

December 2, 2015

The Honorable Barack Obama  
President of the United States  
1600 Pennsylvania Avenue, NW  
Washington, D.C. 20500

Dear Mr. President:

Pursuant to Section 135(b) of the Trade Priorities and Accountability Act of 2015, and Section 135(e) of the Trade Act of 1974, as amended, I am pleased to transmit the report reflecting the opinions of the Labor Advisory Committee (LAC) on the Trans-Pacific Partnership (TPP).

The LAC strongly opposes the TPP, negotiated between the United States (U.S.), Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. We believe that the Agreement fails to advance the economic interests of the U.S. and does not fulfill all of the negotiating objectives identified by Congress in the Trade Priorities and Accountability Act of 2015. The threat to future economic gains here in the U.S. and the standard of living of our people will be put in jeopardy by the Agreement. These threats will grow over time based on the potential for open-ended expansion of the TPP to countries ranging from Indonesia to China.

The LAC believes the agreement should not be submitted to Congress or, if it is, it should be quickly rejected. The interests of U.S. manufacturers, businesses, workers and consumers would be severely undermined by the entry into force of the TPP.

Sincerely,



R. Thomas Buffenbarger, Chair  
Labor Advisory Committee (LAC)

Cc: Ambassador Michael Froman  
Secretary Thomas Perez  
Anne Zollner, FDO

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December 2015

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19. Mr. Edward Wytkind, President, Transportation Trades Department

# **Report**

on the

## **Impacts of the Trans-Pacific Partnership**

By

**The Labor Advisory Committee on Trade  
Negotiations and Trade Policy**

**December 2, 2015**

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## Table of Acronyms

<u>Acronym</u>	<u>Long Form</u>
BSE	Bovine Spongiform Encephalopathy (aka Mad Cow Disease)
CBA	Collective Bargaining Agreement
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CFIUS	Committee on Foreign Investment in the United States
DOD	U.S. Department of Defense
DOL	U.S. Department of Labor
DOS	U.S. Department of State
EPI	Economic Policy Institute
FDI	Foreign Direct Investment
FTA	“Free” Trade Agreement
GHS	Ground Handling Services
ILO	International Labor Organization
IMF	International Monetary Fund
ITUC	International Trade Union Confederation
IP	Intellectual Property
ISDS	Investor-to-State Dispute Settlement
LAC	Labor Advisory Committee on Trade Negotiations and Trade Policy
MEA	Multilateral Environmental Agreement
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
OHCHR	Office of the High Commissioner for Human Rights
OTLA	Office of Trade and Labor Affairs
PNTR	Permanent Normal Trade Relations
ROO	Rule(s) of Origin

RVC	Regional Value Content
SOE	State-Owned and State-Controlled Enterprise
SPS	Sanitary and Phyto-Sanitary (aka “food safety”)
TRQ	Tariff-Rate Quota
TPP	Trans-Pacific Partnership
UNCTAD	United Nations Conference on Trade and Development
USTR	United States Trade Representative
WTO	World Trade Organization



## I. Executive Summary

On behalf of the millions of working people we represent, we believe that the TPP is unbalanced in its provisions, skewing benefits to economic elites while leaving workers to bear the brunt of the TPP's downside. The TPP is likely to harm the U.S. economy, cost jobs, and lower wages.

The primary measure of the success of our trade policies should be increasing jobs, rising wages, and broadly shared prosperity, not higher corporate profits and increased offshoring of America's jobs and productive capacity. Trade rules that enhance the already formidable economic and political power of global corporations—including investor-to-state dispute settlement, excessive monopoly rights for pharmaceutical products, and deregulatory financial services and sanitary and phyto-sanitary rules—will continue to undermine worker bargaining power, here and abroad, as well as weaken democratic processes and regulatory capacity across all 12 TPP countries.

The LAC entered the TPP process hopeful and optimistic that the TPP would finally be the agreement that broke the elite stranglehold on trade policy and put working families at the front and center. Unfortunately, we believe the TPP fails to strike the proper balance: of course it is difficult to convince Vietnam to implement freedom of association before the TPP enters into force once Vietnam has already agreed to provisions that will force it to pay higher prices for medicines and subject even its most basic laws to challenge by foreign investors in private tribunals. Given the misguided values enshrined in the TPP, it is no surprise that the economic rules it will impose will actually make it harder to create a virtuous cycle of rising wages and demand in all 12 TPP countries.

While the TPP may create some limited opportunities for increased exports, there is an even larger risk that it will increase our trade deficit, which has been a substantial drag on job growth for more than twenty years. Especially at risk are jobs and wages in the auto, aerospace, aluminum and steel, apparel and textile, call center, and electronic and electrical machinery industries. The failure to address currency misalignment, weak rules of origin and inadequate state-owned enterprise provisions, extraordinary rights provided to foreign investors and pharmaceutical companies, the undermining of Buy American, and the inclusion of a labor framework that has proved itself ineffective are key among the TPP's mistakes that contribute to our conclusion that the certain risks outweigh the TPP's speculative and limited benefits.

As part of our work to create this report, the LAC reviewed our NAFTA report from more than 20 years ago and the history of trade agreements implemented since that time. What is stunning is that despite the mounting evidence that neoliberal trade and globalization rules do not create shared prosperity and inclusive growth, and despite the fact that some of NAFTA's biggest supporters, including former Labor Secretary Robert Reich, now agree with us that

corporate-driven trade doesn't work for workers, we are essentially having the same debate as we had regarding NAFTA.

The LAC urges the President in the strongest possible terms to reverse course now. Do not send this TPP to Congress. Instead, the TPP should go back to the negotiating table. We want to work with you and our counterparts in the other TPP countries to create a truly progressive TPP that uplifts working people, creates wage-led growth, diminishes income inequality, promotes infrastructure investment, protects intellectual property without undermining access to affordable medicines, and respects our democracy.

## II. A Note on the LAC Process

The United States Trade Representative (USTR) implemented severe and seemingly arbitrary restrictions that greatly limited the Labor Advisory Committee on Trade Negotiations and Trade Policy's (LAC's) ability to fulfill its statutory responsibility to provide advice to U.S. trade negotiators. The LAC is fully aware of its responsibilities as provided under its charter:

*To provide information and advice with respect to negotiating objectives and bargaining positions (emphasis added) before the U.S. enters into a trade agreement with a foreign country or countries, with respect to the operation of any trade agreement once entered into, and with respect to other matters arising in connection with the development, implementation, and administration of the trade policy of the United States, including those matters referred to in the Reorganization Plan Number 3 of 1979 and Executive Order No. 12188, and the priorities for actions thereunder.*

Serious concern over inadequate consultation led to the LAC's June 6, 2013, letter to USTR and the U.S. Department of Labor (DOL). In that letter, LAC noted:

*...restrictions on information that is shared with LAC members and their representatives has reduced much of the potential benefits of the advisory process. Specifically, the unwillingness to share bracketed text or tabled positions from our negotiating partners makes the Committee's ability to provide timely and useful advice, particularly concerning U.S. bargaining positions, almost impossible.*

The LAC formally requested that USTR and DOL "review these policies and make the necessary changes so that the Administration receives the input Congress intended when it created the advisory committee system."

Unfortunately, these restrictions, which have impeded consultation with the LAC, continued throughout the TPP negotiations. For example, between February 21, 2012 and August 2015, the USTR and DOL refused to share the specific text of proposed changes to the labor chapter. The guidelines that were released after the passage of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 will have no measurable impact in addressing this serious systemic problem.

Furthermore, the LAC was never substantively consulted regarding the side understandings that have been finalized with Vietnam, Malaysia, and Brunei. Given that these arrangements are focused solely on these countries' labor and employment laws, the unwillingness of U.S. negotiators to share draft text of these arrangements with its labor advisors (who have security

clearances), is indicative of the indifference USTR generally displayed towards its consultation process with the LAC throughout TPP negotiations.

### III. Statutorily Required Analysis

The LAC has the statutory duty to respond to three questions concerning the TPP. This section will answer each question briefly. Further, in the following sections, the report will provide additional analysis, detail, and comment to support our conclusions.

**Question 1: Is the Trans-Pacific Partnership in the economic interests of the United States?**

**No, the TPP is not in the economic interests of the United States.** The TPP is likely to harm U.S. manufacturing interests, cost good jobs, suppress wages, and threaten our democracy and economic security interests.

**Question 2: Does the TPP achieve the applicable overall and principal negotiating objectives?**

**No, the TPP does not achieve the negotiating objectives necessary to make the TPP in the best interests of America's working families.** While it achieves some of the negotiating objectives set forth in the "Bipartisan Congressional Trade Priorities and Accountability Act of 2015" (also known as "Fast Track 2015"), it falls short on several of the ones most important to working people. Taken together, its inclusions and omissions will doubtless benefit some narrow American economic interests, but the TPP will harm our economy overall, with more negative impacts than positive ones.

**Question 3: Does the TPP provide equity and reciprocity for labor interests?**

**No, the TPP fails to provide equity and reciprocity of benefits for workers.** For example, while the pharmaceutical industry is poised to receive windfall benefits from the TPP, workers in the auto, aerospace, and steel industries are likely to be harmed. Additionally, the Vietnam side letter expressly condones continued denial of freedom of association to workers in Vietnam for at least five years, even as its employers will receive full access to the benefits of the TPP during that time.

## IV. Were the Trade Negotiating Objectives Set Forth in Fast Track 2015 Achieved and in the Best Interests of America's Working Families?

While the TPP appears to at least nominally accomplish a fair number of objectives set out in the “Bipartisan Congressional Trade Priorities and Accountability Act of 2015” (also known as “Fast Track 2015”), there are notable exceptions including investment, environment, and currency that will undermine the interests of working people. More importantly, the question the LAC has been asked to answer relies on a faulty premise. The LAC opposed Fast Track 2015 in large part because of its unsatisfactory negotiating objectives, many of which failed to support our goal of strengthening the U.S. economy and advancing the interests of working people. Many of the negotiating objectives we have been asked to evaluate are so vague that meaningful analysis is nearly impossible. Other objectives are quite literally antithetical to U.S. worker interests. All told, the negotiating objectives “achieved” in the TPP fail to benefit working people in a number of ways, as detailed below.

Critical reforms and new objectives proposed by LAC members were not included in Fast Track 2015.<sup>1</sup> Examples:

- LAC members sought an objective that would have required strong and enforceable rules against currency manipulation in the TPP. Instead, the negotiating objectives with respect to currency in Fast Track 2015 are weak, allowing “cooperative mechanisms” and “reporting” to fulfill the objective.
- LAC members sought an objective requiring strong rules of origin to prevent leakage of TPP benefits to third parties that have made no reciprocal market opening promises to the U.S. Instead, Fast Track 2015 contained no objectives with respect to rules of origin, which paved the way for the TPP’s weak rules of origin.
- LAC members sought an objective to preserve and promote the strength and integrity of Buy America and Buy American programs. Fast Track 2015 contained no such objective.
- LAC members sought an objective that would have ensured the most robust carve out possible for public services including water and wastewater treatment, public transportation, and postal services. Fast Track 2015 contained no such objective.
- LAC members proposed a more balanced approach to trade negotiating objectives concerning agricultural products (SPS rules) and regulatory practices so that maintaining current business practices (particularly those that pose health threats to

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<sup>1</sup> Comparisons in this section are to the trade negotiating objectives set forth in the “Bipartisan Congressional Trade Priorities Act of 2014,” S. 1900, introduced by Senator Max Baucus (MT).

workers and consumers) would not be given priority over public interest objectives. These suggestions were not incorporated into Fast Track 2015.

- LAC members proposed a more balanced approach to objectives concerning foreign investment, for instance by taking into account the updated International Monetary Fund (IMF) guidance regarding capital controls<sup>2</sup> and updated work by United Nations Conference on Trade and Development (UNCTAD) and others regarding the harmful policy implications of Investor-to-State Dispute Settlement (ISDS)<sup>3</sup>. Fast Track 2015 failed to incorporate these reforms.
- LAC members sought new objectives relating to promoting domestic manufacturing, raising wages, and ensuring shared prosperity. Such objectives were not included.
- LAC members sought new objectives that would have ensured that the TPP included an effective set of disciplines to govern the anticompetitive activities of state-owned enterprises and enterprises operating on at the direction of the government (collectively SOEs). While Fast Track 2015 contained objectives with respect to SOEs (Sec. 102(b)(8)), these objectives lack the specificity needed to produce an effective SOE chapter.
- LAC members sought to improve the negotiating objectives affecting access to medicines. These suggestions were not incorporated into Fast Track 2015.
- LAC members sought to strengthen the labor and environment objectives to build upon the accomplishments of the “May 10” Agreement. The labor and environment objectives (Sec. 102(b)(10)) were not strengthened.

On the other hand, many objectives that the LAC proposed reworking or deleting altogether in order to better focus U.S. trade policy on domestic economic development and preserve our democracy were instead included without reform. Examples:

- The “Foreign Investment” objectives (Sec. 102(b)(4)) were not reformed.
- Objectives locking in a deregulatory agenda (e.g., the continuing use of the term “science-based,” which is coded, deregulatory language that has been used to fight the imposition of a silica rule in the U.S. and to thwart effective regulation of endocrine disruptors and carcinogens) were not reformed.

Finally, the TPP simply fails to meet a number of the critical objectives in Fast Track 2015.

These include:

- **Environment:** The TPP does not require all Parties to “adopt and maintain measures implementing . . . its obligations under common multilateral environmental agreements (as defined in section 111(6))” as required by section 102(b)(10)(A)(i) of Fast Track 2015.

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<sup>2</sup> See “The Liberalization and Management of Capital Flows: An Institutional View,” International Monetary Fund, November 14, 2012 (<http://www.imf.org/external/np/pp/eng/2012/111412.pdf>).

<sup>3</sup> See, e.g., UNCTAD IIA Issues Note “Reform of Investor- State Dispute Settlement: In Search of a Roadmap,” Jun. 2013, No. 2, available at: [http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf).

- Investment: The TPP does not “ensur[e] that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States” as required by section 102(b)(4).
  - By allowing a foreign investor to pursue its case all the way to the Supreme Court and then proceed to ISDS, the TPP provides foreign investors a second bite at the apple not provided to U.S. investors under U.S. law.
  - By allowing a foreign investor to receive compensation for “indirect expropriations” that do not permanently destroy all economic value of property, the TPP provides foreign investors compensation not available to U.S. investors under U.S. law.
  - By allowing a foreign investor to receive compensation for a violation of its right to a “minimum standard of treatment,” the TPP provides foreign investors compensation not available to U.S. investors under U.S. law. The “minimum standard of treatment” is an international law concept, not compensable under U.S. property law in U.S. courts.
- Currency: The “side deal” on currency does not constitute a part of the TPP and thus does not fulfill the negotiating objective set out in section 102(b)(11).
- Enforcement: There is nothing in the TPP’s dispute settlement mechanism that would ensure that the TPP will be enforced in “an effective, timely” manner, as required by Sec. 102(b)(15)(A). Instead, the dispute settlement provisions lack automaticity, which could lead U.S. businesses and workers to suffer while they wait for action.



## V. Were the Labor Advisory Committee's Objectives Met?

**Currency: Objective not met.**

**Key Recommendation:**<sup>4</sup> Include enforceable currency rules subject to trade sanctions in the text of the agreement

**Result:** The TPP fails to address currency manipulation at all. There are unenforceable currency “guidelines,” not subject to sanctions, included in a side agreement.

**Rules of Origin: Objectives not met.**

**Key Recommendations:**

- a. Auto Regional Value Content beginning at 62.5 percent, rising to 75 percent
- b. Auto Parts Regional Value Content as high as that for autos
- c. In general, “rules of origin” should be negotiated such that the signatories are the primary beneficiaries of new market access
- d. Once we learned that the USTR was considering a “hybrid deemed originating” standard (e.g., a standard that would allow a part with minimal TPP value to count as originating) for critical auto parts, we recommended in the strongest possible terms that such a standard be abandoned

**Result:** Auto RVC of 45 percent, parts RVCs from 35-45 percent and some parts can be even lower than that using a special process that will declare them “made in TPP,” without having to meet any threshold percentage (Appendix 1 to Annex 3-D). For many other parts, the rule of origin is a simple transformation from one tariff line to another. For many products, that means that non-TPP countries can be primary beneficiaries. In fact, the majority of the parts in an auto, by value, could come from a non-TPP country such as China and be eligible for preferred status under the TPP.

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<sup>4</sup> Recommendations referenced in this section were originally set forth in the AFL-CIO's “Testimony Regarding the Proposed United States-Trans-Pacific Partnership Trade Agreement,” submitted to the USTR January 25, 2010 and expanded, repeated, and further developed in confidential transmissions and interactions between the LAC, USTR, and DOL throughout the TPP negotiations, including in oral and written form, as well as through various public testimonies, reports, proposals, letters, memos, and other documents developed by LAC members and their staff for the purpose of creating a TPP that would work for workers. The original testimony referenced above is included in this report as Annex 1.

**Market Access Assurances: Objective not met.**

**Key Recommendation:** Do not reduce tariffs on Japanese cars and trucks until U.S. auto and truck exports actually achieve meaningful market access in Japan for a sustained period

**Result:** The TPP does not contain this contingency.

**State-Owned Enterprises: While an SOE Chapter is included in the TPP, the LAC's objectives were not met.**

**Key Recommendations:**

- a. Expand CFIUS to include a review and approval process for mergers and acquisitions of U.S. companies by foreign SOEs
- b. Include a broad adverse effects test that can capture sporadic injuries and will allow complaints to advance well before workers have been laid off and companies are on the verge of closure
- c. Include broad coverage for sovereign wealth funds
- d. Cover SOE activities in the U.S. market that involve a company importing from its parent or other related company
- e. Cover SOEs owned at the sub-central level of government
- f. Include provisions to ensure that the definition of "SOE" does not capture public services and that the SOE chapter cannot be used to undermine or limit public services

**Result:** While the TPP has an SOE chapter that does attempt to discipline SOE behavior, exclude coverage of public services, and protect U.S. producers from predatory behavior by foreign SOEs, it fails to include recommendations a-e above. The text fails to include an effective standard to judge what a "commercial" consideration is. As well, the exclusion of any sub-federal entities, where the bulk of the problems lie in countries like China, fails to create a proper framework for the future. The TPP SOE Chapter has also created an enormous loophole by excluding from coverage all support and subsidies provided prior to the TPP's entry-into-force.

