. Passage of Free Trade Agreements

NAFTA and DR-CAFTA were both passed with Congressional approval, but with very different levels of Congressional participation. Where NAFTA was combed through and debated, the DR-CAFTA was hardly debated and passed amid intense protests.<sup>49</sup> Although other countries might consider FTAs to be treaties, the United States does not. In the United States, FTAs are passed under a congressional-executive agreement, which only requires a majority vote in both Houses.<sup>50</sup> Conversely, passage of a treaty requires a two-thirds vote of the Senate.<sup>51</sup> Additionally, DR-CAFTA was negotiated under the “fast track” authority.<sup>52</sup> As such, Congress had limited debate time, was only able to vote yes or no to the Agreement, and could not amend or modify

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46. *Id.*

47. Agreement on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63, art. 17, at 77–78 [hereinafter Jordan FTA]; BOLLE, *supra* note 12, at 2.

48. DR-CAFTA, *supra* note 7, art. 16.6(6).

49. *Implementation of the Dominican Republic-Central America Free Trade Agreement: Hearing Before the H. Comm. on Ways & Means*, 109th Sess. 35 (2005) [hereinafter *DR-CAFTA Hearing Before H. Comm. on Ways & Means*], available at <http://www.hrw.org/legacy/backgrounders/arms/hearing0405/hearing0405.pdf>; *DR-CAFTA Hearing Before S. Comm. on Finance*, *supra* note 38.

50. Brandie Ballard Wade, *CAFTA-DR Labor Provisions: Why They Fail Workers and Provide Dangerous for the FTAA*, 13 LAW & BUS. REV. AM. 645, 653 (2007).

51. U.S. CONST. art. II, § 2, cl. 2.

52. Wade, *supra* note 50, at 652.

controversial provisions.<sup>53</sup> The fast track authority was not authorized at the time NAFTA was passed.<sup>54</sup> Therefore, NAFTA took seven years to negotiate while DR-CAFTA took only one year.<sup>55</sup> Proponents of the fast track authority assert that it gives the President added credibility during negotiations with other parties because he has ultimate negotiating authority so long as congressional oversight procedures are met.<sup>56</sup>

Fast track authority requires the President to make workers' rights a primary objective during trade negotiations.<sup>57</sup> In theory, this should satisfy the concerns of labor organizations and Congress. However, this was not the case with DR-CAFTA, as it faced fierce opposition in Congress over labor concerns during the negotiations.<sup>58</sup> Because of the fast track authority, legislators were not free to amend the Agreement to strengthen its labor provisions. The Agreement only passed by a narrow majority in the House and Senate, which demonstrates a weak commitment from Congress and calls into question the strength of the labor provisions.

## B. Where the Labor Provisions Are Located

The United States has increased the legitimacy of labor provisions in FTAs over time by taking them out of separate side agreements, and placing them in the main body of the text. In NAFTA, the labor and environmental provisions were excluded from the main body of the agreement, and instead were added as a side agreement—the NAALC.<sup>59</sup> The fact that this agreement is not included within the body of the text calls into question its legitimacy and effectiveness—the labor provisions are effectively sidelined to economic interests.<sup>60</sup> By contrast, the Jordan FTA, signed in October 2000, had the labor

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53. *Id.* at 653.

54. *Id.* at 652.

55. *Id.*

56. LAEL BRAINARD & HAL SHAPIRO, BROOKINGS INSTITUTION, POLICY BRIEF NO. 91: FAST TRACK TRADE PROMOTION AUTHORITY (2001), [www.brookings.edu/views/papers/brainard/20011107.pdf](http://www.brookings.edu/views/papers/brainard/20011107.pdf).

57. Trade Act of 2002, Pub. L. No. 107-210, §§ 2102(a)(6), 2102(b)(11)(A), 116 Stat. 933, 994, 1000 (codified as amended at 19 U.S.C. §§ 3802(a)(6), 3802(b)(11) (2006)).

58. See *DR-CAFTA Hearing Before H. Comm. on Ways & Means*, *supra* note 49, at 35; *DR-CAFTA Hearing Before S. Comm. on Finance*, *supra* note 38, at 25–26.