**Labor: Objectives not met.**

**Key Recommendations:**

- a. To improve compliance and enforceability, define the core labor standards with direct reference to ILO Core Conventions
- b. To protect workers, raise wages and expand the middle class in all signatory countries, require that Parties not waive or derogate from any of their labor laws (laws

implementing either ILO Core Conventions or acceptable conditions of work)—  
regardless of where the breach occurred

- c. To protect workers and raise wages, define “acceptable conditions of work” more broadly to include such concepts as payment of all wages and benefits legally owed and compensation in cases of occupational injuries and illnesses
- d. To increase compliance with labor obligations, include commitments aimed at ensuring effective labor inspections
- e. To increase compliance with labor obligations, allow a petitioner to make a complaint based on a single egregious violation, rather than waiting for a “sustained or recurring course of action” to occur
- f. To remove the requirement that violations must be in a “manner affecting trade or investment between the parties,” which adds an unnecessary hurdle as all worker repression and exploitation affect labor market conditions, which affect trading and investment relations between Parties
- g. To prevent forced labor, prohibit trade in goods made with forced labor
- h. To prevent abuse of vulnerable workers and a spiral to the bottom in wages and working conditions, ensure migrant workers receive the same rights and remedies as a country’s nationals
- i. To prevent human trafficking and forced labor, establish enforceable rules for international labor recruiters
- j. To ensure timely enforcement and reduce unwarranted delays, establish clear, universal timelines for consideration of and action upon labor complaints
- k. To reduce excessive discretion to delay or wholly ignore labor complaints, require that a Party that has received a meritorious complaint pursue the complaint by changing permissive language (“may”) to obligatory language (“shall”) (to avoid years-long delays like those confronted in the Guatemala and Honduras cases)
- l. To help raise standards across the region, create an independent labor secretariat that researches emerging labor issues and reports on best practices and establish Trans-Pacific works councils for firms operating in more than one TPP country
- m. To maximize the leverage the U.S. has to improve labor conditions in trading partner countries, the TPP must ensure Parties cannot access the benefits of the TPP until they come into full compliance, in law and in practice, with the obligations of the labor chapter
- n. Include labor and human rights among the criteria for new TPP entrants

**Result:** While the TPP includes some trivial changes to the Labor Chapter from the “May 10” standard, none of the changes provide significant new protections for workers, nor do they remedy the completely discretionary nature of labor enforcement. Two of the proposals above

(b and g) were arguably incorporated into the labor chapter, although in a significantly weaker version. While the TPP also includes side letters/consistency plans to improve labor rights laws in three partner countries (Brunei, Malaysia, and Vietnam), by focusing on legal changes to the exclusion of implementation and enforcement benchmarks, the plans adopt the same failed approach as the Colombia Labor Action Plan. Thus, the LAC has no confidence that they will be effective. Moreover, Mexico, which also has a dismal labor and human rights record, has no such plan.

**Investment: While the Investment Chapter has some very minor differences from the version in the Peru FTA, the LAC's objectives were not met.**

**Key Recommendations:**

Omit ISDS. If ISDS is not omitted from the agreement, make the following changes:

- a. Require investors to exhaust domestic remedies before filing an ISDS case
- b. Require a foreign investor to have the burden of demonstrating that a purported standard of protection under customary international law is based on actual state practice rather than on the unsupported assertions of previous investment tribunals (as the U.S. argued in the *Glamis Gold* case)
- c. Codify the traditional, narrow definition of Minimum Standard of Treatment so that it applies only to the following three areas (as the U.S. argued in the *Glamis Gold* case): the obligation to provide internal security and protection to foreign investors and investment; to not deny justice by engaging in notoriously unjust or egregious conduct in judicial and administrative proceedings; and to provide compensation for direct expropriation
- d. Clarify that regulatory measures that adversely affect the value of an investment but do not transfer ownership of the investment or permanently destroy its *entire* economic value do not constitute acts of indirect expropriation
- e. Narrow the definition of investment to include only the kinds of property that are protected by the U.S. Constitution. This would mean excluding, for example, the expectation of gain or profit and the assumption of risk
- f. Ensure that foreign investors may not use the most favored nation (MFN) principle to assert rights provided by other investment agreements or treaties
- g. Explicitly limit national treatment to instances in which a regulatory measure is enacted primarily for a discriminatory purpose
- h. Clarify the language to ensure that foreign subsidiaries cannot bring investment claims against a nation that is the home of their parent company

- i. Modify the restriction on capital controls (used for example in the U.S.-Korea FTA, Article 11.7.1(a)) so that it allows the use of such controls—at least with regard to circumstances consistent with recent IMF guidance
- j. In the Annex on Expropriation, strengthen the “exception” by omitting the phrase “except in rare circumstances.” In addition, the non-exhaustive list of “excepted” policies should also explicitly include, “labor,” “decent work” as that term is understood by the ILO, and all measures that Parties take in order to comply with the Labor and Environment Chapters of the agreement

**Result:** Although the TPP contains a provision (Article 9.22.7) that restates the general principle of law that a complaining party has the burden of proving its claims, it does not address the concern at issue in recommendation (b) above: that arbitral panels impose their own ideas about the obligations required by customary international law rather than requiring evidence that a purported standard of protection under customary international law is based on how countries actually behave based on a sense of international legal obligation. The new burden of proof provision is not novel, nor a reform. Likewise, there is a new provision (Article 9.5.3) in the MFN Article, but it merely brings the text that was previously in a footnote (as in the Peru FTA, Article 10, Footnote 2) into the main text. It does not at all address the concern at issue in recommendation (f) that investors can use the MFN principle to incorporate substantive rights not provided in the TPP into an investment challenge brought pursuant to the TPP.

In short, **none** of the provisions the negotiators point to as ISDS “fixes” (including Articles 9.6.4, 9.6.5, 9.15, 9.22.7, and Annexes 9-A and 9-B) provide legal certainty that non-discriminatory public interest measures of general application will be safe from ISDS challenges. Labor’s recommendations listed above **do not** appear in the final TPP. Moreover, because of expansion of ISDS into other areas not previously covered in U.S. FTAs (including applying the minimum standard of treatment obligation to financial services rules), the ISDS provisions in TPP are objectively worse than prior ISDS provisions.

### **Enhanced Screening Mechanism for Inward Bound FDI: Objective not met.**

**Key Recommendation:** The LAC recommended that the administration improve the current Committee on Foreign Investment in the United States protocol so that the Committee can examine more than just national security issues, but can also consider economic security. The U.S. should emulate the screening mechanisms that Australia and Canada use (e.g., add a “net economic benefit test”) in order to ensure that FDI is not used to undermine the U.S. economy or U.S. workers. Existing policy interpretation prevents the U.S. from scrutinizing deals such as the original proposal for a China Development Bank loan to Lennar Corporation, which would have required the homebuilder to use a Chinese state-owned construction company. Finally,

we requested that the TPP at least leave room for the U.S. to add such an expanded inward investment review policy in the future.

**Result:** This recommendation was rejected in its entirety by U.S. negotiators although existing screening mechanisms in other TPP countries were allowed to continue to operate.

**Procurement: Objectives not met.**

**Key Recommendations:** Because it can undermine important job creation programs, the LAC recommended omitting a procurement chapter altogether. If a procurement chapter were to be included, we recommended the following improvements:

- a. A carve out from procurement obligations for all procurement projects funded by stimulus funds appropriated in response to a verified recession or depression
- b. An expansion of the “May 10” provision to clarify that living wage obligations and prevailing wage obligations in bids would be considered TPP-consistent
- c. A clarification to ensure that procurement provisions aiming to promote economic and social justice (including “clean hands” requirements, bonus points for bidders with better health and safety records, and obligations to provide benefits for same-sex spouses) would be considered TPP consistent

**Result:** None of these LAC recommendations are included in the final TPP. Although the TPP did show an improvement in Article 15.8.4 by ensuring that failure to pay taxes is an allowable ground to exclude a bidder, it failed to add grounds related to sub-standard labor and environmental performance. Moreover, the TPP text is noticeably weaker than “May 10” as regards procurement. Where the Peru FTA allowed procuring entities to “apply technical specifications . . . to **require** a supplier to comply” with laws covered by the Labor Chapter, the TPP only ensures that a procuring entity may “**promote** compliance” with such laws (emphasis added).

**Dock-on: Objectives not met.**

**Key Recommendations:** The dock-on provisions of the TPP present a potential major problem—the rules negotiated in the TPP could be even more devastating to U.S. workers depending upon which countries join in the future and under what conditions. The LAC urged the Administration to include standards for new entrants regarding labor rights, democratic governance, open markets, and other readiness criteria. Moreover, we urged that the TPP or another legally binding document include language making clear that Congress would be able to vote on each new TPP entrant based on the terms of its final protocol of accession to the

Agreement (rather than no vote at all, or a simple vote to approve the Administration’s commencement of negotiations with a potential new entrant.)

**Result:** The TPP contains no democracy clause or other readiness criteria. Moreover, while it reserves the rights of TPP Parties to apply their own “applicable legal procedures” before a new Party may accede, this language does **not** ensure a Congressional vote. The implementing bill will be critical in this regard, and it must contain language ensuring that a Congressional vote is required before a new entrant may accede to the TPP based on the terms of its final protocol of accession. We would be pleased to work with the Administration to develop appropriate implementing legislation.

The LAC would oppose any implementation language that fails to ensure full Congressional consultations and a final vote on accession. No future president should be able to unilaterally grant membership into the TPP on behalf of the U.S. Unfortunately, given the passage of Fast Track 2015, if the implementing bill does not contain the proper language, Congress will have no ability to fix such a grievous mistake.

#### **Elimination of Technology Transfer Mandates and Production Offsets in Return for Market Access: Objective not met.**

**Key Recommendation:** Some foreign countries rely heavily on official and non-official policies that force U.S. companies to transfer technology, production, and jobs in return for market access or government procurement. While such activity has been well-noted by the Department of Commerce’s Bureau of Industrial Security in its annual reports to Congress with respect to the defense industry, this market distorting mechanism also occurs in the commercial sector—and the effect is clear: it is yet another incentive to move jobs and factories from the U.S. The LAC recommended a clear prohibition on such activity.

**Result:** The TPP contains similar substandard language on offsets as was included in prior trade agreements. While it prohibits offsets with respect to “covered procurement,” it does not prohibit any other offsets. Moreover, Chapter 15 (Government Procurement) allows Malaysia to continue to enforce offsets in covered procurement for 12 years and allows Vietnam to do so for 25 years. This phase-in period for Vietnam is likely to be particularly devastating to the U.S. aerospace industry, which is already producing in Vietnam. In Vietnam in particular, such production will be performed in workplaces not legally required to respect freedom of association for at least the first five years after entry into force, and potentially much longer (see analysis of the Labor Chapter and the Vietnam Labor Conditions).

## Intellectual Property & Drug Pricing Transparency: Objectives partially met.

### Key Recommendations:

- a. For copyright, the LAC recommended strong provisions to protect workers (including actors, writers, musicians, and others) whose income and standard of living rely upon royalties and other IP-related payments. Illegal downloads and similar acts of intellectual property theft have devastating consequences on creative arts workers across the nation. The LAC supports efforts to ensure that agreements help curb such theft, which robs American families of their incomes.
- b. For patents, the LAC similarly supports strong provisions. Industrial espionage and other forms of patent theft undermine American workers and their employers. On the other hand, with respect to pharmaceutical products, the LAC values human life and health over monopoly rights. Therefore, we recommended that the TPP adhere to TRIPS provisions, or at least “May 10” if TRIPS-plus provisions were required. The LAC specifically opposed patent linkage, excessive data/market exclusivity periods, evergreening of patents, bans on pre-grant opposition to patents, and a so-called “transparency annex” that gives drug makers leverage over drug listing and pricing decisions made by government health programs.

**Result:** The TPP’s copyright provisions are satisfactory. However, its medicines provisions are not consistent with valuing human health and life over profits for pharmaceutical companies. The TPP includes provisions locking in an agenda likely to raise prices for life-saving medications. It includes patent linkage, patent evergreening, a five to eight year market exclusivity period for “biologic” drugs, and a “transparency annex” that provides drugmakers more leverage over drug listing and pricing decisions. Though some observers cheer that these provisions are “not as bad” as they could have been, they are all worse than the status quo. The TPP’s medicines provisions are decidedly anti-development and fall short of “May 10” provisions in a number of areas (see the “May 10” section for details).

### **Public Services: Objective not met.**

**Key Recommendation:** The LAC recommended an expanded carve out for public services to ensure the right of state, local, and national governments to provide public services at the level and in the manner they see fit.

**Result:** The TPP includes the same inadequate language on public services as prior agreements (see Article 10.1 and Annex II).



## **Financial Services: Objective not met.**

**Key Recommendation:** The LAC recommended a clarifying rewrite of the “prudential exception” to ensure that countries are free to take necessary actions to protect their financial systems without the deterrent effect of international financial services firms threatening legal action under the TPP. Even if the cases were to fail, the expense of mounting a defense can have a deterrent effect.

**Result:** The TPP’s “prudential exception” (Article 11.11.1) and the related Article 11.22 (Investment Disputes in Financial Services) are substantially identical to the corresponding provisions in the Peru FTA (Articles 12.10 and 12.19). Not only is the unfortunate ambiguity of the prudential exception retained, but the “prudential filter” mechanism provides no sure path to a positive determination that a challenged measure will be protected by the exception in Article 11.11.1, particularly now that the grounds for such challenges have been expanded to cover the “minimum standard of treatment” (Article 11.2.2(a)).

## **Climate Change: Objective not met.**

**Key Recommendation:** In light of the bilateral U.S.-China agreement on climate change and clean energy cooperation concluded during the course of the TPP negotiations, the LAC recommended the TPP incorporate rules to ensure that U.S. compliance with this agreement would not harm U.S. workers by making U.S. production costs less competitive. Specifically, we suggested that the TPP make clear that countries failing to address climate change could have a border adjustment fee applied to their exports to offset a refusal to appropriately address climate change mitigation.

**Result:** The TPP includes no provisions relating to climate change or border adjustments. Because it fails to address climate commitments the U.S. has already made, the TPP is a step back from the status quo. In order for a climate strategy to succeed, all countries must do their respective parts. Failure to address climate rules or border adjustments or fees in the TPP means that not only could U.S. climate efforts be undermined, but the offshoring of good American jobs in energy-intensive and trade-exposed industries (including steel and aluminum) could accelerate.

## VI. Analysis of the TPP's Likely Effects on Critical Industries & Sectors

### Manufacturing—General

The Trans Pacific Partnership will seriously undermine the future of domestic manufacturing production and employment. As was noted in an initial evaluation of the TPP published in the *Wall Street Journal*, the combined U.S. trade deficit in manufacturing, including automobiles and auto parts, would increase by \$55.8 billion under the TPP.<sup>5</sup> Utilizing the conservative estimate of the Department of Commerce that each \$1 billion in trade correlates to 6,000 jobs, the TPP will cost, at a minimum, 330,000 jobs in the manufacturing sector. That estimate does *not* include the indirect cost in terms of jobs or on wages and living conditions of all the primary and secondary workers who will be negatively affected by the agreement. Indeed, we believe that the job loss potential of the TPP is much higher.

The importance of the manufacturing sector to the U.S. cannot be overstated. Indeed, while U.S. job growth overall has rebounded, the manufacturing sector still lags significantly. The Administration's goal of creating one million new manufacturing jobs by January 2017 is far from being met. Indeed, the potential job loss under the TPP could almost completely wipe away the few manufacturing jobs that have been created to date. Manufacturing jobs pay considerably more, on average, than other private sector jobs; the TPP will further exacerbate wage stagnation and decline as well as income inequality. The losses in this sector spread to other sectors including the provision of public services as demand slows from those who lost jobs and communities find their tax bases reduced.

The single greatest threat to manufacturing in the TPP results from the rules of origin provisions in the auto and auto parts sector. Under this provision, which requires 45 percent, at most, of a finished automobile to consist of value originating in the TPP countries, the majority of an auto could consist of value created outside of the TPP, from a country such as China. The North American Free Trade Agreement began the fundamental shift of auto assembly and auto parts production from the U.S., with massive outsourcing of production to Mexico. Under NAFTA, 62.5 percent of the value of a vehicle must originate in the signatory countries to qualify for preferential trade treatment. The immediate reduction of that requirement to 45 percent, with the potential for significantly more foreign-sourced parts to be deemed as originating in the TPP for calculation purposes, will deal a devastating blow to U.S. production and employment. The technical and detailed provisions in this critical area cannot mask the serious negative impact that the TPP will have.

The auto and auto parts sector is a critical job creation engine in the U.S. The single largest customer for the steel industry in the U.S. is the auto sector. The single largest customer for

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<sup>5</sup> "Pacific Trade Deal Likely to Have Narrow Reach," *Wall Street Journal*, Mar. 15, 2015.

coated free sheet paper in the U.S. is the auto sector. Glass, rubber, plastics, chemicals, and many other critical manufacturing sectors depend on the auto sector for significant portions of their sales.

“Offsets” are a market distorting activity referring to “any condition or undertaking that requires the use of domestic content, a domestic supplier, the licensing of technology, technology transfer, investment, counter-trade or similar action to encourage local development or to improve a Party’s balance of payments accounts.”<sup>6</sup> Offsets are used to a great extent in manufacturing. TPP would permit developing countries to “adopt or maintain” offsets with respect to covered government procurement during a so-called transition period. In the case of Vietnam, this transitional period is for 25 years. For Malaysia, the period is 12 years.

The continued use of offsets by Vietnam and Malaysia provides them with additional leverage to demand that production be transferred there, under the guise of government procurement, for many years. Once a factory is built for the purposes of fulfilling an offset requirement, the factory will not simply disappear at the end of the contract. Instead, it can become a less expensive outsourcing alternative to U.S. production. The transfer of this production, both during and after the transition period, could result in the direct loss of jobs here in the U.S. in the short term and an even greater loss of jobs and wages in the long-term as Vietnam and other developing countries who are members of the TPP (including prospective members such as Thailand) develop their own manufacturing industries to compete with U.S. manufacturers and their domestic suppliers.

The negative impact of the TPP on manufacturing is further exacerbated by the failure of the agreement to ensure that effective disciplines to address currency manipulation were included in the agreement. The provision on currency manipulation that is relegated to a side agreement amounts to little more than an annual opportunity to discuss a country’s concerns about currency manipulation by another TPP member. This Administration has refused to address currency manipulation by China, Japan, and South Korea in the past. TPP participants Vietnam and Malaysia have now begun to mimic those countries’ activities recognizing the enormous trade advantages they may reap with little fear of an effective response.

The TPP’s limited provisions to address the significant impact and continuing economic rise of state-owned enterprises, and those entities operating in concert with state directives, will also seriously undermine U.S. manufacturing exports and lead to increased imports of unfairly priced products into the U.S. market thereby jeopardizing production and employment. The chapter on SOEs fails to provide a specific standard that can be used to judge the anticompetitive impact of SOEs and the adverse consequences test could limit the ability to respond as, in normal circumstances, it requires that injury occur for a period of one year or

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<sup>6</sup> TPP Chapter on Government Procurement, Article 15.1.

more. Significant damage can be done during that period of time through repeated attacks on our market.

Overcapacity is a problem that was ignored by the negotiators. Despite a crisis in the U.S. steel market, China continues to maintain significant capacity that is produced based on non-market economic forces and there are no provisions in the TPP to address this threat. Thus, Vietnam, which has indicated its intention to develop substantial domestic steel-making capacity, will only add to the existing worldwide glut. The TPP provides 13 years of tariff protection for Vietnam's nascent steel industry providing it sufficient time and relief from market pressures to build up its industry. This will only limit Vietnam as an export market for U.S. steel while also further contributing to a worldwide glut driving down prices and, here in the U.S. shuttered capacity, and lost jobs. Overcapacity is a rising threat in a number of other important industrial sectors as well.

Advancing the interests of our nation's manufacturing sector was simply not a priority for U.S. negotiators. Indeed, the so-called "utilization of global value chains" was the driving force behind the TPP. This terminology "utilization of global value chains" is simply a euphemism for further outsourcing of production and offshoring of jobs to maximize profit-making potential for multinational companies without advancing the interests of working people.

### **Aerospace Manufacturing**

The objections stated in these comments are of special significance with respect to the aerospace and related industries. The benefits to our national economy of the aerospace industry cannot be overstated. The industry employs more than 500,000 workers, many of whom are highly skilled. The industry is also responsible for developing state of the art technology that has led to new and innovative industries. Aerospace workers also earn high wages. A significant number earn well-over \$25 an hour. Vietnam and Malaysia, both TPP countries, clearly recognize the importance of aerospace and are engaged in producing products for the aerospace and related industries.

As aerospace manufacturers continue to expand their supply chains, the ability of these countries to unfairly compete with domestic manufacturers poses a real risk to U.S. workers, their communities and of course the U.S. economy. The TPP fails to obligate Vietnam and Malaysia to fully comply with international labor standards before it receives the benefits of the TPP,<sup>7</sup> which will permit employers in these nations to continue to suppress wages below where they would be if workers were free to exercise fundamental workplace rights. This wage suppression, in turn, will result in aerospace companies and their suppliers increasingly moving work to Vietnam and Malaysia to take advantage of cheap, exploited labor.

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<sup>7</sup> See the Section on the Labor Rights Chapter for additional information.

Offsets are used to a great extent in the aerospace and related industries. As explained above with respect to general manufacturing concerns, the TPP would permit some TPP countries to “adopt or maintain” offsets with respect to covered government procurement during a so-called transition period. In the case of Vietnam, this transitional period is for 25 years. For Malaysia, this period is 12 years.

## **Air Transport Services**

Chapter 10 – “Cross Border Trade in Services – applies to a much broader range of air transport related services than the GATS or any other trade agreement previously entered into by the United States. We have two concerns with the Chapter: 1) the scope of the services covered, and 2) the process by which the final text was reached.

With respect to the scope of the coverage, our primary concern is with “ground handling services” (GHS), a group of services that has not been covered in prior U.S. trade agreements. GHS has been defined to include several services the scope of which are not themselves defined and which are subject to multiple interpretations. These include “flight operations,” “crew management,” and “flight planning,” all of which appear to include or constitute airside, rather than groundside, services. Flight operations, for example, seems to be an entirely airside matter. The term is not defined in the federal aviation regulations, but could be interpreted to include core flight activities of an airline.

We have been advised that, however the elements of GHS might be construed, it does not matter because the U.S. has listed GHS, along with most of the other aviation services covered by Chapter 10, on its schedule to Annex II. While we appreciate the placement of these services in Annex II, we note our disappointment that air transport services are included in the TPP at all. We urge the President and Congress to proceed with great caution.

With respect to the process of developing the Chapter 10 text, we are quite disappointed that critical text was developed without input from the LAC. We did not see—or even hear about—the broad range of services that were going to be covered by Chapter 10 until the text was made available to cleared advisors after the Maui negotiating round. At that point, the text we are concerned about was unbracketed, i.e., already effectively finalized. We believe that this process defeated a fundamental purpose of the cleared advisor process: to allow timely consultations about sensitive and potentially controversial subjects in order to ensure that the best interests of our citizens are advanced.

## **Apparel and Textile**

The TPP will grant substantial trade benefits, including eventual duty-free access for all TPP countries to the U.S. market. The inclusion of Vietnam in this agreement is of major concern to U.S. textile and apparel workers due to the size of Vietnam’s apparel industry, extensive government subsidies, and Vietnamese government ownership of large apparel manufacturing facilities.

Even before this agreement, Vietnam is the second largest textile and apparel exporter to the U.S., shipping more than \$9 billion in product to the U.S. in 2014. This will surge under TPP, which will put enormous pressure on U.S. manufacturers and workers, as well as those of Central America.<sup>8</sup>

We are pleased that the TPP agreement will utilize a yarn-forward rule of origin for the majority of textile and apparel products. Unless a product is specifically exempted (and one problem with the agreement is that there are too many exemptions), all yarn, fabric and final assembly work associated with apparel or textile product must be performed within the TPP region. We are also pleased to note that, unlike previous U.S. trade agreements, TPP does not include a tariff preference level. This would have allowed TPP countries to export a significant amount of apparel and textile product to the U.S. duty free without meeting the yarn-forward rule of origin.

The U.S. government will eventually eliminate all import duties on all textile and apparel products as part of the TPP. Products will fall into three baskets for purposes of tariff reduction. The “A” basket (least sensitive products) will have immediate duty free treatment. The “B” basket (moderately sensitive products) will have a five-year duty phase out. The “X” basket (most sensitive products) will have a 10 to 12 year duty phase out. It is estimated that over 50 percent of Vietnam’s trade will receive the longest scheduled phase-out.

We note that, under this scheme, in the unlikely event that the U.S. chooses to exercise its rights under the Vietnam labor side letter to halt further tariff reductions until Vietnam has ensured that workers can exercise freedom of association, no action can be taken until “after the fifth anniversary of the date of entry into force” of the TPP. Therefore, the soonest that action could be taken would be during Year 6 of the agreement, at which time Vietnam will have already received substantial benefits in this key sector, which will have likely induced additional investment in, and movement of global supply chains to, Vietnam even as its workers continue to lack the freedom to exercise fundamental labor rights consistent with internationally recognized standards.

### **Auto & Auto Parts Industry**

It is a source of great national pride that the auto sector is once again one of the leading manufacturing export sectors in the United States. We commend President Obama for taking bold action to save more than one million jobs in the auto sector during the economic crisis. Last year, roughly 2.1 million new cars and trucks were built in the U.S. and shipped to other

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<sup>8</sup> Even with the yarn-forward rule largely intact, much Central American production could migrate to Vietnam, with its lower wages and authoritarian regime. The consequences of further degrading Central America’s jobs base are dire. See the AFL-CIO’s “Examining the Root Causes of the Central American Refugee Crisis” for more information. Available at: [http://www.aflcio.org/content/download/141601/3683141/AFL-CIO\\_CAFTAReport\\_2\\_NO+BUG.pdf](http://www.aflcio.org/content/download/141601/3683141/AFL-CIO_CAFTAReport_2_NO+BUG.pdf).

countries, the first time auto exports surpassed two million. This number represents a 73 percent increase from 2004. The U.S. auto industry's impact is felt throughout our economy and has long been the cornerstone of the manufacturing sector. It is large, profitable, and competitive. In 2014, a total of 16.5 million U.S.-built light vehicles were sold (in the U.S. and abroad). The TPP should build on this success in order to continue to create jobs in the United States. If the TPP fails to do this, it could create rules that will lead to greater investment in Asia at the expense of the United States. The LAC is deeply concerned about the impact the TPP could have on the supply chain and the wages of workers in the auto-manufacturing sector over time. We have repeatedly asked the Administration for an in-depth analysis of the possible ramifications of the TPP on the U.S. auto sector and the related supply chain, but have never received it. We have not been made aware of any evidence to suggest the TPP will have a positive impact on the U.S. auto industry and domestic employment.

Fair rules are needed for all countries to truly compete in every sector; the auto sector is no different. Countries from around the world sell cars in America with virtually unfettered access and no non-tariff barriers. Domestic auto companies sell less than half of all vehicles sold in the U.S. The same cannot be said for all TPP countries. For example, Japan has the most closed auto market in the developed world, with imports gaining less than seven percent of the market. Deeply entrenched non-tariff barriers are the norm, and the Japanese government has a long track record of investing in foreign currencies to undervalue the yen, making Japanese exports cheaper than they otherwise would be.

Unfortunately, the TPP lacks enforceable currency rules, with the parties instead relying on a side agreement and "diplomacy." Diplomacy has proven to be an ineffective approach to addressing currency misalignment, especially with respect to Japan. In the past, U.S. administrations concerned about promoting U.S. manufacturing and addressing the large U.S. trade deficit have tried more rigorous approaches (e.g., the 1985 Plaza Accord). The LAC recommended a rigorous approach in the TPP: enforceable currency rules, subject to trade sanctions. Unfortunately, this recommendation was ignored.

Japan's auto market is the most closed in the developed world. This is why, from the outset the LAC has urged USTR to include TPP provisions ensuring that the U.S. would not lower tariffs on Japanese cars, trucks, and related parts until Japan demonstrates actual market opening and its automobile import rates approach the rates of other developed countries. The U.S.-Japan bilateral agreement on automobiles is well intentioned but fails to incorporate our recommendation. We are not convinced the TPP will effectively break down unfair trade barriers that permeate Japan's auto market. Japan's commitments are simply inadequate.

This is hardly the first time the U.S. has tried to pry open Japan's auto market, but every President since Ronald Reagan has failed. We remind the Administration that when Japan officially joined the negotiations on April 12, 2013, USTR released the following statement:

*“Japan has agreed, through our consultations, that U.S. tariffs on imports of Japanese motor vehicles will be phased out in accordance with the longest staging period for any other product in the TPP negotiations, and that phase-outs of these tariffs will be “back loaded” to take place at the end of the staging period.”*

Now that the tariff schedules have become available, it is clear that tariffs on many of Japan’s agricultural products will not be eliminated, while the tariffs for U.S. cars, trucks, and auto parts will be. We view this as a failure to achieve the promised outcome.

Japanese automakers eventually stand to receive a one billion dollar annual tax break on exports to the U.S., regardless of whether promised new markets in Japan materialize for U.S. exporters. We reiterate that the TPP should have required that Japan actually open its market to imports before enjoying tariff reductions from the U.S. Hard working U.S. families have heard enough empty promises. Japan is far from the only country in the TPP that has a strong manufacturing base and a long history of maintaining a closed market. All remaining U.S. tariffs on cars, trucks, and parts will eventually be eliminated. It is less than certain, however, that non-tariff barriers deployed by all TPP participants will in fact be eliminated.

It is important to note that the TPP includes a transitional safeguard provision but, unlike the Section 421 provision in China’s protocol of accession, it requires that the U.S. compensate a TPP partner for the relief we impose to address the injury they cause. In essence, we are being asked to pit one interest against another: relief from injury for one sector will potentially result in the loss of trade benefits in other sectors. This makes the transitional safeguard provision demonstrably weaker than prior safeguards.

Prior trade agreements have facilitated the offshoring of jobs. For example, since NAFTA, Mexico’s auto industry has exploded while U.S. factories have closed.<sup>9</sup> American Axle, which has closed four out of five plants in the United States since the passage of NAFTA, provides just one cogent example. Meanwhile, in 1998, American Axle opened a plant in Silao, Mexico, which now has 2,700 employees. As of 2011, 60 percent of the plant’s products were exported from Mexico.

In short, we view the TPP as devastating for the U.S. auto, light truck, and related parts sectors. We expect U.S.-based production to be negatively impacted, as it has been with prior similar deals, hurting both jobs and wages and harming communities that rely on the multiplier effect of good manufacturing jobs.

## **Call Centers**

Call center workers take orders for goods and services, provide product support, answer consumers’ questions, perform market research, and more. These jobs are a major source of

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<sup>9</sup> See, e.g., “Mexican plant becomes big link in American Axle Chain,” *Crains Detroit Business*, Jul. 1, 2011.



employment in the U.S., as nearly 4 percent of the U.S. workforce is employed in call centers. However, call center jobs are increasingly being offshored, including to TPP member nations such as Mexico, as well as countries that have publicly expressed interest in joining the TPP, such as the Philippines. This offshoring not only costs U.S. jobs, but also puts Americans' data security at risk. Unfortunately, the TPP will likely speed the offshoring of such jobs while failing to address data security concerns.

In many communities across the U.S., call center jobs have replaced manufacturing jobs that had been automated or sent overseas. The Bureau of Labor Statistics estimates that call center workers make an average of \$15.56 per hour.<sup>10</sup> While this is not high pay by manufacturing standards, it is measurably better than the minimum wages available in retail and fast food sectors—sectors call center workers may end up in when their jobs are offshored. Call centers are often primary sources of stable jobs in regions that have been decimated by poor trade policy.

According to the Bureau of Labor Statistics, 200,000 U.S. call center jobs were lost from 2006 to 2012, as the trend of offshoring continued. One estimate finds that 3.4 million service sector jobs have been offshored since 2003.<sup>11</sup> Meanwhile, the call center industry is booming in many TPP member nations and prospective member nations. Especially attractive locations for outsourcing include those with high levels of English fluency, which for purposes of the TPP include new partners Malaysia and New Zealand and potential TPP partners Taiwan, India and the Philippines. The Philippines has over 600,000 call center agents primarily serving the U.S. market,<sup>12</sup> while industry analysts project that the size of the call center industry there will double in the coming years.<sup>13</sup> Meanwhile, the number of call center locations in Mexico increased from 8,632 to 18,701 between 2007 and 2010.<sup>14</sup>

Instead of combating this trend, the TPP will exacerbate it via three mechanisms described below, which are embedded in the agreement.

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<sup>10</sup> Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment Statistics*, December 1, 2015, [http://www.bls.gov/oes/current/naics5\\_561420.htm](http://www.bls.gov/oes/current/naics5_561420.htm).

<sup>11</sup> "The Trans-Pacific Partnership - People of Color Beware: Your Jobs, Wages, and Health Are at Risk," *Communications Workers of America*, last modified December 10, 2014, [http://files.cwa-union.org/national/issues/PolicyIssues/Trade/TPP\\_Fact\\_Sheets\\_11\\_19\\_and\\_on/December-2014-fact-sheets/21041210cwapeopleofcolor.pdf](http://files.cwa-union.org/national/issues/PolicyIssues/Trade/TPP_Fact_Sheets_11_19_and_on/December-2014-fact-sheets/21041210cwapeopleofcolor.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> "Philippines aims to remain call center capital of the world," *Rappler*, last modified September 18, 2012, <http://www.rappler.com/business/12658-philippines-aims-to-remain-call-center-capital-of-the-world>.

<sup>14</sup> Ordonez, Franco, "Mexican call centers provide jobs, network for deported teens," *McClatchyDC*, Sept. 1, 2013. Available at: <http://www.mcclatchydc.com/news/nation-world/world/article24754915.html>.

*Investment Incentives:* The excessive protections in the Investment Chapter, including the use of ISDS that, according to the Cato Institute, “effectively subsidizes[s] outsourcing,”<sup>15</sup> provides an incentive to outsource call center jobs. Call center wages in the U.S. are generally substantially higher than those in countries with growing call center industries, including Mexico and the Philippines. A fair and equitable justice system and transparent and accountable administrative procedures are important factors that have long encouraged companies to create and maintain call center operations in the U.S. Through its investment protections, the TPP undermines these very advantages, making countries with lower wages and exploitive labor practices more attractive places to do business. For example, the TPP guarantees U.S. companies that outsource jobs to other TPP member nations a “minimum standard of treatment,” which includes “fair and equitable treatment,” and “full protection and security”—protections substantially broader than those afforded to domestic investors under domestic laws.

*Government Procurement:* The United States’ government procurement schedule prevents dozens of federal government agencies from providing bidding preferences for a wide range of services to firms owned or operated domestically. While U.S. companies theoretically are afforded similar rights in other TPP member nations’ procurement processes, there simply is no meaningful market for U.S. call centers to provide services procured by foreign governments. As such, the practical outcome of these commitments is that more U.S. government contracts will be provided to firms operating in other TPP member nations, while the U.S. will likely gain little access to foreign procurement markets for call center services. To make matters worse, the TPP is likely to eventually extend this poor policy choice to state procurement practices given that it *requires* parties to re-open negotiations on sub-federal procurement within three years.

*Data Localization:* The Electronic Commerce Chapter contains provisions on data localization that will adversely affect the U.S. call center industry. Specifically, the chapter mandates that member nations “allow the cross-border transfer of information by electronic means, including personal information” and forbids member nations from requiring the use or location of computing facilities in their territory as a condition of doing business. These provisions would significantly limit the options that the U.S. government would have to incentivize the location of call center services domestically.<sup>16</sup>

Troublingly, the Electronic Commerce Chapter’s requirements for data privacy are extremely weak. Article 14.8 simply directs member nations to “adopt or maintain a legal framework that

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<sup>15</sup> Daniel J. Ikenson, *A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement*, Mar. 4, 2014 available here: <http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state>.