59. NAALC, *supra* note 43, Annex I.

60. ROBERT E. SCOTT, ECON POL'Y INST., THE HIGH PRICE OF 'FREE' TRADE: NAFTA'S FAILURE HAS COST THE UNITED STATES JOBS ACROSS THE NATION 1 (2003), available at [http://www.epinet.org/content.cfm/briefingpapers\\_bp147](http://www.epinet.org/content.cfm/briefingpapers_bp147).



provisions written directly into the main body of the agreement.<sup>61</sup> Since this agreement was passed, the standard has been to include labor provisions within the main body of the text.<sup>62</sup> DR-CAFTA follows the Jordan FTA model of including labor and environmental provisions within the main body of text.<sup>63</sup> DR-CAFTA is thus an improvement from the NAFTA model.

### C. How Labor Rights Are Defined

The International Labor Organization (“ILO”) defines and oversees international labor standards, and works with member states to “ensure that labour standards are respected in practice.”<sup>64</sup> The ILO sets out these standards in the Declaration on Fundamental Principles and Rights at Work and its Follow Up (“Declaration”).<sup>65</sup> Specifically, the Declaration addresses four main areas that are considered labor rights: (1) the freedom of association and right to organize; (2) elimination of forced or compulsory labor; (3) abolition of child labor; and (4) elimination of discrimination in employment and occupation.<sup>66</sup> FTAs should address these four categories of rights. Yet, NAFTA’s NAALC, DR-CAFTA, and the Jordan FTA differ in how they define a labor right.<sup>67</sup>

NAALC’s Article 1(b) states that its objective is to “promote, to the maximum extent possible, the labor principles set out in Annex 1.”<sup>68</sup> Annex 1 then sets out eleven basic labor principles: (1) freedom of association; (2) collective bargaining; (3) the right to strike; (4) prohibition of forced labor; (5) protection for children and young persons; (6) minimum employment standards, such as minimum wage

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61. Jordan FTA, *supra* note 47, art. 6.

62. KIMBERLY ANN ELLIOTT, INST. FOR INT’L ECON. NO. 03-7, LABOR STANDARDS AND THE FREE TRADE AREA OF THE AMERICAS 14 (2003), available at <http://www.iie.com/publications/wp/03-7.pdf>.

63. DR-CAFTA, *supra* note 7, art. 16.

64. About the ILO, [http://www.ilo.org/global/About\\_the\\_ILO/lang—en/index.htm](http://www.ilo.org/global/About_the_ILO/lang—en/index.htm) (last visited Mar. 20, 2010).

65. See generally Int’l Labour Org. (“ILO”), *ILO Declaration on Fundamental Principles and Rights at Work and Annex*, 37 I.L.M 1233 (1998) [hereinafter *ILO Declaration*], available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/index.htm>.

66. See *id.*; ILO, *Freedom of Association and Protection of the Right to Organise Convention* (1948); ILO, *Forced Labour Convention* (1930); ILO, *Abolition of Forced Labour Convention* (1957); ILO, *Minimum Age Convention* (1973); ILO, *Worst Forms of Child Labour Convention* (1999).

67. The definition of a labor right facilitates or limits the content of a claim. For instance, if the agreement did not list the right of association as a labor right, then a party could not claim a violation of the right of association.

68. NAALC, *supra* note 43, Annex 1.

and equal pay; (7) prohibition of employment discrimination; (8) equal pay for men and women; (9) prevention of occupational injuries and illnesses; (10) compensation for occupational injuries and illnesses; and (11) protection of migrant workers.<sup>69</sup> These standards comply with those set out by the ILO and address all four relevant categories in detail.