<sup>16</sup> The LAC notes with approval that financial institutions are not included in the TPP’s obligation to allow sensitive personal data to be stored any place in the world (Article 14.13.2). The LAC had recommended a more extensive exception to ensure the privacy and security of data.

provides for the protection of the personal information," without further guidance beyond the notation that "each Party should take into account principles and guidelines of relevant international bodies." These protections fall far short of the protections embodied in U.S. domestic law, including the Health Insurance Portability and Accountability Act. As such, call center operators in TPP member nations with lax laws or policies governing data security would be afforded non-discriminatory treatment as mandated by the Chapter, assuming that those nations met even the barest of requirements on data privacy established in the Chapter. Moreover, because the chapter lacks any provisions to ensure that those harmed by the theft of their data can legally serve and hold account responsible parties offshore, the Chapter is likely to leave even more Americans victims of international fraud and negligence without adequate recourse (*vis-à-vis* the status quo).<sup>17</sup>

The Philippines, which, as noted above, is working to join the TPP in the future is an instructive example here. The Philippines passed a reasonably strong data privacy law in 2012, yet the principal governing body to oversee the law does not yet exist. As such, consumer data sent to the Philippines remains at risk of data breaches or misuse, yet the nation has still met the standard of "adopt[ing]" a legal framework. By requiring non-discriminatory treatment of data but failing to impose strong privacy standards, the TPP incentivizes the shipment of call center jobs to countries with lax security policies and places consumer data privacy (as well as jobs) at risk.

## Dairy

The U.S. dairy industry employs 140,000 workers —about 40,000 of them are members of the International Brotherhood of Teamsters—and the LAC is concerned that the TPP will pose a drag on dairy industry jobs and wages. Especially concerning are the unbalanced dairy market access provisions of the TPP and the failure of the agreement to include enforceable disciplines against currency manipulation. The leadership of the Teamsters dairy conference shares the lukewarm reaction of the American dairy industry to the TPP market access provisions across the range of products covered.

The LAC would like to emphasize that U.S. dairy exports to TPP partner countries have been growing steadily for the last decade. Japan is already the sixth largest market for U.S. dairy products; U.S. exports to Malaysia are five times the value of that market access ten years ago; similarly, last year, the U.S. exported \$264 million of dairy products to Vietnam, quintuple the value of a decade ago. We believe these trends demonstrate that U.S.-based dairy farmers and workers, in production and processing, would continue to expand market share throughout the Pacific Rim even without the TPP. The TPP provides no guarantee that export growth will accelerate.

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<sup>17</sup> For more information on the existing problems holding international suppliers accountable to U.S. residents, see Hearing on H.R. 5913, the "Protecting Americans from Unsafe Foreign Products Act," Subcommittee on Commercial and Administrative Law, U.S. House of Representatives, May 1, 2008. Available at <http://judiciary.house.gov/index.cfm/hearings?ID=3897E579-C03A-9943-0EA7-684335EB1E53>.

The lengthy phase-outs of tariffs support our skepticism about the purported benefits to the dairy industry of this agreement. For example, Japan's tariffs on cheese will not be eliminated for 16 years; and its tariffs on whey will not go away for 21 years. Malaysia enjoys a 15-year transitional period to create new tariff-rate quotas (TRQs) covering fluid milk and Canada will take a decade to eliminate its high tariffs on whey powder. Further, Canada's commitment to TRQ percentage increases over the next twenty years are all in the low single digits. These dairy market access concessions hardly comprise the economic benefit that farmers, processors, and dairy workers were led to believe would be a legacy of the TPP—particularly in light of the new access provided in our own market and the TPP's inclusion of dairy export powerhouse New Zealand and its monopolistic dairy industry.

The bottom line, however, lengthy and anemic market access provisions notwithstanding, is that tariff reductions are meaningless in an agreement that fails to halt currency misalignment by all the signatory states. As our TPP partners inevitably and opportunistically devalue their currencies against the dollar, U.S. dairy exports will be less competitive, as will any other product or service produced or provided by America's workers.

### **Meat/Proteins**

The TPP's unambitious approach toward Japan's lowering of its tariffs for U.S. protein exports is confounding. While the U.S. reduces its tariff rate to zero over 15 years, Japan phases its tariffs down over periods of 20-30 years. Japan also has an additional safeguard measure, being referred to as a "snapback." If the tonnage of imported meat exceeds a certain threshold, Japan can reinstate the current tariff rate of 38.5 percent. This snapback rate will be slowly reduced over 15-20 years.

Additional provisions that cast doubt on the market access goals in the TPP are included in the SPS chapter. Vague language regarding science, risk analysis, and regulatory equivalence will give TPP trading partner countries plenty of wiggle room to restrict market access. For instance, the controversial pig and cattle growth hormone, ractopamine, is authorized in the U.S. but banned outright in Europe, Russia, and China, and discouraged in UN guidelines. Since the risk assessment studies and their interpretations differ, each country takes its own stance on the safety of the drug, and no definitive trade violation can be determined.<sup>18</sup> Japan, a TPP trading partner, also imposed a ban on U.S. beef that remains in effect to this day, based on the age of the cow, reflecting a lingering fear of mad cow disease (BSE). Though Japan only instituted the ban after one cow fell ill, dozens of countries follow its lead.

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<sup>18</sup> Another approach that could be taken would be USG assistance to help the U.S. industry phase out the use of chemicals and additives around which there is no consensus regarding their impacts on human, animal, plant and ecological health.

Furthermore, the procurement language in the TPP opens up government contracts for protein, including lucrative as DOD contracts, to TPP countries. This could have a big impact on the protein marketplace in the U.S. Finally, the low labor standards and wages in many of the TPP countries (unlikely to be affected in the short term or even in the long term by the provisions in the Labor Chapter) will result in protein processing moving overseas. The minimum wage in Vietnam is about 60 cents an hour. In a small margin industry such as this one, the appeal for less regulation and lower labor cost is undeniable.

On the other hand, the TPP does nothing to protect citizen choices regarding food safety or food labeling (including country-of-origin meat labeling, dolphin-safe tuna labeling, and GMO labeling). Therefore, the TPP is potentially the worst of both worlds. It provides very little to ensure that U.S. workers in the meat industry will gain jobs or wages through significant export increases, nor does it raise the bar on food safety or consumer information in ways that will protect working families and our democracy.

### **Public Sector**

Public sector workers have been harmed by existing U.S. trade policy and are likely to be further harmed by the TPP. Prior unbalanced U.S. trade policy, designed by and for global corporations, has already cost public workers in terms of lower wages, fewer jobs, and reduced infrastructure investment. There are no new or revised terms in the TPP that are poised to alter this trend.

The LAC believes that there is strong evidence to support the public provision of public services. The decision to provide some services through the public sector ensures efficient and equitable access to these services—for example, many remote and rural communities were connected to the nation’s power grid only because *public* utilities made it possible. Private service providers, in contrast, often fail to provide services to geographically isolated communities or to individuals who cannot afford to pay. Public services benefit the economy, for instance by providing education and training as pathways out of poverty or by linking families in distress with needed healthcare, housing, and food assistance.

The privatization of public services has often demonstrably lowered quality, decreased wages, and working conditions for service workers, and excluded the poorest and most geographically isolated customers, those too marginalized to deliver a profit. In 2011, the Project on Government Oversight (POGO), which accepts no union contributions, compared the costs of federal employees and contractors in a seminal study entitled *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, the first to compare service contractor billing rates to the salaries and benefits of federal employees.<sup>19</sup> POGO determined that on average, contractors charge the government almost twice as much as the annual compensation of

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<sup>19</sup> POGO’s *Bad Business* study can be found here: <http://pogoarchives.org/m/co/igf/bad-business-report-only-2011.pdf>.

comparable federal employees. Of the 35 types of jobs that POGO looked at in its report, it was cheaper to hire federal workers in all but two cases.

**The TPP Is Likely to Have a Negative Impact on Public Sector Wages:** Existing trade rules have reduced the annual wages of a full-time American worker without a four-year college degree by \$1,800 a year on average, in both traded and non-traded sectors.<sup>20</sup> Non-college-educated workers comprise about 70 percent of America’s workforce, including large portions of its public sector workforce. The TPP is therefore expected to drive down public sector wages, benefits, and working conditions.

**The TPP Is Likely to Reduce Revenues Available to Provide Public Services:** Given the TPP’s expected impacts on manufacturing, it is likely to reduce the property taxes in manufacturing communities.<sup>21</sup> By extension, when communities lose factories, businesses that provide services to factories and their employees lose revenue, decreasing both sales and income tax revenues. Detroit, Michigan, Bridgeport, Connecticut, and Baltimore, Maryland have all experienced this cycle. Disused land and buildings and unemployed residents lead to reduced federal, state, and local tax revenues. Combine this with the added leverage that tax-avoiding global corporations will have over our economy after the TPP—attributable in part to ISDS and other bad trade policies—and the TPP is a recipe for disinvestment: exactly the kind of disinvestment that has been plaguing not only Amtrak, but infrastructure, education, and training programs across the country. Public disinvestment means a loss of public sector jobs and wages.

**The TPP Fails to Adequately Protect Public Services from Trade Commitments:** The U.S. has never clearly exempted public transportation, sanitation, water or wastewater, utility, postal or other services from its trade deals—nor has it exempted public services from expropriation and minimum standard of treatment obligations—and the TPP is no exception. If the U.S. or a state or local government decide at some future date to reverse a failed privatization experiment, the U.S. could face a state-to-state or an investor-to-state challenge—potentially well after good-paying unionized jobs have been eliminated. For example, deprivatization of an immigration detention center or cancellation of a GPS-monitoring contract could potentially result in a case against the U.S., which, if successful could cost untold millions in taxpayer monies.<sup>22</sup>

## Steel

The steel sector will be particularly hard hit by the TPP, a blow that the industry and its workers cannot afford and do not deserve. The TPP makes a number of fundamental errors in

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<sup>20</sup> “Globalization has lowered wages for American workers, new EPI study finds,” EPI Press Release, Mar. 22, 2013. Available at: <http://www.epi.org/press/globalization-lowered-wages-american-workers/>.

<sup>21</sup> To say nothing of the permanent reduction in tariff revenues not only in the U.S., but all TPP countries. This loss of revenue hits developing country partners especially hard.

<sup>22</sup> There are existing global corrections firms that operate prisons and immigration detention centers and provide GPS monitoring in the U.S. that could mount such challenges.

dealing with the issues facing this sector that may also affect other metal producing companies and broader manufacturing. First is the complete failure of the TPP to effectively discipline currency misalignment. The agreement reached separately by the Finance Ministers to the TPP countries provides no specific, enforceable limitations on the currency manipulation of the TPP countries. This is not a hypothetical issue. Indeed, earlier this summer when the People's Republic of China devalued its currency, Vietnam and Malaysia followed suit, mimicking the actions of China without fear of reprisal by the U.S. Currency manipulation has also been utilized by Japan as a predatory act. This practice acts as a tax on U.S. exports to the manipulating country and a subsidy for that country's products exported to the U.S. The currency side deal may shed more sunlight on the actions of the offending countries, but for those who are adversely affected by the manipulation, it will do little to address the threat.

Second is the rising threat that the rules of origin in the auto and auto parts sector will have on steel. The assembled automotive rule, requiring only 45 percent of a vehicle's content, by value, to come from the TPP region is unacceptable. The TPP should support, not undermine, job retention and creation among the participating countries. Overnight, producers in North America will see the existing North American Free Trade Agreement's 62.5 percent content standard plummet. This will act as an incentive for further outsourcing of production and offshoring of jobs as a majority of a vehicle's content, by value, could come from a country such as China and still receive the preferences of the TPP.

Domestic steel production, however, is further undermined by an additional provision that allows the steel used in auto body parts to come from anywhere in the world and be considered to originate in the TPP if it undergoes only minor transformation. The TPP creates a class of parts—steel, aluminum, plastic used in body parts and bumpers, laminated glass and other items—that the negotiators deemed would be produced locally for use by auto producers.<sup>23</sup> This assumption puts at risk the future of domestic steel as the auto sector is steel's single largest consuming sector.

The TPP also fails to address rising global capacity in the sector. Global overcapacity is the single greatest existing threat to commodity producers such as steel. Vietnam is reportedly planning to add more than 44 million tons of capacity and Malaysia an additional 10 million tons. There are no provisions in the TPP to address this critical issue. Indeed, to the extent that some of this production might emanate from state-owned or state-controlled entities, the damage could be severe as the SOE chapter does not provide effective disciplines against existing SOE activities: subsidies or support provided prior to the agreements entry into force are not actionable and the prospective standards that are included in the agreement are not sufficiently defined to allow quick or effective resolution of any injury that might occur.

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<sup>23</sup> See Appendix 1 to Annex 3-D of the TPP for more information.

There are numerous other provisions in the TPP that, in concert, will also negatively impact the steel sector. Vietnam, for example, was able to continue its existing tariffs on imports of steel into its market for 13 years while the U.S. is open to imports. Thus, U.S. exports to Vietnam will be impeded while that country develops its own steel-making capacity essentially limiting current and future U.S. exports to the market.



## VII. Analysis of Critical Issues in the TPP

### **The LAC Expects the TPP to Drive Down Wages, Cost Jobs, and Have a Negative Impact on the U.S. Economy as a Whole**

We strongly support President Obama's efforts to create shared prosperity for all families in the U.S. However, we do not believe that continuing to put in place trade policies similar to those enacted over the last 25 years will in fact achieve our shared goals. Experience makes clear that current U.S. trade policies have been an obstacle to creating good, sustainable jobs, providing the opportunity for rising prosperity for all, alleviating gross income inequality, and reinvigorating our manufacturing sector.

On behalf of the millions of working people we represent, we believe that current U.S. trade policy, which is reproduced wholesale in the TPP, is imbalanced. The primary measure of the success of our trade policies should be increasing jobs, rising wages, and broadly shared prosperity, not higher corporate profits and increased offshoring of America's jobs and productive capacity. Trade rules that enhance the already formidable economic and political power of global corporations—including ISDS, excessive monopoly rights for pharmaceutical products, and deregulatory financial services and SPS rules—will continue to undermine worker bargaining power, here and abroad, as well as weaken democratic processes and regulatory capacity across all 12 TPP countries.

Repeatedly, over many decades, America's workers have protested flawed trade policies, including those enshrined in the North American Free Trade Agreement (NAFTA), the World Trade Organization (WTO), and Permanent Normal Trade Relations (PNTR) for China. Yet we seem to be revisiting the same old debates about trade policy despite the fact that the bulk of the economic evidence is on our side—not against trade, but for the reform of trade rules.

**Chart 1: Job Displacement Due to Existing Bad Trade Policies**

<b><u>Policy</u></b>	<b><u>Estimated U.S. Jobs Displaced</u></b>	<b><u>Source</u></b>	<b><u>Applicable Dates</u></b>
NAFTA	682,900	Economic Policy Institute <sup>24</sup>	1994-2014
PNTR with China, with no action on currency manipulation	3,200,000	Economic Policy Institute <sup>25</sup>	2001-2013
Korea FTA	75,000	Economic Policy Institute <sup>26</sup>	2011-2014
Trade deficit with Japan, with no action on currency manipulation	896,600	Economic Policy Institute <sup>27</sup>	2013

Under past trade agreements and policies, U.S. communities lost hundreds of thousands of jobs as companies shed their U.S. workforces to shift jobs and production to places where workers’ fundamental labor and human rights are routinely violated (despite promises made at the ILO or in FTA labor chapters) and wages are consequently unfairly suppressed. While there have been important improvements in trade-linked labor and environmental provisions over the past twenty years, these changes have fallen significantly short of what is needed to guarantee that workers can securely exercise their basic rights and that the environment is protected. In addition, those provisions that potentially could help workers or ensure a greater environmental sustainability are largely left unenforced.

What is so disappointing is that the TPP includes these prior failed provisions largely wholesale—without improvements gleaned from mistakes of the past. In Colombia, which is bound to the strongest labor rights provisions in any U.S. trade agreement, workers still cannot exercise their fundamental rights to organize and bargain collectively without fear for their lives and for their families’ well-being. The LAC was hopeful that the Colombia experience, more than anything else, would have provided a road map to new trade rules. Instead, TPP

<sup>24</sup> Scott, Robert E. and Kimball, Will, “China Trade, Outsourcing and Jobs: Growing U.S. trade deficit with China cost 3.2 million jobs between 2001 and 2013, with job losses in every state,” Economic Policy Institute Briefing Paper No. 384, Dec. 11, 2014. Available at: <http://www.epi.org/files/2014/bp385-china-trade-deficit.pdf>.

<sup>25</sup> Scott, Robert E., “Heading South: U.S.-Mexico trade and job displacement after NAFTA,” Economic Policy Institute Briefing Paper No. 308, May 2011. Available at: [http://epi.3cdn.net/fdade52b876e04793b\\_7fm6ivz2y.pdf](http://epi.3cdn.net/fdade52b876e04793b_7fm6ivz2y.pdf).

<sup>26</sup> Scott, Robert E., “U.S.-Korea Trade Deal Resulted in Growing Trade Deficits and More Than 75,000 Lost U.S. Jobs,” EPI Working Economics Blog, Mar. 30, 2015. Available at: <http://www.epi.org/blog/u-s-korea-trade-deal-resulted-in-growing-trade-deficits-and-more-than-75000-lost-u-s-jobs/>.

<sup>27</sup> Scott, Robert E., “Currency Manipulation and the 896,600 U.S. Jobs Lost Due to the U.S.-Japan Trade Deficit,” Economic Policy Institute Briefing Paper No. 387, Feb. 4, 2015. Available at: <http://www.epi.org/files/2014/JapanCurrencyManipulation.pdf>.

negotiators simply included in the TPP labor mechanisms that have proved to be less than effective.

Furthermore, improvements in labor and environmental standards are necessary but not sufficient to reform U.S. trade policy. They **must** be coupled with transformative changes to other FTA rules, which incentivize the off-shoring of jobs and exacerbate the erosion of worker bargaining power.

Furthermore, to make any new trade and economic deal successful, the Administration and the President must enact and implement, in conjunction with the deal itself, a broad set of domestic industrial and economic policies to rebuild, repair and modernize our infrastructure and prepare our workforce for the jobs of the future. Absent these investments, globalization and trade deals will continue to leave workers behind. Unfortunately, the LAC has not been consulted on the TPP implementing bill and can express no confidence that it is being drafted consistent with these recommendations.

The TPP unduly protects and privileges the “rights” of corporations and investors—even to the point of creating a private system of “corporate courts” (investor-to-state dispute settlement, or ISDS). The result is an ever-widening gulf between the share of GDP going to profits for corporations and the share that workers take home.

Chart 2: Workers’ Share of National Income is Shrinking (U.S.) (Credit: St. Louis Federal Reserve)

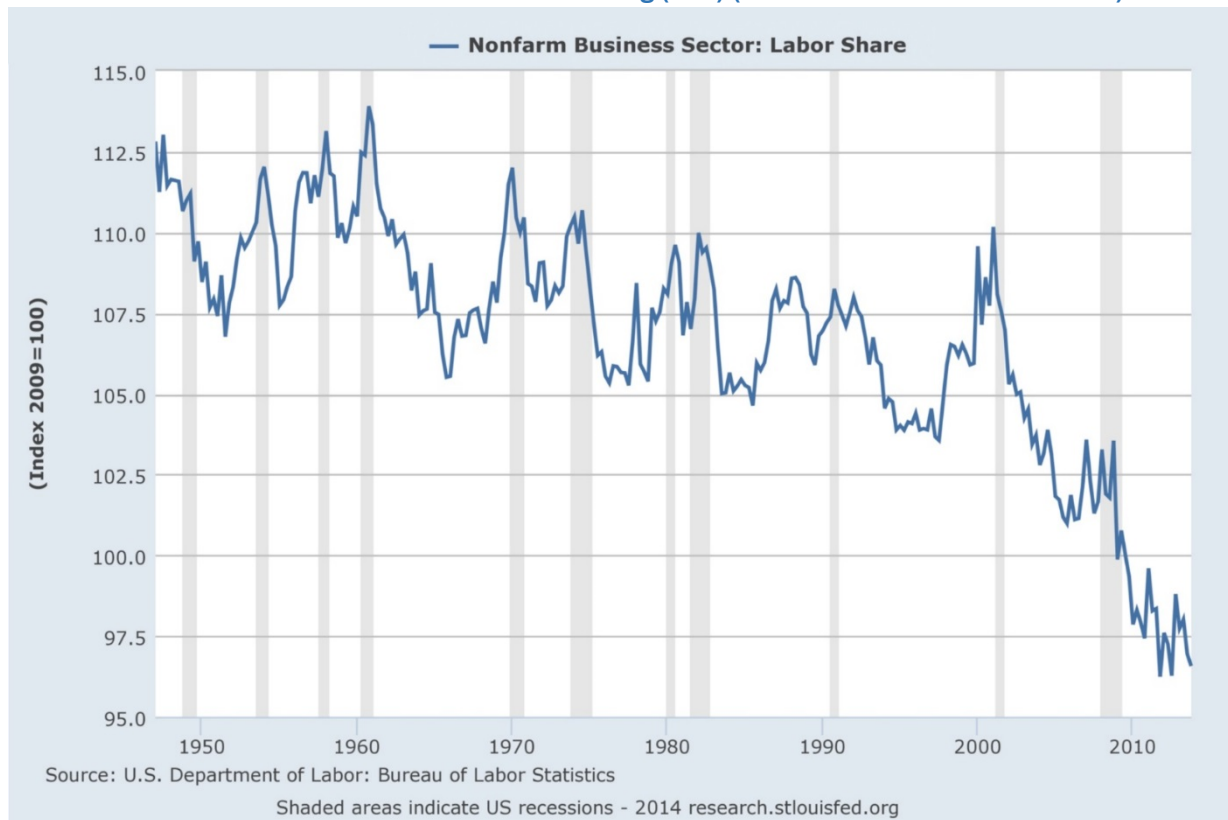


Chart 3: Workers' Share of National Income is Shrinking (Comparative) (Credit: The Economist)



As such, the LAC predicts that the TPP will cause job losses and will add to the existing economic trends of wage stagnation and increasing income inequality.

Corporate trade deals, beginning with NAFTA, have already contributed to U.S. wage stagnation in a number of ways. First, they provide incentives that make off-shoring decisions more attractive (including ISDS guarantees and in some cases excessive intellectual property protections). This enhanced opportunity to produce offshore provides added leverage for employers to actively deter the free exercise of freedom of association and collective bargaining by “predicting” workplace closures and offshoring of jobs if workers vote for a union or refuse to give back hard-won wages and contract rights during negotiations.<sup>28</sup>

Second, when trade deals cause “job churn,” as all economists recognize they do, affected workers do not immediately find jobs with the same or better wages as traditional economic models assume. Instead, many former manufacturing workers find new jobs in lesser paid service and retail sectors. As Jeff Faux noted, “[t]he vast majority of workers who lost jobs from

<sup>28</sup> See, e.g., Bronfenbrenner, Kate, “We’ll Close! Kate Bronfenbrenner’s article on threats of plant closings after NAFTA,” *Multinational Monitor*, 18(3), 8-14, 1997. Available at: <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1018&context=cbpubs>.

NAFTA suffered a permanent loss of income.”<sup>29</sup> As more workers compete for the remaining retail and services jobs, wages in these industries can be driven down as well (some have called this the “Wal-Mart effect”). This trend affects not just the workers in higher paid countries such as the U.S., but also workers in lower paid countries. For example, since NAFTA, wages in Mexico have lost purchasing power and the U.S.-Mexico wage gap has actually increased.<sup>30</sup>

Third, trade deals can cause so much churn and economic upheaval that they contribute to migration flows and, in the worst scenarios, produce economic refugees. This happened after NAFTA, when millions of *campesinos* were driven off their land by cheap U.S. agricultural exports to Mexico.<sup>31</sup> When trade deals, including the TPP and every prior U.S. trade deal, do not effectively protect migrant workers from abuse and exploitation, they add to wage stagnation by allowing bad-actor employers to drive down the wages and working conditions of all workers by exploiting and abusing some. This drives wages down, just as water will equalize between a full and an empty pool. Even highly skilled, less trade exposed workers can be impacted.

Fourth, as predicted by the Stolper-Samuelson<sup>32</sup> theorem and recognized by economists such as Paul Krugman,<sup>33</sup> the TPP’s trade rules, again like prior trade and globalization deals, are likely to drive down wages of the 70 percent of U.S. workers who lack a college degree. This is because returns are flowing to capital, rather than to wages for so-called “unskilled labor.” According to EPI, existing trade rules and relationships, which the TPP will not alter in ways beneficial to workers, already cost U.S. workers without a college degree \$1,800 a year in wages.<sup>34</sup>

Added together, these trends suppress wages and reduce demand, both of which are important to economic growth. This demand-side of the equation is critically overlooked by advocates of trade policies that drive wages ever lower in the relentless pursuit of quarterly profits and

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<sup>29</sup> See “NAFTA’s Impact on U.S. Workers,” EPI Working Economics Blog, Dec. 9, 2013. Available at:

<http://www.epi.org/blog/naftas-impact-workers/#sthash.66P1mjRS.uXfs&sref=https://delicious.com/celestedrake/search/nafta>.

<sup>30</sup> See “The US-Mexico Wage Gap Has Grown, Not Shrunk, under NAFTA. Awkward.,” Center for Global Development Views from the Center, Mar. 17, 2015. Available at: [http://www.cgdev.org/blog/us-mexico-wage-gap-has-grown-not-shrunk-under-nafta-awkward?utm\\_source=150317](http://www.cgdev.org/blog/us-mexico-wage-gap-has-grown-not-shrunk-under-nafta-awkward?utm_source=150317); and Weisbrot, Mark, et al., “Did NAFTA Help Mexico? An Assessment After 20 Years,” Center for Economic and Policy Research, Feb. 2014. Available at: <http://cepr.net/documents/nafta-20-years-2014-02.pdf>.

<sup>31</sup> See, e.g., Bacon, David, “Globalization and NAFTA Caused Migration from Mexico,” Political Research Associated, Oct. 11, 2014. Available at: <http://www.politicalresearch.org/2014/10/11/globalization-and-nafta-caused-migration-from-mexico/#sthash.VfsXAENA.dpuf>

<sup>32</sup> Krugman, Paul, “Trade and Wages, Reconsidered,” Brookings Papers on Economic Activity, Spring 2008. Available at: [http://www.brookings.edu/~media/projects/bpea/spring-2008/2008a\\_bpea\\_krugman.pdf](http://www.brookings.edu/~media/projects/bpea/spring-2008/2008a_bpea_krugman.pdf).

<sup>33</sup> See “Trouble with Trade,” The New York Times, Dec. 28, 2007. Available at: <http://www.nytimes.com/2007/12/28/opinion/28krugman.html?ex=1356584400&r=0>.

<sup>34</sup> “Globalization has lowered wages for American workers, new EPI study finds,” EPI Press Release, Mar. 22, 2013. Available at: <http://www.epi.org/press/globalization-lowered-wages-american-workers/>.

“competitiveness.” This shortsighted vision of competitiveness is leaving the U.S. less competitive by reducing demand in the U.S. economy, which relies on consumers for 70 percent of its strength. A failure to focus on rising wages overseas also limits the potential for U.S. export growth, leaving jobs and development opportunities on the table.

Although the LAC is not equipped to perform our own econometric analysis of the TPP, we note that our conclusions of its potential negative impacts on wages, inequality and increasing corporate power are widely shared, including in a 2013 Center for Economic and Policy Research analysis of the TPP’s likely effect on U.S. wages that forebodingly concluded that: “most workers are likely to lose.”<sup>35</sup> Moreover, a forthcoming paper by Jeronim Capaldo and Alex Izurieta for Tufts’ Global Development and Environment Institute finds that, among other things, the TPP will negatively affect U.S. economic growth and increase inequality. These findings are not surprising and wholly consistent with trade rules that substitute the interests of U.S.-based multinational enterprises for the interests of the U.S. economy as a whole. Global corporations have long used the U.S. as a flag of convenience. Rather than exacting a price for this convenience in terms of the social contract and rising prosperity for workers, the TPP once again incorporates a set of rules that are likely to leave workers behind.

Trade can be a force for progress in the world, or it can continue to be a disguise for rules that create profit centers for global corporations that do not behave as responsible global citizens. Sadly, we must conclude that the TPP appears to be the latter.

### **Currency Manipulation Is Addressed Only in a Completely Unenforceable Side Agreement, Wholly Outside the Legal Structure of the TPP**

Economists and elected officials from the right, center, and left have urged the U.S. to insist on enforceable measures to curb currency manipulation in the TPP. American workers have paid a heavy price as millions of American jobs have already been lost due to this practice. The Economic Policy Institute (EPI) concludes that reducing the U.S. trade deficit through currency realignment would create 2.3 million to 5.8 million jobs over the next three years.<sup>36</sup> According to Matt Blunt, president of the American Automotive Policy Council, a weak yen adds \$5,700 per car in profits for Japanese imports. Toyota’s record quarterly profits this year can be directly attributed to the weak yen, according to the *Wall Street Journal*.<sup>37</sup>

The problem also extends well beyond Japan. As conservative economist Art Laffer explained:

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<sup>35</sup> Rosnick, David, “Gains from Trade? The Net Effect of the Trans-Pacific Partnership Agreement on U.S. Wages,” Center for Economic and Policy Research, Sept. 2013. Available at: <http://cepr.net/documents/publications/TPP-2013-09.pdf>.

<sup>36</sup> Scott, Robert E., “Stop Currency Manipulation and Create Millions of Jobs, With Gains across States and Congressional Districts,” EPI Briefing Paper #372, Economic Policy Institute, Feb. 26, 2014. Available at <http://www.epi.org/publication/stop-currency-manipulation-and-create-millions-of-jobs/>.

<sup>37</sup> Kunaota, Yoko, “Toyota Posts Record Profits Fueled by Weak Yen,” *Wall Street Journal*, Aug. 4, 2015.



*“If TPP does not include such a currency discipline, it is reasonable to expect certain countries in the negotiations that have historically and repeatedly manipulated their currencies to continue to do so, with a profound negative impact on the U.S. economy and jobs market.”<sup>38</sup>*

This particular omission in the TPP agreement practically ensures that the best hopes of its proponents will not materialize. It will negatively influence investment decisions in the U.S. and leave U.S. businesses and their workers vulnerable to currency manipulation, potentially indefinitely. This manipulation will undermine export opportunities, wipe out any potential benefits from tariff reductions, and stunt the growth of demand abroad.

American workers and their employers got a taste of the devastating effects that currency devaluation can have on trade during the first year NAFTA went into effect. For years prior to NAFTA, Mexico, facing persistent crushing foreign debt obligations, developed a habit of devaluing the peso in the waning years of a president’s term. Late 1994 proved little different as the peso dropped precipitously in December of that year wiping out many of the promised NAFTA benefits. For working people on both sides of the border, it was too late: tariff reductions were locked in, as were strong new legal rights for U.S. investors and empty promises for Mexican workers wanting to exercise fundamental labor rights.<sup>39</sup>

The TPP currently includes three countries identified by the Peterson Institute for International Economics as “egregious” currency manipulators: Japan, Singapore, and Malaysia.<sup>40</sup> Taiwan and Thailand, both also identified as “egregious” currency manipulators in the same report<sup>41</sup> have expressed interest in joining. Moreover, China, which is also on the Peterson list,<sup>42</sup> is poised to continue to depress U.S. jobs, wages, and economic growth through currency manipulation whether or not it joins the TPP. The misalignment of the renminbi has a double impact: its nearby competitors will often follow China’s lead in order not to lose ground to Chinese exports. Notably, Vietnam, a current TPP participant, devalued its currency immediately after China’s devaluations during the summer of 2015.

Manufacturers, such as Ford Motor Company, have highlighted the long-term, pernicious impact of currency manipulation and the need for effective disciplines to deter repeated devaluations. While exchange rates may change month to month, the long-term threat of

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<sup>38</sup> Laffer, Arthur B., Ph.D., “Currency Manipulation and its Distortion of Free Trade,” The Laffer Center at the Pacific Research Institute.

<sup>39</sup> For more on the known risks of Mexico’s peso devaluations and the havoc wreaked on working people as a result of NAFTA, see MacArthur, John R., *The Selling of “Free Trade”: NAFTA, Washington, and the Subversion of American Democracy*, University of California Press, 2000.

<sup>40</sup> Gagnon, Joseph E. “Combating Widespread Currency Manipulation,” Policy Brief No. PB12-19, Peterson Institute for International Economics, Jul. 2012. Available at <http://www.iie.com/publications/pb/pb12-19.pdf>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

misalignment continues. As this summer's renminbi devaluation demonstrated, years of progress towards rebalancing currency exchange rates can be reversed in one fell swoop.<sup>43</sup>

It is not sufficient to argue that the currency side deal is sufficient because currency manipulation is not particularly rampant at a particular moment in time. The only way to ensure that our economic interests are protected is to have currency disciplines that are effective and readily accessible. Transparency may please economists and academics who can engage in more debate, but it does not advance the interests of domestic producers and workers.

Given that the TPP has been pitched to Congress and the American public as a strategic effort to better compete against China, the omission of enforceable currency rules is especially galling.<sup>44</sup> The argument that Japan would not have joined if the TPP had included enforceable currency provisions is precisely the point: a TPP without such provisions is demonstrably worse than no agreement at all. It actively undermines the United States' economy and will contribute to the continued bleeding of U.S. manufacturing (and increasingly service) jobs to TPP countries, China, and other mercantilist competitors.

### **The TPP's Provisions Relating to Medicines Jeopardize Access, Fail to Protect Public Health, and Undermine Sustainable Development**

The TPP, in numerous subtle and not-so-subtle ways, contains rules and tools that will drive up the price of medicines for working families in the U.S. and abroad. Rather than learning from the mistakes of prior trade rules that have increased the price of medicines in developing countries<sup>45</sup> the TPP incorporates nearly wholesale the wish list of big pharmaceutical companies with respect to intellectual property rights, drug and device pricing provisions, and ISDS. While some have praised the TPP medicines provisions as "not as bad as they could have been." that is not the correct yardstick. Measured against the status quo, public health is likely to be harmed and prices on drugs and medical devices are likely to increase in all TPP countries.<sup>46</sup> Life-saving medicines could likely be increasingly out of the reach of those most in need, particularly in the poorest TPP nations.

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<sup>43</sup> Needham, Vicki, "AFL-CIO: Yuan shifts show need for currency in trade deals," *The Hill*, Aug. 13, 2015.

Available at: <http://thehill.com/policy/finance/251045-afl-cio-yuan-shifts-show-need-for-currency-in-trade-deals>.

<sup>44</sup> For more on why the TPP will not help U.S.-based workers and producers better compete with China, see AFL-CIO, "The U.S.-China Economic Relationship: The TPP Is Not the Answer," May 2015. Available at: <http://www.aflcio.org/content/download/156731/3897641/TPPChinaReport.pdf>.

<sup>45</sup> "All Costs, No Benefits: How TRIPS-plus intellectual property rules in the US-Jordan FTA affect access to medicines," Oxfam Briefing Paper 102, Oxfam International, Mar. 21, 2007. Available at: <http://dontradeourlivesaway.files.wordpress.com/2011/01/all-costs-no-benefits.pdf>.

<sup>46</sup> For more information on the TPP's impact on access to medicines, please visit Doctors Without Borders (<http://enewsp.com/2015/11/06/doctors-without-borders-statement-on-the-official-release-of-the-full-text-of-the-trans-pacific-partnership-trade-agreement/>) and UNITAID (<http://www.unitaid.eu/en/rss-unitaid/1339-the-trans-pacific-partnership-agreement-implications-for-access-to-medicines-and-public-health>).