In contrast, the Jordan FTA and DR-CAFTA define labor rights much more narrowly. For example, DR-CAFTA only allows claims regarding (1) the right of association; (2) the right to organize and bargain collectively; (3) a prohibition on forced or compulsory labor; (4) minimum ages for child employment and elimination of the worst forms of child labor; and (5) acceptable minimum wages, hours of work, and occupational safety and health.<sup>70</sup> The Jordan FTA differs only in that it does not include eliminating the worst forms of child labor.<sup>71</sup> Although both DR-CAFTA and the Jordan FTA comply with the first three prongs of the ILO definition of labor, they fail to address employment discrimination. In addition, they fall critically short of the expansive definition given in the NAALC. Most notably, they both specifically exclude any mention of equal pay for men and women, or migrant workers' rights. As a result, a Haitian worker in the Dominican Republic will find little relief for employment discrimination, or violations of their rights as migrants under the DR-CAFTA labor rights definition. This oversight is a substantial limitation to the enforcement of labor rights for Haitians in the Dominican Republic.

#### D. Obligations for Parties

Although NAALC's Annex 1 announces eleven protected rights, it does not elevate these definitions to minimum standards that need to be met by all member states:

The following are guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law. They indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces.<sup>72</sup>

Thus, the Annex considers the rights as "guiding principles," and domestic law will inevitably trump its provisions. Similarly, NAALC Ar-

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69. *Id.*

70. DR-CAFTA, *supra* note 7, art. 16.8.

71. Jordan FTA, *supra* note 47, art. 6.6.

72. NAALC, *supra* note 43, Annex 1.

ticle 2 only requires a party to enforce its own laws and “ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.”<sup>73</sup> Therefore, although international labor standards are encouraged, the NAALC requires a country to enforce only its own domestic laws.

DR-CAFTA, like NAALC and the Jordan FTA, requires that countries enforce only their domestic labor laws: “A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.”<sup>74</sup> This standard is more complicated than that of the NAALC, requiring several elements not included in the NAALC. Under DR-CAFTA, a claimant would have to prove that the government (1) failed to enforce, (2) its own labor laws, (3) in a sustained or recurring way, and (4) in a manner affecting trade between these parties.<sup>75</sup> A migrant worker in the Dominican Republic rarely has official documentation or formal education, and is therefore unlikely to have the capacity to demonstrate recurring violations of labor rights.<sup>76</sup> They may also have little knowledge of whether or how the labor violation might affect trade. This makes it much more difficult to bring a claim under DR-CAFTA than under the NAALC.

### E. Sanctions

NAFTA’s NAALC, DR-CAFTA, and the Jordan FTA differ considerably in the penalties associated with violating each agreement. Under the NAALC, only a violation of occupational safety and health, minimum wage, or child labor standards are penalized.<sup>77</sup> The fine for a violation is up to fifteen million dollars the first year and a suspension of NAFTA benefits if the fine is not paid.<sup>78</sup> Violations of freedom of association, the right to organize, and collective bargaining are subject to cooperative consultation between the parties.<sup>79</sup>

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73. *Id.* art. 2.

74. DR-CAFTA, *supra* note 7, art. 16.2.1(a); NAALC, *supra* note 43; Jordan FTA, *supra* note 47, art. 6.4(a).

75. DR-CAFTA, *supra* note 7, art. 16.2.1(a).

76. See *ILLEGAL PEOPLE*, *supra* note 1.

77. BOLLE, *supra* note 12, at 2; Marisa Anne Pagnattaro, *The “Helping Hand” in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 *FLA. J. INT’L L.* 845, 877 (2004).

78. Wade, *supra* note 50, at 667.

79. Pagnattaro, *supra* note 77, at 877.

The Jordan FTA authorizes sanctions for a violation of any of its labor provisions.<sup>80</sup> This includes failure to uphold ILO principles or domestic laws.<sup>81</sup> Labor provisions are treated like economic violations, and both use the same dispute resolution mechanism, which elevates a labor violation to the same seriousness as an economic one.<sup>82</sup> This means that the parties to the agreement have the same degree of motivation to comply with the labor provisions as they do to comply with the economic provisions. This provides substantial support for labor rights enforcement and is the strongest level of labor protection in a U.S. FTA to date. Unfortunately, no subsequent FTA has followed the Jordan model in allowing sanctions for violations of the agreement's labor provisions.

On the contrary, only certain labor violations under DR-CAFTA are subject to a dispute resolution mechanism.<sup>83</sup> Article 16 states that parties shall "strive to ensure" that international standards are applied domestically<sup>84</sup> and may not weaken labor protections to encourage trade or investment.<sup>85</sup> But these provisions are virtually unenforceable because neither fines nor sanctions can be applied to violations of these international standard.<sup>86</sup> Sanctions may only apply to a country that violates its existing laws.<sup>87</sup> This is described under Article 16.6, which outlines that countries must resort to consultation for disputes arising under 16.2(1)(a) before moving to the dispute resolution body.<sup>88</sup> The text does not list, and thus does not permit the resolution of disputes arising under any other section, which excludes violations of international standards from ever reaching the dispute resolution body. Additionally, the monetary damages are capped at fifteen million dollars per year, which is not payable to the afflicted party, but is placed in a fund to improve labor conditions in the defending country.<sup>89</sup> Suspension of economic benefits would be possible only if this fee is not paid.<sup>90</sup> DR-CAFTA envisions a narrower view of labor rights than the NAALC, and provides a substantially weaker enforcement provision than the Jordan FTA. Thus, it cannot be considered a legiti-

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80. Wade, *supra* note 50, at 3; *see also* Jordan FTA, *supra* note 47, art. 17.

81. Wade, *supra* note 50; *see also* Jordan FTA, *supra* note 47, art. 6(1).

82. Wade, *supra* note 50.

83. *See* DR-CAFTA, *supra* note 7, art. 20.

84. *Id.* art. 16.1(1).

85. *Id.* art. 16.2 (2).

86. Wade, *supra* note 50, at 2.

87. *Id.*

88. DR-CAFTA, *supra* note 7, art. 16.6.

89. *Id.* art. 20.

90. *Id.*

mate step forward for workers' rights. It may in fact be a step backwards.

### III. Free Trade Labor Provisions—Do They Work?

#### A. The Realities of NAFTA

In terms of labor rights, particularly in Mexico, NAFTA has not fulfilled its promise. When NAFTA took effect on January 1, 1994, it eliminated duties on half of all goods sent from the United States to Mexico and phased out other tariffs over five to fifteen years.<sup>91</sup> In addition, all non-tariff agricultural trade barriers between the two countries were removed, and most of the barriers between the United States and Canada were scheduled for removal by January 1, 1998.<sup>92</sup> For investors, NAFTA offered provisions intended to stimulate foreign investment, encourage the relocation of factories and jobs, and promote deregulation and privatization of basic services, such as water and energy.<sup>93</sup> These methods could expose a country to economic instability and job loss and arguably promote a “race to the bottom”—an exploitation of human and natural resources for the benefit of industry and investors. Inevitably, NAFTA was sold on promises of high-wage American jobs, an increased living standard in all three countries, and a healthier Mexico that could serve as a better market for importing goods to the United States.<sup>94</sup>

The reality of NAFTA has been very different. Today, fewer Mexican workers hold regular paying jobs than before the agreement.<sup>95</sup> Real wages have sharply plummeted, and with job shortages in Mexico, the number of Mexicans seeking work in the United States has more than doubled.<sup>96</sup> According to the Mexican government, more than half the population of Mexico makes less than the amount necessary to cover basic needs like food, housing, and health care.<sup>97</sup> This reality is very different than the one of a hearty industry promised by proponents of NAFTA.<sup>98</sup>

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91. Wade, *supra* note 50, at 648.

92. *Id.*

93. PUBLIC CITIZEN, THE TEN YEAR TRACK RECORD OF THE NORTH AMERICAN FREE TRADE AGREEMENT: THE MEXICAN ECONOMY, AGRICULTURE AND ENVIRONMENT I (2003), available at [http://www.citizen.org/documents/NAFTA\\_10\\_mexico.pdf](http://www.citizen.org/documents/NAFTA_10_mexico.pdf).