## Intellectual Property

The Intellectual Property (IP) Chapter elevates the rights of patent holders over the need to protect the public health when these two goals are in conflict. Article 18.3 (Principles) provides no special protections for provisions to protect “public health and nutrition, and to promote the public interest...” because such provisions are only allowed to the extent that they are “consistent with the provisions of this chapter,” making the provision a legal nullity.

The IP Chapter includes specific measures that undermine access to medicines in developing countries and undermine the “May 10” standards. But these harmful measures also lock in current U.S. patent rules that many policymakers and stakeholders are currently seeking to reform. In the future, Congress will be less able to rebalance U.S. patent policies to give affordability and cost effectiveness a higher priority than guaranteeing patent holders excessive rents. The situation is even more dire for developing country partners who face even greater resource constraints.

Articles 18.50 and 18.52 require countries to establish periods of exclusivity for chemical and biologic drugs that could lead to delays in the introduction of generic competition, even beyond the original patent period. It is also unfortunate that patent holders may be able to extend monopoly protections by delaying applications for marketing approval.

Article 18.37.2 requires countries to establish at least one of three paths that allow pharmaceutical companies to “evergreen” drugs or extend patents for an additional 20 years. This misguided policy will further push the cost of medicines in other TPP countries in the wrong direction and undermine efforts to reform U.S. laws. Evergreening inhibits innovation by encouraging pharmaceutical companies to research small changes in existing technologies rather than focus their research efforts on real breakthroughs. In contrast to the TPP, evergreening was not required in the U.S.-Peru FTA, which is viewed as a gold standard by proponents of the “May 10” framework, including many Members of the House and Senate.

Requirements for patent term adjustments in Articles 18.46 and 18.48 could significantly delay generic competition and restrict access to affordable medicines. During the negotiation of the TRIPS Agreement, patenting and regulatory delays were a justification for the adoption of a 20-year patent term—three years longer than the previous term in the U.S.

Article 18.74 requires that TPP country courts be authorized to consider “any legitimate measure of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price or the suggested retail price,” when deciding damages in a patent infringement case. It is not clear how these considerations may exceed the remedy of a “reasonable royalty” allowed for patent infringement under the Biologic Price Competition and Innovation Act section of the Affordable Care Act.

Article 18.52.3 provides for another round of negotiations over exclusivity for biologics 10 years after the entry into force of the TPP. This provides another opportunity for the pharmaceutical companies to obtain the remaining few goals they were unable to achieve in the TPP, by pressuring the USTR and other countries to agree to a lengthier exclusivity period for biologics, thereby further delaying generic competition and denying even more people access to lifesaving drugs.

### Investment Chapter

Intellectual property rights are subject to ISDS, and pharmaceutical companies have not been shy about making use of such provisions under NAFTA.<sup>47</sup> As a consequence, global pharmaceutical firms will be able to challenge steps taken by the federal government and states to moderate prescription drug costs in Medicare and Medicaid. As states update their Medicaid formularies, they may be subject to ISDS challenges by global pharmaceutical companies that disagree with listing and pricing decisions or even utilization rules. ISDS could have a chilling effect on proposed reforms in the Medicare Part B pricing formula for drugs administered in a doctor's office or the enactment of price negotiations under Medicare Part D. Whether or not the cases are likely to be successful, even the threat of a claim can nip proposals in the bud. Even President Obama's proposal to reduce exclusivity for biologics to seven years could be challenged. Exploding and unjustified prices for drugs to treat Hepatitis C, cancer and other illnesses are already causing patients to be denied medicines that will cure them of life threatening illnesses. Giving global pharmaceutical companies more tools to seek unjustifiable rents at the expense of patients and taxpayers is unacceptable.

USTR maintains that Article 9.15 of the Investment Chapter preserves the ability of governments to protect public health or achieve other regulatory objectives, but this safeguard is meaningless. Because Article 9.15 further requires protected measures to be "otherwise consistent with [the Investment] chapter," it is a legal nullity, providing no protections whatsoever for public interest measures. Investors will be able to freely attack—and in some cases win judgments against—measures that reduce their profits, even when those measures are non-discriminatory measures of general application designed to promote public health or other public interest goals.

### Transparency Annex

From the outset, the LAC urged the USTR to abandon the so-called "transparency" provisions for pharmaceuticals and medical devices that had been included in the U.S.-Korea FTA. While such an annex is included in the TPP, strong resistance from TPP Parties resulted in some weakening of the provisions vis-à-vis the Korea FTA. The USTR succeeded in winning provisions that give device and pharmaceutical companies greater leverage in listing and pricing decisions in government-supported programs, including not just Medicare, but the

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<sup>47</sup> See, e.g., *Eli Lilly v. Canada* (<http://www.state.gov/s/l/c63964.htm>) and *Apotex v. U.S.* (<http://www.state.gov/s/l/c27648.htm>).

more comprehensive health systems in TPP partner countries, such as New Zealand and Japan. The annex appears to force governments to reveal “methodologies” and “guidelines” they use to make pricing and listing decisions. This information can in turn be used by drug and device companies to undermine government negotiations to reduce costs and be good stewards of public monies.

The annex also gives device and pharmaceutical companies the ability to appeal decisions they do not like. While the annex is not subject to state-to-state dispute settlement, global drug and device companies can use evidence gleaned from the procedures it requires to mount ISDS challenges.

Finally, the annex fails to reference cost effectiveness among its principles but does highlight the need to value the therapeutic significance of a product. This could create adverse pressure on public programs that seek to elevate the use of less expensive technologies that are as effective as more expensive alternative therapies. Medicare regulators have tried multiple times over the last 20 years to develop cost effectiveness criteria for making national coverage determinations. These efforts have failed under strong opposition by manufacturers who have an interest in securing coverage of high cost drugs that are no more effective than (and in some cases even less effective than) more affordable alternatives. The failure to include cost effectiveness among the principles in this annex will no doubt give the drug and device makers another tool for blocking reforms that could provide substantial savings for Medicare.

### **The TPP’s Docking Provisions Don’t Ensure Appropriate Trading Partners or Guarantee Adequate Congressional Oversight and a Vote on New Members**

The TPP includes about 40 percent of the world’s GDP and is structured to include more countries over time. The TPP’s Chapter on Final Provisions (Chapter 30) sets out the procedure for adding additional countries. The procedure sets out no criteria whatsoever for determining whether interested countries would make good partners. The LAC has repeatedly recommended such criteria as a democratic form of government and a favorable labor and human rights record. The TPP eschews any such measurement, leaving the prospect open for TPP membership to parties with a greater democracy deficit than Brunei, a greater labor rights deficit than Vietnam, and a worse record on human trafficking than Malaysia. It is a mistake to enter into permanent trade relationships with countries that have such a demonstrated lack of respect for human life and dignity and that trample on religious freedom. Such relationships limit our ability to use, when appropriate, economic persuasion to foster change.

In addition, the TPP establishes no process to ensure a Congressional vote on the final accession protocol of new TPP entrants. This omission fails to provide the American people a meaningful role in determining which additional countries we wish to establish permanent trade relationships with in the future.

It is undemocratic to allow the executive branch alone to make this determination. While the TPP's implementing bill may (it has not yet been made public) ensure Congress a partial vote (for instance to confirm tariffs already negotiated by USTR or if the Committees of jurisdiction fail to object to the start of negotiations with a new entrant), such a half-measure would be woefully insufficient. To approve the final terms of a new country's accession protocol to the TPP, nothing short of full Congressional oversight and voting rights, consistent with Article 1, Section 8 of the Constitution, is acceptable.

Low wage countries with terrible human rights records and a long history of maintaining closed markets could join this agreement in the future (indeed some have already expressed interest). Public reports indicate that the Philippines, Indonesia, South Korea, Thailand, and several others have expressed an interest in joining. Experience has proved we cannot rely on promises to respect freedom of expression and fundamental human rights. The TPP's implementing legislation must require full public and congressional consultations *before* the U.S. negotiates with any potential new entrant, and as noted above, a vote in both houses of Congress on any and all final accession terms.

### **The TPP Does Not Ensure Its Rules Will Be Adequately Resourced or Timely Enforced**

The Labor Advisory Committee has made clear that the existing infrastructure, as well as orientation, of our nation's trade enforcement system is completely inadequate. From labor rights to commercial activities, this and previous administrations have essentially ceded responsibility for trade enforcement to the private sector. In certain areas, such as addressing currency manipulation, the Administration has blocked action through the interpretation of existing laws and statutes allowing trading partners to act with impunity. The result has been rising trade deficits, outsourced production, offshored jobs, lost opportunity, and rising income inequality.

During the negotiations on the TPP, the LAC has provided concrete and comprehensive approaches to ensure that, whatever rules are agreed to as part of the Agreement, they are actually enforced. Even the best rules will be worthless if they do not govern the covered activities. To date, the USTR has essentially ignored the requests of the LAC to engage on these matters.

In labor rights, the only actions that have been taken by this Administration have been the result of petitions filed by the AFL-CIO and other outside organizations. While the LAC appreciates that action was undertaken, it has been years since the original petitions in the Bahrain, Guatemala, and Honduras cases were filed and final action still has not occurred. In other areas, for example, the question of China's export demonstration bases and their impact on U.S. auto parts producers, a request for action was filed in 2012 and, while consultations were initiated, three years later we are still awaiting a conclusion and action on other export demonstration bases that were identified. Despite having the authority to self-initiate action on predatory and protectionist dumping and subsidy measures, the Administration has refused to

act, except when the private sector experiences significant injury, marshals the millions of dollars that are required to file a case, and pursues its rights under the law.

Promises that are not enforced will not improve America's economy, create jobs, or raise our standard of living. The existing flaws in the TPP coupled with the failure of the Administration to seriously address enforcement issues demands that the Agreement be rejected.

### **The TPP Fails to Live Up to "May 10" Standards**

Disappointingly, the TPP does not live up to the standards of the "May 10" Agreement that has guided every U.S. FTA since 2007. That agreement, which represented a first step in ensuring that FTAs properly address the needs of workers, the environment, and low-income people seeking access to affordable medicines, set standards in each of these areas that are not met by the TPP. The "May 10" Agreement was intended to be the floor for standards, not the ceiling. Unfortunately, the "May 10" Agreement may be providing an excuse to prevent progress on issues vital to improving economic conditions for workers.<sup>48</sup>

The TPP's Labor Chapter broadly meets the standards of the "May 10" Agreement, though, as noted below, it fails to include the vast majority of the improvements that the LAC recommended to build upon "May 10" to better ensure that member nations actually protect worker rights.<sup>49</sup> The TPP also clearly falls short of "May 10" for major reason--a critical component of "May 10" was that member nations needed to bring their laws into compliance with "May 10" standards before a congressional vote on implementing legislation for the agreement.<sup>50</sup>

It appears that some TPP member nations' laws will not be in compliance with the Labor Chapter's mandates before the agreement takes effect. For example, under the side understanding with Vietnam, Vietnam will have five years after the TPP enters into force to allow independent unions to form beyond the enterprise level. Limiting unions' ability to affiliate beyond the enterprise level severely inhibits the bargaining power of unions and could even promote the creation and consolidation of employer-dominated unions over this five-year period.

Unions derive effectiveness from solidarity. Single enterprise unions undermine solidarity because workers do not have brothers and sisters at other workplaces who can support their

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<sup>48</sup> While there are always those in Congress who will threaten to withhold their support for an agreement because it "goes too far" toward protecting working families or the environment, the reality is that no trade agreement presented to Congress under fast track procedures has even been defeated by such threats.

<sup>49</sup> The LAC's few Labor Chapter ideas that were addressed were rewritten in a manner that substantially undermines their effectiveness.

<sup>50</sup> See e.g., Levin, Sandy. "An Open Letter to Progressives: TPP Is Not Yet 'The Most Progressive Trade Agreement in History'." May 11, 2015. <http://democrats.waysandmeans.house.gov/op-eds/open-letter-progressives-tpp-not-yet-most-progressive-trade-agreement-history>.

organizing and bargaining efforts. Furthermore, in a developing country such as Vietnam, this limitation severely restricts the resources at the disposal of single-enterprise unions, limiting their ability to provide services for members. In short, this phase-in period, a deviation from “May 10,” could actually undermine efforts to build truly independent and effective unions in Vietnam.

Meanwhile, it does not appear from the text of the side understandings with Vietnam and Malaysia that employment discrimination will be prohibited on all of the bases upon which the ILO prohibits employment discrimination. Most egregiously, the Vietnam plan does not address discrimination on the basis of either religion or political opinion, despite the abhorrent ongoing violations of many Vietnamese citizens’ rights upon these bases. While the understanding with Brunei does nominally prohibit employment discrimination on bases consistent with ILO guidance, the failure of the plan to address Brunei’s penal code, which is highly discriminatory on the basis of sex, religion and sexual orientation, among other bases, means that workers who should be protected will, in fact, continue to face major threats and discrimination with little recourse.

Importantly, the TPP does not include any side understanding with Mexico that is legally enforceable under the terms of the agreement, despite its widespread violations of worker rights through the use of protection unions, corrupt labor boards, and impunity for those committing violence against workers.

Finally, as noted in Section V, the LAC views the TPP text as weaker than “May 10” as regards procurement. Where the Peru FTA allowed procuring entities to “apply technical specifications . . . to **require** a supplier to comply” with laws covered by the Labor Chapter, the TPP only ensures that a procuring entity may “**promote** compliance” with such laws (emphasis added).

The TPP also fails to live up to the “May 10” Agreement standards on the environment in two critical ways. First, it does not require member nations to “adopt, maintain, and implement” policies to fulfill their commitments under all seven MEAs listed in the “May 10” Agreement. The only MEA held to this standard in the TPP is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), despite the fact that there is evidence that some TPP members are in violation of various “May 10” MEAs.<sup>51</sup>

Moreover, we do not believe that the TPP “goes beyond “May 10”” simply because it covers additional topics. Environmental provisions of the TPP that were not included in the “May 10” deal are generally too weak to constitute a major step forward, while the omission of the

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<sup>51</sup> For example, in 2014, the ICJ ruled against Japan’s commercial whaling (<http://www.independent.co.uk/news/world/asia/japan-kill-30-minke-whales-in-first-hunt-since-icj-ruling-9537063.html>) and in 2015, NOAA has cited a Mexican-flagged fishing vessel as being in violation of the IATTC ([http://www.nmfs.noaa.gov/ia/iuu/msra\\_page/2015noaareptcongress.pdf](http://www.nmfs.noaa.gov/ia/iuu/msra_page/2015noaareptcongress.pdf)).

“adopt, maintain, and implement” standard with respect to all seven “May 10” MEAs represents a serious step backward.

Second, the “May 10” Agreement directed that any environmental obligations would be enforced “on the same basis as the commercial provisions of our agreements – same remedies, procedures, and sanctions.”<sup>52</sup> The TPP does not meet this standard because it provides a more onerous requirement—three separate rounds of consultations—before a violation of the Environment Chapter can be brought to dispute resolution, in comparison to only one round of consultations for other enforceable obligations in the agreement. Unfortunately, this additional hurdle may never be tested, given the absence of any prior efforts to seek enforcement of Environment Chapter obligations under U.S. trade agreements.

The TPP also takes major steps back in comparison to “May 10” on the issue of access to medicines, in several ways. First, the “May 10” Agreement provides for five years of data exclusivity for biologic medicines,<sup>53</sup> yet the TPP requires protections that are essentially equivalent to eight years of data exclusivity.

Another area in which the TPP falls short relates to patent term extensions. “May 10” directed member nations to “make best efforts to process patent applications and marketing approval applications expeditiously with a view to avoiding unreasonable delays,” instead of lengthening the term of the patent. In contrast, the TPP requires patent extensions for regulatory review periods deemed “unreasonable” and for delays in patent issuance of over five years from application for a patent or three years from making an examination request.

The TPP also falls short of “May 10” in terms of evergreening and graduation. Unlike the U.S.-Peru FTA, Article 18.50(2) of the TPP enables pharmaceutical companies to “evergreen” patents or extend monopoly protections by making modest changes in the way an older drug is administered or formulated or by demonstrating a new use for an older drug. Meanwhile, the transition periods afforded to developing countries in Article 18.83 of the TPP are based on fixed periods of time, even though it is not at all clear that the referenced countries will have graduated to becoming high-income countries within those time periods. This provision is also inconsistent with the “May 10” Agreement, which did not contain a “graduation” mechanism.

These various provisions render the TPP inconsistent with both the letter and spirit of the “May 10” Agreement. Instead of moving forward to better protect workers, the environment and access to medicines, the TPP takes steps back on each of these issues in a number of ways. Benefitting from these changes are employers, those who degrade the environment, and

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<sup>52</sup> Office of the U.S. Trade Representative, “Bipartisan Trade Deal,” May 2007, p 2, available at: [https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf).

<sup>53</sup> See e.g., Levin, Sandy. “Is TPP the Most Progressive Trade Agreement in History? Not If You Need Access to Affordable Medicines.” May 28, 2015. <http://levin.house.gov/tpp-most-progressive-trade-agreement-history-not-if-you-need-access-affordable-medicines>



pharmaceutical companies. Bearing the brunt of these changes are working people and their families.

### **The TPP Will Not Help the U.S. Compete Against China**

Rather than set “high standards” for trade in Asia, the TPP will advance the interests of global corporations rather than the U.S. national interest. Indeed, as the TPP is viewed as the trade template for the future, it seriously undermines the ability to address some of our most pernicious trade problems and will ensure that anticompetitive activities can continue, costing the U.S. production, jobs and our standard of living.

Important trade policy reforms needed to achieve shared prosperity and sustainable growth and development in the TPP are unfortunately non-existent (climate change and currency), inadequate to the challenge (labor), or counterproductive (ISDS) in the TPP. The deal is unlikely to help workers organize, bargain, and raise wages in Vietnam, Mexico, or the U.S., and it will not prevent any trading partners from disadvantaging American manufacturing by manipulating their currency or utilizing SOEs to implement their economic plans. The argument that it nevertheless somehow sets a “high bar” for China is therefore unsupported.