94. *Id.*

95. SCOTT, *supra* note 60, at 10.

96. PUBLIC CITIZEN, *supra* note 93.

97. Wade, *supra* note 50, at 648–49.

98. See SCOTT, *supra* note 60.

## B. Jordan After the Agreement

The Jordan FTA phased out tariffs over nine years with the goal of eliminating duties on almost all products by 2010.<sup>99</sup> Its provisions for the enforcement of workers' rights are by far the strongest of any U.S. FTA in that sanctions can apply to any violation of domestic and international labor laws.<sup>100</sup> However, since the agreement came into effect, the National Labor Committee, a U.S.-based NGO, has released a series of reports that show a proliferation of sweatshop conditions in Jordan's export zones.<sup>101</sup> This proliferation can be attributed to the boom in apparel manufacturing caused by the Jordan FTA.<sup>102</sup> The reports document complaints by foreign workers of twenty-hour work days, lack of pay, and physical abuse by supervisors; these workers produce garments for American retailers, including Target and Wal-Mart.<sup>103</sup> More recent reports have alleged that Israeli businessmen are running Jordanian sweatshops that employ workers trafficked from Bangladesh, subjecting them to minimal pay and physical abuse.<sup>104</sup>

These reports are not necessarily proof that the Jordan FTA labor provisions have failed, because the possibility of imposing sanctions through the agreement has not yet been attempted. They do call into question whether labor protections in a FTA are adequate enough to protect workers from the influx of industry foreseen by the agreement. Finally, if a country with relatively strong labor standards can devolve into sweatshop scandals in export zones within a couple years of a FTA, then it does not bode well for a country like the Dominican Republic, which already has negligible protections.

## C. Is DR-CAFTA Destined for the Same Fate?

Compared to the Jordan FTA, DR-CAFTA labor provisions do not enforce compliance with international labor standards.<sup>105</sup> The Agree-

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99. Jordan FTA, *supra* note 47, Annex 2.1.

100. *See supra* Part II.

101. Charles Kernaghan, Nat'l Labor Comm., U.S.-Jordan Free Trade Agreement Stumbles, NAT'L LABOR COMM., July 24, 2009, <http://www.iatp.org/tradeobservatory/headlines.cfm?refID=106500>; NLC's Response to Recent Jordanian Ministry of Labor Report on the Musa Factory, NAT'L LABOR COMM., Aug. 13, 2009, <http://www.nlcnet.org/article.php?id=666>.

102. *Id.*

103. Steven Greenhouse & Michael Barbaro, *An Ugly Side of Free Trade: Sweatshops in Jordan*, N.Y. TIMES, May 3, 2006, at C1.

104. Dana Weiler-Polak, *Report: Israeli Businessmen Running Sweatshop in Jordan*, HAARETZ.COM, Oct. 8, 2009, <http://www.haaretz.com/hasen/spages/1106389.html>; Kernaghan, *supra* note 101.

105. *See supra* Part II.

ment does not require improvement in domestic labor laws, nor does it provide sufficient incentive to enforce existing domestic labor laws.<sup>106</sup> All of the signatories to the DR-CAFTA also members of the ILO, which defines clear labor standards for member states.<sup>107</sup> These standards are merely guidelines.<sup>108</sup> Unfortunately, Central American countries often do not comply with these international standards.<sup>109</sup> Since DR-CAFTA relies on countries to enforce their own existing labor obligations, there is no added motivation for a country to increase their compliance with ILO standards, particularly if lowered standards can be used to attract foreign investment. One concern is that the labor provisions fail to promote basic labor rights enforcement. For example, there is no protection against discrimination in the workplace.<sup>110</sup> The elimination of employment and workplace discrimination is one of the four core labor rights expounded by the ILO Declaration.<sup>111</sup>

If the NAALC and the Jordan FTA have not succeeded in benefiting the workforce needed to fuel their economic vision, then it is difficult to imagine that DR-CAFTA will succeed in improving workers' rights in the Dominican Republic. Unfortunately, as the Dominican economy expands under the Agreement, it is likely that poor labor standards will be reinforced, if not worsened. Those at the bottom of the workforce, many of them Haitian migrants, may be forced to bear the brunt of economic expansion, while experiencing little benefit themselves.

#### **IV. Dominican Law and the Prospect of Labor Rights Enforcement Through DR-CAFTA**

DR-CAFTA does not require the Dominican Republic to comply with international labor standards, nor does it require improvement of domestic laws. It does require that the country uphold its own labor laws.<sup>112</sup> In sum, the country's labor laws cannot be challenged

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106. See DR-CAFTA, *supra* note 7, arts. 16.2, paras. (1), (2).

107. See ILO Declaration, *supra* note 65; ILO, *Freedom of Association and Protection of the Right to Organise Convention* (1948); ILO, *Forced Labour Convention* (1930); ILO, *Abolition of Forced Labour Convention* (1957); ILO, *Minimum Age Convention* (1973); ILO, *Worst Forms of Child Labour Convention* (1999).

108. ILO Declaration, *supra* note 65.

109. DR-CAFTA FALLS SHORT, *supra* note 11, at 4–5.

110. See DR-CAFTA, *supra* note 7, art. 16.8 (The article does not include employment discrimination in its definition of labor law.).

111. ILO Declaration, *supra* note 65, at 1238.

112. See *supra* Part II.

through the dispute resolution mechanism even if they violate international or DR-CAFTA standards. Violations of domestic laws will only be redressed if they are recurring and directly affect trade with the relevant party.<sup>113</sup>

#### A. Laws that Violate DR-CAFTA and International Standards

Unfortunately, many of the Dominican Republic's labor laws fall short of the standards promoted by the ILO and DR-CAFTA Article 16, and these violations may be aggravated by the influx of labor needed to fulfill the vision of the DR-CAFTA. For example, although the Dominican constitution provides for the right of association and the right to organize, the Labor Code's provision for union members falls short of international standards.<sup>114</sup>

Sugar is the Dominican Republic's second most important export after mining,<sup>115</sup> and exports stand to increase under DR-CAFTA.<sup>116</sup> Unfortunately, the treatment of sugar cane workers is a particular problem for Haitian immigrants, who make up sixty percent of the agricultural labor force.<sup>117</sup> The law provides significantly fewer benefits for those who work in the sugar cane industry. For example, based on a ten-hour day, the average minimum wage for farm workers is 150 pesos per day.<sup>118</sup> The U.S. 2008 State Department Human Rights Report on the Dominican Republic ("Report") deemed this wage an inadequate amount to provide a decent standard of living for workers and their families.<sup>119</sup> Sugar cane workers are given even less: the minimum wage is ninety-five pesos per day.<sup>120</sup> This treatment places Haitian sugar cane workers at a marked disadvantage to farm workers and guarantees that they will be unable to provide a decent standard of living for their family.

Female workers represent a majority in Dominican free trade zones,<sup>121</sup> and yet, the U.S. Department of State identified that the country has "no effective government programs to combat economic

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113. DR-CAFTA, *supra* note 7, art. 16.2(a).

114. *Id.*

115. ILLEGAL PEOPLE, *supra* note 1, sec. III.

116. U.S. Trade Representative, Trade Facts: Fact Sheet on Sugar in CAFTA-DR (2005).

117. Roebing, *supra* note 4.

118. 2008 HUMAN RIGHTS REPORT, *supra* note 5, sec. 6.e.

119. *Id.*

120. *Id.*

121. DR-CAFTA FALLS SHORT, *supra* note 11.



discrimination against women.”<sup>122</sup> This is a worrying oversight since women represent a group that has historically faced workplace discrimination. There are some instances where domestic laws are ignored. Dominican law provides that women have the same status as men, and sexual harassment in the workplace is chargeable with a misdemeanor.<sup>123</sup> However, union leaders report that sexual harassment remains a problem.<sup>124</sup> In addition, women often receive less pay than men for comparable work, and some employers regularly give pregnancy tests before hiring women.<sup>125</sup> Even though it is illegal to discriminate based on these tests, NGOs have reported that pregnant women were often not hired, and women who became pregnant were often fired.<sup>126</sup> Unfortunately, female workers face an additional hurdle in that under DR-CAFTA, employment discrimination is not a covered labor right and cannot be challenged. Even if the Dominican Republic violates its own domestic laws protecting women in the workplace, a DR-CAFTA claim is likely to fail because the topic is not enumerated under the definition of protected labor rights.