The TPP will allow China to benefit without even joining. Its weak rules of origin, lack of rules on currency manipulation, and benefits that would apply to Chinese companies operating in any of the TPP countries mean that China has very little incentive to change its mercantilist model that has been undercutting U.S. manufacturers and displacing millions of U.S. jobs for more than a decade. For example, if Chinese intermediate parts are exported to Malaysia for final assembly and export to the U.S., those parts can be made out of compliance with TPP standards, but still receive TPP benefits as part of the finished product. In the case of automobile parts, Chinese exports made out of compliance with TPP standards can even constitute more than a majority (55 percent) of the value of a vehicle’s content.

China is already deeply integrated into trade and supply chains with all TPP countries—far more deeply than the U.S. is in many cases. A number of forces are responsible for drawing China closer together with other Pacific economies—including geography and several hundred billion dollars in Chinese foreign investment and development funding. It is difficult to believe that these deep relationships will be weakened simply through the conclusion of the TPP, particularly based on the TPP’s porous rules.

There is no reason to believe that drawing the Pacific Rim countries away from China is a realistic goal, so long as China continues to offer mutually beneficial trade, investment and supply chain opportunities to those countries, such as the New Silk Road and the Asian Infrastructure Investment Bank. The LAC believes it is reckless to ask Congress to enter into a deal that has a high probability of undermining U.S. wages, jobs, and labor rights—as previous FTAs have done—when that deal has no real chance of diminishing China’s existing economic influence.



What the TPP *will* affect is the relative attractiveness of Vietnam, which has no independent labor unions and wages one-third of China's, as an alternative manufacturing location for global corporations. In recent years, rising wages in China and concerns about supply chain and intellectual property risk have helped drive some manufacturing operations in U.S. firms' supply chains back to the United States. The TPP may well result in downward pressure on wages throughout the region, undermining the revival of U.S. manufacturing and job growth as well as delaying the emergence of a larger, more affluent Chinese middle class that could provide a larger market for U.S. exports.

As it stands, the TPP will do little but make it easier for firms concerned about rising wages in China to move jobs to Vietnam and enshrine corporate power over regulatory policy through ISDS. This is a model for increasing corporate profits, but not for helping U.S. workers and small firms or for increasing wage-led growth in the Pacific Rim.

Given that the TPP is extremely unlikely to create the strategic advantage over China that its supporters claim, we urge Congress to reject the "TPP at any cost" argument. A low-standards TPP, which is an apt description, given its inadequate rules on labor, environment, rules of origin, and state-owned enterprises; its dangerous privileges for investors; and its total lack of currency and carbon provisions, is demonstrably worse than the status quo, and will not force China to become a nation that trades fairly. The only kind of TPP worth implementing is a truly high standard TPP that prioritizes worker rights, democratic governance, a growing middle class, and protections for the planet over corporate profits. The TPP as currently conceived is not that deal.<sup>54</sup>

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<sup>54</sup> An expanded version of this argument can be found in the 2015 AFL-CIO Report "The U.S.-China Economic Relationship: The TPP Is Not the Answer," available at: <http://www.aflcio.org/content/download/156731/3897641/TPPChinaReport.pdf>.

## VIII. Analysis of the Impacts of Critical TPP Chapters

### Rules of Origin

The offshoring of U.S. jobs has been a devastating problem for working families as all too many companies game the system by shifting more and more work to low-road countries with low wages, inadequate health and safety standards, and weak labor and environmental enforcement. Rather than promote further offshoring through “supply chains” (now often renamed “global value chains” to avoid the low-road stigma), the TPP has been packaged by supporters as a way to combat low-road off-shoring. To help achieve this goal, the LAC recommended the strongest possible rules of origin (ROOs) for a variety of products, autos being the most critical. Strong rules of origin would promote the greatest possible production within the TPP region. If the TPP were to actually include high standards for the environment, labor, and human rights, strong ROOs would work to reinforce these rules and minimize leakage of production to non-TPP countries with lower standards. Unfortunately, the TPP fails to live up to its “high labor and environmental standards” rhetoric (see the relevant sections of this report) and importantly does not contain the kind of robust ROOs that will prevent substantial leakage.

A strong ROO incentivizes production in the TPP countries, rather than rewarding outsourcing to non-TPP countries. In addition, it supports exports and the jobs they create. The LAC recommended the auto, auto parts, and light truck regional value content (RVC) to begin at least as high as the NAFTA standard (62.5 percent) and to increase to at least 75 percent over several years. We also recommended correcting the loopholes and exceptions that have weakened previous RVC standards. With respect to light trucks, the RVC is even more important, as the initial tariff is much higher than for autos. The LAC shared a detailed proposal on auto and light truck RVC with USTR several years ago.

It is only common sense that if there are twelve countries in TPP, the TPP ought to have a higher RVC than NAFTA, which includes only three countries. Even if the NAFTA RVC stayed the same—at 62.5 percent—applying that rule to TPP would allow the same content to be produced in nine additional countries, dramatically increasing the opportunity to move auto supply chain jobs out of North America. Unfortunately, the 45 percent RVC standard in the TPP is considerably less stringent than NAFTA. It means that more than half of the value of a finished vehicle could originate from countries that are not participating in the agreement, do not meet its standards, and have not agreed to open their markets to U.S. exports.

Cars primarily built with parts from non-TPP countries like China, the Philippines, or Thailand will unjustly receive benefits, punishing compliant actors, rewarding those who take advantage of exploitive conditions, and doing nothing to stimulate job retention or creation in the auto sector in the TPP countries. To make matters worse, the RVC threshold for many important parts is as low as 35 percent. Low thresholds for parts have important ramifications for the

integrity of the whole vehicle standard as well. This is because a qualifying part is considered to be 100 percent originating when counted towards the total value of the vehicle even though in reality the part met the lowest content standard. Low thresholds for parts could allow vehicles to qualify for duty free treatment that in fact are far below the nominal 45 percent TPP content requirement.

We also note with disappointment that the criteria for determining where several important parts and components originate will be less than vigorous—approaching a “hybrid deemed originating” standard that will require only minimal TPP value to receive full TPP tariff preferences. It is also important to note that because additional countries will be able to “dock on” to this Agreement in the future the RVC for autos will increasingly harm the U.S. auto industry for years to come. As more countries join, the 45 percent standard will become less and less meaningful to workers here in the U.S. as the 45 percent standard could be met with products from any of 20 or more countries, rather than any of 12.

The consequences of the TPP’s auto shortcomings will be far-reaching and long term. Auto manufacturers, suppliers, and dealers themselves employ more than 1.5 million people in the U.S., and directly contribute to the creation of 5.7 million U.S. jobs.<sup>55</sup> This concern is not theoretical. The United States had a trade surplus with Mexico in 1993, the year before NAFTA was implemented. Supporters of that trade agreement promised new jobs. Instead, U.S. trade deficits with Mexico had displaced production supporting almost 700,000 U.S. jobs by 2010. Most of the jobs displaced were in manufacturing.<sup>56</sup>

### **State-Owned Enterprises**

The TPP fails to achieve the objectives identified by Congress in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015. Specifically, the legislation identified that “The principal negotiating objective of the United States regarding competition by state-owned and state-controlled enterprises is to seek commitments that— (A) eliminate or prevent trade distortions and unfair competition favoring state-owned and state-controlled enterprises to the extent of their engagement in commercial activity, and (B) ensure that such engagement is based solely on commercial considerations, in particular through disciplines that eliminate or prevent discrimination and market-distorting subsidies and that promote transparency.”

The TPP is, indeed, the first trade agreement negotiated by the U.S. that includes a complete chapter on state-owned enterprises as well as entities that are state-controlled.<sup>57</sup> Unfortunately, the approach has a fatal flaw as it utilizes the term “commercial considerations” but provides no

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<sup>55</sup> Center for Automotive Research (CAR) “Cars Move America” 2015 jobs report. Available at: <http://www.autoalliance.org/cars-move-america/auto-jobs-in-every-state>.

<sup>56</sup> Economic Policy Institute, “Manufacturing Job Loss: Trade, not Productivity, is the Culprit,” August 11, 2015. Available at: <http://www.epi.org/publication/manufacturing-job-loss-trade-not-productivity-is-the-culprit/>.

<sup>57</sup> Note that the Singapore FTA included SOE provisions in its chapter on Anticompetitive Business Conduct, Designated Monopolies, and Government Enterprises.

specific guidance on how that term is to be applied. Our experience with China, and its attempt to portray many of its firms as engaging in market-oriented activities, should provide a clear lesson to those who believe that the chapter will have any significant impact. Indeed, the text may potentially impose substantial costs on U.S. producers and their employees as it allows SOEs to masquerade as engaging in commercial activities while enjoying substantial state support.

During the negotiations, the Labor Advisory Committee filed comments numerous times and engaged negotiators to try to ensure that the chapter would have a more inclusive standard that took account of the realities of state-led capitalist systems. As our experience with China has taught us, even firms that purport to be “private” often benefit from substantial state support and operate with state protections and under state direction.

The TPP will also allow existing SOEs to continue to benefit from the support that they have already received and may continue to receive prior to the Agreement’s possible entry-into-force. Malaysia, Vietnam, and Singapore already have SOEs that have accrued substantial benefits that will allow them to compete unfairly against U.S. and other firms. A company with significant market capitalization without any need to service debt has a substantial advantage over market-based firms. Other benefits that may have been showered upon those SOEs will further advantage them in U.S. and world markets.

In addition, the TPP chapter on SOEs includes a limitation on the ability of a party to challenge the activities of a SOE that it believes is engaging in unfair and predatory trade practices that negotiators argue are covered by the text. The chapter requires that there be “significant” “adverse effects” that, under normal conditions must exist for a year or more. This test may protect repeated actions of an SOE to injure the market-based operations of firms in other countries by requiring that a party not only prove “significant” injury but also potentially withstand a significant period of injury or threat. Negotiators clearly did not internalize the reality of the business world with increasingly thin operating margins and the need to maintain operating cash flow.

As well, the TPP text allows other nations to exempt certain of their SOEs and state-controlled entities from coverage. It also allows for potentially significant levels of support to continue to flow to the SOEs. For example, “restructuring” support can continue to be provided to entities in Vietnam that collectively could have serious negative repercussions on the competitive opportunities for U.S. firms. In addition, the non-conforming measures covering Vietnamese SOEs could simply allow the activities on behalf of the state to shift to small- and medium-sized enterprises with substantial preferential support. Certain government-controlled financial institutions “may take into account factors other than commercial considerations and provide financial services (except insurance and securities) solely to or accord preferential treatment to Vietnamese nationals or enterprises in the territory of Vietnam. These services are not

intended to displace or impede private financing.” The implications of this exception could potentially be wide-ranging.

## **Government Procurement**

This Chapter will likely be a net loser for America’s domestic producers and their employees as well as for responsible purchasing policies. Trade commitments that require the federal government to treat foreign bidders as if they were U.S. bidders undermine one of the most important job creation tools: fiscal policy. Governments should be able to use stimulus funds to create jobs within their borders, and not be required to spend those funds to create jobs elsewhere—nor should developing countries be prevented from using their limited funds on domestic stimulus. That is why the LAC recommended omitting a Government Procurement chapter from TPP, and in the alternative, made several recommendations to ease the Chapter’s potential harm. These recommendations were rejected.

Instead, the TPP gives bidders from all TPP countries expansive access to U.S. goods, services, and construction contracts. It is not clear that responsible bidding criteria (such as a requirement that a bidder not have outstanding environmental clean-up obligations or the use of bonus points for bidders with better safety records) will be free from “barriers to trade”-type challenges.

Importantly, though the agreement does not cover state procurement at this time, the TPP **requires** that the Parties “commence negotiations with a view to achieving expanded coverage, including sub-central coverage” within three years. Such provisions could undermine popular local and state preference programs, and it is not at all clear that Congress would get to vote to approve or reject such an expansion of this Chapter.

Given that USTR has not provided evidence requested by the LAC to demonstrate that Government Procurement provisions in prior agreements are net job and wage winners for U.S.-based workers—despite repeated requests—we can only conclude that such evidence does not exist and that this chapter is a gain for global corporations and foreign firms, but not for U.S. workers.

## **Investment**

Although USTR maintains that the investment provisions in the TPP “fix” all the loopholes and shortcomings of the ISDS, the LAC disagrees. The minimal changes to the investment chapter do **not** fix the glaring shortcomings inherent in the undemocratic investor-to-state ISDS mechanism. Instead, the new provisions seem to function more as public relations tools to help justify the inclusion of ISDS in the TPP in the face of widespread public and academic opposition.

Even the one meaningful carve-out, for tobacco control measures<sup>58</sup> primarily serves to highlight the fact that ISDS is ripe for abuse. If the other “fixes” in the Investment Chapter really worked, why would the TPP need to provide special protections for tobacco control measures? Moreover, the carve-out is not perfect. Parties would have to specifically invoke it, which may be difficult to do in the face of a powerful investor; and the global web of investment agreements makes it possible for global challengers to use the provisions of a different investment deal to attack the tobacco control measures they cannot reach directly through the TPP.

Moreover, there is a harmful, substantial change to investment policy from past FTAs: the TPP extends the notoriously vague and overbroad “Minimum Standard of Treatment” obligation to the Financial Services Chapter.<sup>59</sup> This will provide global banks with even more tools to use in their quest to escape effective regulation.

Simply put, ISDS is a separate justice system for which there is no legal or ethical justification. The global investors who benefit from the system have never provided evidence of systemic bias against them from the developing countries that they explain are the target of the provisions. Rule of law requires that the law—including the system of justice—apply to everyone equally. That is why the LAC opposed inclusion of ISDS in the TPP.

By offering additional legal protections beyond those that exist under U.S. law or other countries’ national courts, ISDS makes it more attractive to send production and investment overseas. It simply makes no sense for the TPP to include provisions that could promote the offshoring of jobs—particularly unionized, middle class jobs. Furthermore, ISDS actually disadvantages U.S. companies that only produce in the U.S. (e.g., micro and small to medium sized companies) because they have fewer rights than their foreign competitors.

Even if the purported fixes in the TPP text (including Article 9.6.4, which merely restates the general principle of law that a claimant has the burden of proving the elements of his claim; Article 9.15, which is a legal nullity; and Annex 9-A, which is not new, but a repeat of a failed provision meant to rein in overbroad MST interpretations) were not so completely ineffective on their face, the TPP does not include any mechanisms to prevent or correct miscarriages of justice by unaccountable arbitrators.<sup>60</sup>

As one of the lawyers who brought a case against the U.S. on behalf of a Canadian company told *The Nation* magazine, “[The ISDS provision in] NAFTA does clearly create some rights for

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<sup>58</sup> TPP Article 29.5.

<sup>59</sup> See Article 11.2.2.

<sup>60</sup> Canadian Professor Gus Van Harten has demonstrated the most arbitrators do have a bias—in favor of expanding justiciable claims, thereby creating more cases. More information on his research is available here: [http://issuu.com/embajadaecuusa/docs/g\\_van\\_harten](http://issuu.com/embajadaecuusa/docs/g_van_harten).

foreign investors that local citizens and companies don't have. But that's the whole purpose of it.”<sup>61</sup> None of the investment rules in the TPP negate this reality.

It is disingenuous for proponents of the TPP to argue to the American public that ISDS is anything but a special interest giveaway. The U.S. economy does not win just because U.S. companies win ISDS cases. When U.S. based companies sue and win against foreign governments, those gains are not shared with the American people—they are kept in the private coffers of the winning company, which is under no obligation to use the funds to create jobs or give workers raises. Nothing in the TPP changes this.

ISDS undermines rule of law by creating special rules and special “courts” available only to a certain class—the foreign investor class. Taking claims of powerful actors out of the jurisdiction of domestic courts may actually impede the development of domestic rule of law by removing a main pressure point to improve the fairness and efficiency of courts. Furthermore, there is no way for developing or developed countries to “graduate” from the ISDS mechanism once domestic courts “measure up.” There is simply no pro-worker argument for the TPP’s ISDS provisions.

## Environment

While the TPP addresses a broader range of environmental issues than have been addressed in many past U.S. trade agreements, the environmental text fails to meet the standards for the environment included in every U.S. trade agreement since 2007 (the so-called “May 10” agreement) and the standards mandated by the Bipartisan Congressional Trade Priorities and Accountability Act. These shortcomings will negatively affect U.S. efforts to protect the environment and will further incentivize offshoring of jobs to countries with lax environmental standards and weak or no carbon reduction measures.

The Environment Chapter and other environment-related policies in the TPP fail on multiple levels. First, the Bipartisan Congressional Trade Priorities and Accountability Act directs USTR to pursue policies in which enforceable “environment [sic] obligations are subject to the same dispute settlement and remedies as other enforceable obligations under the agreement”; the TPP fails to meet this objective. To the extent that the TPP’s enforceable obligations address issues covered by the Investment Chapter, investors have the right to initiate ISDS cases to recover losses, whereas non-governmental organizations do not have a corresponding private right of action to enforce the Environment Chapter.

Moreover, even to the extent that environmental violations are addressed via the state-to-state dispute settlement process (a step the U.S. has never taken for an environmental obligation),

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<sup>61</sup> Greider, William, “The Right and US Trade Law: Invalidating the 20th Century: How the right is using trade law to overturn American democracy,” *The Nation*, Nov. 17, 2001. Available at: <http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century#>.

the Environment Chapter has a more onerous process to reach a dispute settlement panel than is true for other obligations in the TPP (including even labor). The Environment Chapter requires three separate levels of consultations—general "Environment Consultations," "Senior Representative Consultations," and "Ministerial Consultations"—before entering the dispute settlement process, whereas other enforceable TPP obligations only require one round of consultations before entering the dispute settlement process.