These issues exemplify Dominican laws that violate international labor standards, but cannot be challenged via DR-CAFTA. A consideration of the enforcement of domestic law is more encouraging, as it may be an area where a successful challenge is possible.

## B. Violations of Dominican Laws

In many instances, Dominican labor laws are systematically violated; they are thus better candidates for challenges brought under DR-CAFTA.<sup>127</sup> To bring a complaint, a party must show the following: the government (1) failed to enforce, (2) their own labor laws, (3) in a sustained or recurring way, (4) and in a manner affecting trade between these parties.<sup>128</sup> One problem that affects the enforcement of many Dominican labor laws is abuse by those in power. Consider the following:

Police officers, who are charged with the protection of the general population, frequently overlook the mistreatment of the Haitians, and often even contribute to it. Despite these egregious violations, the Haitian government usually does not condemn the conditions

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122. 2008 HUMAN RIGHTS REPORT, *supra* note 5, sec. 5.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *See supra* Part II.E.

128. DR-CAFTA, *supra* note 7, art. 16.2(a).

that its nationals are forced to tolerate out of fear of losing the remittances sent home by migrant workers to their families back in Haiti which considerably helps to defray the shortcomings of Haiti's own weak economy. The fact is that while the Dominican Republic is in need of cheap Haitian labor for their agricultural sector, it continues to complain about the negatives of their presence.<sup>129</sup>

Such abuses of authority, which violate enumerated labor rights, might be successfully challenged under DR-CAFTA.

Sugar cane workers, in particular, are often subject to violations of domestic law.<sup>130</sup> For instance, the law establishes a maximum work period of forty-four hours per week.<sup>131</sup> But sugar cane workers are usually paid by the weight of the cane, rather than by the number of hours they worked.<sup>132</sup> Many cane workers report fraud by weighing station operators in the Report: they alleged that they were often not provided trucks at the end of the day, leading to the sugar cane drying overnight and losing much of its weight by the next morning.<sup>133</sup> This reduced their already low wages, and could qualify as a violation of minimum wage requirements. In addition, sugar cane harvesting is a seasonal occupation; during the off-season, sugar plantations often provide work that falls below minimum wage.<sup>134</sup> Even during the main season, less able-bodied workers who could not produce as much cane per day often receive less than minimum wage for their work.<sup>135</sup> These are all examples of labor law as defined under DR-CAFTA Article 16.8, which defines the enforcement of an acceptable minimum wage as a type of labor law.<sup>136</sup>

There have also been widespread reports of employer intimidation to stop union activities in free trade zones, in violation of Article 16.8 which requires the right of association and right to organize and bargain collectively.<sup>137</sup> Health conditions of sugar cane workers in the Dominican Republic are also a cause for concern. According to the

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129. Kaitlin Porter, *Stateless in the Dominican Republic*, COUNCIL ON HEMISPHERIC AFFAIRS, <http://www.coha.org/2009/08/stateless-in-the-dominican-republic/> (last visited Mar. 20, 2010).

130. *Id.*

131. 2008 HUMAN RIGHTS REPORT, *supra* note 5, sec. 6.e.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. DR-CAFTA, *supra* note 7, art. 16.8.

137. 2008 HUMAN RIGHTS REPORT, *supra* note 5, sec. 6.b.

Report, those who live in the bateyes<sup>138</sup> have inadequate schools, medical facilities, running water, and sewage systems.<sup>139</sup> In some cases, workers were denied medical attention or pensions even though deductions had been taken from their wages.<sup>140</sup> These violations could fall under Article 16.8's acceptable conditions of work, which includes occupational safety and health.<sup>141</sup> Violations of these rights can be challenged under DR-CAFTA so long as the challenger can prove sustained or recurring action, or inaction, on the part of the government, and that the policy affected trade.<sup>142</sup> Since the United States is another producer of sugar, it is plausible that the violations could have affected trade between the parties. For instance, if union intimidation, or inadequate health care is allowing Dominican sugar producers to produce a less expensive product, then it theoretically could hurt the American sugar market and satisfy this condition.

The Dominican Ministry of Labor has inspectors who must enforce labor standards.<sup>143</sup> Workers reported that these inspectors were not properly trained and did not respond to health and safety complaints.<sup>144</sup> Workers also felt they could not remove themselves from hazardous working conditions without losing their employment, even though the law requires that employers provide a safe working environment.<sup>145</sup> Again, evidence of failure to enforce domestic labor laws, such as health and safety requirements, could be used to bring a claim under DR-CAFTA provided the evidence demonstrates an affect on trade.<sup>146</sup>

The Dominican Republic also prohibits involuntary servitude, but the Report found that "mandatory overtime . . . was sometimes enforced through locked doors or loss of pay or employment for those who refused."<sup>147</sup> Trafficking of persons is illegal, and yet the Report found "reports of trafficking in children within the country."<sup>148</sup> The Council on Hemispheric Affairs states more specific numbers: "[i]n 2008, approximately 3,000 street children of Haiti were trafficked to

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138. A shantytown or sugarcane work camp. 2008 HUMAN RIGHTS REPORT, *supra* note 5, sec. 6.d.

139. *Id.*

140. *Id.*

141. DR-CAFTA, *supra* note 7, art. 16.8.

142. *Id.* art. 16.2(a).

143. 2008 HUMAN RIGHTS REPORT, *supra* note 5, sec. 6.d.

144. *Id.*

145. *Id.*

146. DR-CAFTA, *supra* note 7, art. 16.2(a).

147. 2008 HUMAN RIGHTS REPORT, *supra* note 5, sec. 6.c.

148. *Id.*

the Dominican Republic for a variety of purposes, such as agricultural and domestic services, begging on the streets, slave labor, or prostitution.”<sup>149</sup> In fact, child labor is a continuing problem in the country. In October 2008, the United Nations Children’s Fund reported that 9.7% of minors between the ages of ten and seventeen were working illegally.<sup>150</sup>

While these statistics are grim, they point to areas where labor rights might be improved through a DR-CAFTA claim. Unfortunately, there are several obstacles to overcome before this can happen. First, a party to the Agreement would have to bring the complaint, which raises political issues. The United States has the political clout to overcome this problem, but it is unlikely that the any White House administration would have the political will to do so unless a labor violation substantially and negatively affected our economy. Second, it could be difficult to prove that the violation was recurring unless a third party, such as an NGO, took notice and worked alongside laborers to gather evidence for the claim. Since Haitian workers are also denied access to basic public services and education, they are the least likely group to have the ability to record violations or to know how to recognize a violation. Finally, proving that a labor violation directly affects trade with a party might create an insurmountable barrier since labor violations are unlikely to produce such a huge economic effect that they would alter a trading relationship.

## Conclusion

By increasing trade, DR-CAFTA seeks to create greater import and export capabilities between the member states. This is an effort that will require human power to fuel the foreseen economic growth. In the Dominican Republic, some of the sectors expected to profit from the Agreement rely heavily on workers of Haitian descent, who are systematically disenfranchised and discriminated against in the country. Although many have argued it will help improve labor standards, DR-CAFTA will continue to permit the systematic exploitation of workers and immigrants in the Dominican Republic. The effect will be to maintain a racial hierarchy and a de facto caste system within the country. Many violations of domestic law in the Dominican Republic could theoretically be challenged under the DR-CAFTA dispute resolution mechanism. However, there are loopholes that make this in-

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149. Porter, *supra* note 129.

150. 2008 HUMAN RIGHTS REPORT, *supra* note 5, sec. 6.c.

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credibly difficult. Furthermore, the limited scope of labor rights under the Agreement, as compared to the broader scope of the NAALC, significantly reduces the types of claims that can be brought. Although it was sold as a proud step forward for labor rights enforcement, this Agreement offers little benefit for the people who are needed to fuel the economic growth that it promises.