Second, the TPP flatly fails to comply with the Bipartisan Congressional Trade Priorities and Accountability Act's directive that USTR pursue provisions in trade agreements that would require member nations to “adopt, maintain, and implement” policies to fulfill commitments under seven different multilateral environmental agreements (MEAs) to which they are party. Instead, the only MEA addressed in this way in the TPP is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Of the other six “May 10” MEAs (the Montreal Protocol on Substances that Deplete the Ozone Layer, the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the Convention on the Conservation of Antarctic Marine Living Resources, the International Convention for the Regulation of Whaling (ICRW), and the Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC)), only two (MARPOL and Montreal) are included, but with a lesser standard to “maintain” policies listed in an annex to the Environment Chapter, rather than the more comprehensive “adopt, maintain, and implement” standard.<sup>62</sup>

The concerns related to the inclusion of all seven “May 10” MEAs in a robust manner are real. Japan has a long history of actions inconsistent with the ICRW, while the U.S. National Oceanic and Atmospheric Administration (NOAA) has found Mexico to be in violation of the IATTC. As such, the failure to require Parties to “adopt, maintain, and implement” policies to fulfill commitments with respect to the ICRW and IATTC, for example, means that environmental violations in those countries are likely to persist, at the expense of animal safety and critically, at the expense of U.S. workers whose domestic employers actually comply with those treaties.

The Environment Chapter is riddled with unenforceable directives, including promises to “strive to act consistently” with conservation measures and “endeavor not to undermine” schemes designed to manage shared fisheries resources. It is not clear how a dispute resolution panel would determine whether a country is striving or endeavoring to do something; in practice, we are not aware of any trade case that has ever attempted to enforce such aspirational language. As such, the bulk of the Environment Chapter is an attempt to portray the TPP as “environmentally friendly.” Experience has shown that vague standards, standards

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<sup>62</sup> For MARPOL only, if a Party fails achieve “deemed” compliance by maintaining a measure listed in Annex 20-B, a complaining Party may establish a violation only by demonstrating that the other Party “failed to take measures to prevent the pollution of the marine environment from ships in a manner affecting trade or investment between the Parties.” TPP Chapter 20, FN 8.



riddled with loopholes, and promises that lack accountability mechanisms do not work—particularly when there is so much money to be made by taking shortcuts to get around good environmental stewardship.

Finally, we are disappointed that the TPP fails to recognize the need for 21st Century trade agreements to address climate change. Indeed, the phrase “climate change” does not appear in the TPP text. Worse, Article 20.15 on the Transition to a Low Emissions and Resilient Economy, appears to have no legally enforceable obligations.

Of most concern to U.S. workers, the TPP fails to incorporate either provisions similar to the bilateral U.S.-China agreement on climate change and clean energy cooperation<sup>63</sup> or to make clear that countries failing to address climate change can be assessed a border adjustment or fee. In this sense, the TPP is actually a step back from commitments the U.S. has already made. Because the U.S. is currently working to limit carbon emissions, it would be troublesome if other TPP countries could attract investment by utilizing cheap, high-emission processes that would undermine U.S. efforts. In order for a strategy to combat climate change to succeed, all countries must do their respective parts. Failure to secure participation in these efforts or to ensure the TPP consistency of a possible border adjustment mechanism could facilitate the offshoring of good American jobs in energy intensive and trade exposed industries (including steel, aluminum, chemical manufacturing, paper mills, and plastics manufacturing). It also puts U.S. climate and trade policies squarely at odds instead of taking advantage of obvious opportunities for synergy. The following charts highlight the industries most at risk due to carbon intensity and by carbon intensity cross-referenced with trade exposure.

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<sup>63</sup> FACT SHEET: U.S.-China Joint Announcement on Climate Change and Clean Energy Cooperation. Available at: <http://www.whitehouse.gov/the-press-office/2014/11/11/fact-sheet-us-china-joint-announcement-climate-change-and-clean-energy-c>.

**Chart 4: Most Carbon Intensive Industries**

2002 NAICS Code	2002 NAICS Title	Total Emissions (MMTCO <sub>2</sub> e)
331111	Iron and Steel Mills	134.1
327310	Cement Manufacturing	85.3
325199	All Other Basic Organic Chemical Manufacturing	54.0
325110	Petrochemical Manufacturing	52.2
322121	Paper (except Newsprint) Mills	44.0
325211	Plastics Material and Resin Manufacturing	40.3
325311	Nitrogenous Fertilizer Manufacturing	38.4
331311	Alumina Refining	33.4
322130	Paperboard Mills	33.3
325188	All Other Basic Inorganic Chemical Manufacturing	27.8

**Chart 5: Carbon Intensive Industries by Trade Exposure (2009 figures)**

331419	Primary Smelting and Refining of Nonferrous Metal (except Copper and Aluminum)	7%	135%
325192	Cyclic Crude and Intermediate Manufacturing	5%	102%
327112	Vitreous China, Fine Earthenware, and Other Pottery Product Manufacturing	5%	94%
322110	Pulp Mills	8%	90%
325221	Cellulosic Organic Fiber Manufacturing	7%	90%
325311	Nitrogenous Fertilizer Manufacturing	14%	83%
331112	Electrometallurgical Ferroalloy Product Manufacturing	11%	77%
331311	Alumina Refining	21%	70%
327122	Ceramic Wall and Floor Tile Manufacturing	7%	69%
322122	Newsprint Mills	16%	68%
331312	Primary Aluminum Production	22%	64%
327111	Vitreous China Plumbing Fixture and China and Earthenware Bathroom Accessories Manufacturing	5%	60%
325188	All Other Basic Inorganic Chemical Manufacturing	8%	58%
327212	Other Pressed and Blown Glass and Glassware Manufacturing	11%	58%
325212	Synthetic Rubber Manufacturing	5%	57%
331411	Primary Smelting and Refining of Copper	2%	55%
335991	Carbon and Graphite Product Manufacturing	6%	52%
327211	Flat Glass Manufacturing	16%	51%

The justification that the TPP excludes the “adopt, maintain, and implement” standard for all seven “May 10” MEAs because “not all TPP members have joined all seven “May 10” agreements” is unconvincing. The “May 10” text requires a Party to “adopt, maintain, and

implement laws, regulations, and all other measures to fulfill its obligations under the multilateral environmental agreements listed in Annex 17.2 (“covered agreements”)<sup>64</sup> and defines “covered agreement” as “a multilateral environmental agreement listed below to which both Parties are party,”<sup>65</sup> going on to list seven specific agreements. The Panama FTA contains the same list of seven agreements as the Peru and Colombia agreements do, despite the fact that Panama did not join the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) until 2013,<sup>66</sup> well after the Panama FTA was negotiated and approved by Congress.

Fast Track 2015 specified the “adopt, maintain, and implement” standard for any of the seven MEAs “to which both the United States and one or more other parties to the negotiations are full parties.” Sec. 102(b)(10)(A)(i) and Sec. 111(6)(A). Thus, instead of downgrading the environmental chapter into a host of well-meaning but largely unenforceable promises, the TPP should have adopted the approach that all seven MEAs would be fully enforceable for every Party that had joined them, and USTR should have, from the outset of negotiations, set out to secure ratification by recalcitrant Parties, knowing that it was offering U.S. market access as a prize.

## Labor

The USTR has repeatedly posited that the TPP includes the “highest labor standards” of any trade agreement. However, the USTR has not included with these statements any recognition that prior labor provisions in trade agreements have largely failed to improve working conditions and labor rights on the ground in our trading partner countries. In fact, there is evidence to suggest that labor standards in the U.S. and elsewhere have deteriorated as a result of the increased power and leverage that these corporate agenda agreements provide to employers vis-à-vis employees.<sup>67</sup> Thus, the “highest labor standards ever” is not the correct measuring stick.

Instead, the LAC asks whether the provisions of the Labor Chapter have incorporated lessons learned from past agreements and made sufficient improvements that we have confidence will actually secure fundamental labor rights for working people in TPP partner countries. Without

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<sup>64</sup> U.S.-Panama FTA, Article 17.2.

<sup>65</sup> U.S.-Panama FTA, Annex 17.2.

<sup>66</sup> “Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR),” *Australia Legal Information Institute*, last modified December 11, 2013, [http://www.austlii.edu.au/au/other/dfat/treaty\\_list/depository/CCAMLR.html](http://www.austlii.edu.au/au/other/dfat/treaty_list/depository/CCAMLR.html).

<sup>67</sup> See, e.g., Bronfenbrenner, Kate, “We’ll Close! Kate Bronfenbrenner’s article on threats of plant closings after NAFTA,” *Multinational Monitor*, 18(3), 8-14, 1997 (available at: <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1018&context=cbpubs>); Clemmens, Michael, “The US-Mexico Wage Gap Has Grown, Not Shrunk, under NAFTA. Awkward.,” *Center for Global Development Views from the Center*, Mar. 17, 2015 (available at: [http://www.cgdev.org/blog/us-mexico-wage-gap-has-grown-not-shrunk-under-nafta-awkward?utm\\_source=150317](http://www.cgdev.org/blog/us-mexico-wage-gap-has-grown-not-shrunk-under-nafta-awkward?utm_source=150317)); and NAFTA at 20, AFL-CIO Report, Mar. 2014 (available at: [http://www.aflcio.org/content/download/121921/3393031/version/1/file/March2014\\_NAFTA20\\_nb.pdf](http://www.aflcio.org/content/download/121921/3393031/version/1/file/March2014_NAFTA20_nb.pdf)).

changes based on past evidence of failure, the Labor Chapter could amount to little more than a public relations gambit designed to secure passage of the TPP rather than to create a virtuous circle of rising wages and demand throughout the 12 TPP countries.

The core part of the Chapter is a mere copy of the Peru template, which was an advancement for its time, but which was never intended to serve as a ceiling on labor rights provisions.<sup>68</sup> As we have repeatedly stated, the Peru template fails to provide a labor standard that is clearly defined. It fails because of its limited focus on the ILO's 1998 Declaration of Fundamental Principles and Rights at Work, as opposed to the ILO Conventions and accompanying reports and recommendations, which do provide well-established standards. The requirement to adopt and maintain in law the "right" as stated in the ILO Declaration on Fundamental Principles and Rights at Work introduces uncertainty as to the extent of the obligation.

*"The[ ] incorporation [of the principles] into these agreements—rather than that of more specific standards—manifests general principles into legally binding and enforceable elements. As regards their enforcement, the principles of the Declaration do not expressly define the rules of conduct. Consequently, it may be more challenging to assess the compliance of conduct with legal obligations in concrete cases... These difficulties are not resolved by referring the labour provisions to the 'rights' contained in the Declaration. Whether making reference to the 1998 Declaration's 'principles' or 'rights,' the trade partners may be confronted with uncertainty in determining the implications of these standards, which threatens not only a uniform application but might also foster uncertainty as to whether some parties are applying less stringent labour standards than the others."<sup>69</sup>*

In addition, violations under this chapter are limited to only those that are "in a manner affecting trade or investment between the Parties." Such language provides an additional hurdle to labor cases—hurdles that do not exist for violations of intellectual property, financial services, SPS and other TPP obligations. Certainly if other regulatory practices are presumed to affect trade and investment, so should practices that work to suppress wages and working conditions. Exploitive labor practices are not a natural endowment and should not receive

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<sup>68</sup> As the AFL-CIO noted at the time of the "May 10" Agreement: "While the May 10th reforms negotiated by Chairman Rangel represent progress in comparison to previously negotiated FTAs, they are by no means a complete fix appropriate for any country or any situation. Intractable and egregious human rights violations in Colombia and unbalanced market access issues in South Korea put FTAs with these two countries in a completely Separate—and significantly more problematic—category. The full letter can be accessed here: <http://www.massafclcio.org/sites/massafclcio.org/files/PERUlettertoHouse.907.pdf>.

<sup>69</sup> Agusti-Panareda, J., Ebert Franz, and LeClercq Desiree, Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System, ILO Background Paper, March 2014, pp. 17-18.

privileged protection, but that is exactly what this “manner affecting trade and investment” hurdle provides.

In 2011, the AFL-CIO joined with labor federations from a majority of TPP countries (including federations from Australia, Canada,<sup>70</sup> Malaysia, New Zealand, Peru, and Singapore) to draft and submit a comprehensive labor chapter that attempted to address past shortcomings. Of the most important recommendations made in that model chapter, the only ones that the TPP “included” were recommendations that had been weakened in key ways that undermine their effectiveness.

- For example, while the TPP seemingly advances labor obligations by its addition of language concerning “acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health,” the agreement provides that these obligations will be satisfied “as determined by” each country. As a result, any country could satisfy the minimum wage obligation as long as it set a minimum wage, no matter how low and inadequate it might be. The same would be true for matters concerning hours of work and safety and health. This hardly constitutes much improvement for workers in countries like Malaysia, Brunei and Vietnam where wages are well below the poverty level and safety and health standards are unacceptable based on ILO standards.
- Rather than prohibiting trade in goods made with forced labor, the TPP requires parties to “discourage” trade in such goods. This weakened provision could be met by hanging a poster, for example.
- The commitment not to waive or derogate from laws implementing acceptable conditions of work in an Export Processing Zone provides absolutely no protection whatsoever to the vast majority of workers in TPP countries. The commitment is too narrow to be of clear value to workers.

Too much of the new text (vis-à-vis “May 10”) relies on legally imprecise language like “may” and “endeavor to encourage.” Such language, which is aspirational rather than obligatory, does not provide the clear protections workers in the region need to organize, collectively bargain, and raise their wages in a safe and just working environment. Aspirational language will not help build new markets for U.S. products or achieve the development goals of the TPP’s supporters.<sup>71</sup>

As the AFL-CIO has previously noted, the choice of trading partners in the TPP is cause for great concern. The Vietnam labor side letter/“Plan for the Enhancement of Trade and Labour

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<sup>70</sup> Joined later.

<sup>71</sup> On a related note, the LAC is disappointed that the entire Development Chapter of the TPP is unenforceable. Workers need strong institutions to support their efforts to create effective, independent unions. This requires much more than is promised in the Development Chapter. The LAC encourages the Administration to include robust funding for labor capacity building in developing TPP countries, regardless of whether the TPP enters into force.

Relations” (hereinafter “side letter” or “consistency plan”) provides Vietnam with a five to seven year grace period to fully implement freedom of association. The side letter then creates a convoluted process by which the scheduled tariff reductions Vietnam has not yet received by Year 6 of the agreement could be delayed, should the U.S. determine that Vietnam has failed to comply with its freedom of association commitments and act upon that determination. Instead, the TPP should have required full compliance with internationally recognized labor rights on Day One. After all, U.S. leverage to achieve change in Vietnam is at its zenith now—before Vietnam achieves the U.S. market access and U.S. business investment it seeks. Instead, the U.S. used its immense leverage to achieve the all it wanted in the investment, intellectual property, and financial services chapters, leaving little left over to secure needed changes in labor and human rights law and practice before Vietnam can access TPP benefits.

Moreover, as explained in a 2015 AFL-CIO publication,<sup>72</sup> at least three other TPP partners, namely Malaysia, Brunei, and Mexico, have human rights shortcomings so serious as to require major shifts in labor policy and enforcement to come into compliance with internationally recognized labor rights on Day One. Of these, only Brunei and Malaysia have side letters, giving Mexico an undeserved pass to continue labor abuses.

Moreover, while these plans do address important and needed legal changes, they fail to incorporate the fundamental lesson learned from the Colombia Labor Action Plan. Legal changes, without benchmarks for enforcement performance, do not work well for economically vulnerable workers. When they try to exercise their new “rights,” but continue to face repression, they become even more discouraged. Commitments to change laws and decrees, without measurements that assess whether new unions are forming, whether wage theft is being addressed, whether passports are no longer being confiscated, whether women are actually receiving equal opportunities, and the like do not by themselves create meaningful changes. Viable and effective worker organizations must be supported by the legal structures of the country—not merely tolerated—and they must be adequately resourced. Robust resource commitments are woefully lacking in the side letters.

To let the TPP enter into force without full compliance with all labor commitments from all twelve countries could undermine the entire agreement. It sends the message that promises to comply—in any area—are sufficient. If the TPP is going to have beneficial effects, promises and changes on paper are not enough. Nor do they rebalance the playing field in ways beneficial for workers in the U.S. or globally.

The issue of labor rights compliance is critical. It creates the space necessary for workers, both in the U.S. and in our TPP partner countries, to engage in the give and take necessary to raise their pay, benefits, and conditions of work. If workers lack the basic rights to speak up about

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<sup>72</sup> “The Trans-Pacific Partnership: Four Countries that Don’t Comply with U.S. Trade Law,” AFL-CIO, Feb. 2015. Available at: <http://www.aflcio.org/content/download/150491/3811471/file/TPPreport-NO+BUG.pdf>.

workplace conditions and to join together in common cause to improve their lot, it simply exacerbates—rather than improves—the status quo, which has been used to keep wages lower than they might otherwise be both in the U.S. and globally. This is causing a global weakness in demand that hampers growth and exacerbates inequality. Even the IMF recognizes this link between a lack of unions and an increase in inequality.<sup>73</sup> Trade policy that concentrates wealth in the hand of a few by failing to adequately promote workplace rights fails workers—no matter where they reside.

Without robust labor and human rights standards and strong enforcement tools that cannot be weakened through delay, inaction, or the acceptance of “progress” as a substitute for real improvements, the labor chapter of the TPP will not help build the bargaining power of workers here and abroad, and it could facilitate rather than combat the race to the bottom.

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<sup>73</sup> Jaumotte, Florence, and Buitron, Carolina Osorio, “Power from the People,” *Finance & Development*, Vol. 52, No. 1, International Monetary Fund, Mar. 2015. Available at: <http://www.imf.org/external/pubs/ft/fandd/2015/03/jaumotte.htm>.



## IX. Analysis of Labor Conditions in TPP Partner Countries

At the outset of this section, the LAC notes that the U.S. is out of compliance in a number of ways with fundamental labor rights. As Human Rights Watch put it, "freedom of association is a right under severe, often buckling pressure when workers in the United States try to exercise it."<sup>74</sup> Particularly egregious examples include restrictions and in some cases even prohibitions on the rights of freedom of association and collective bargaining for many public employees (at the federal, state, and local levels), child labor in the agricultural sector, many prison labor systems, and the lack of a federal regime sufficient to deter private sector employers from routinely interfering with the right to freedom of association. We will continue to work domestically at the state and federal levels to improve these shortcomings and believe the administration should work to address these shortcomings with as much effort as it has been making to conclude the TPP. As well, we support U.S. ratification of the remaining six ILO Core Conventions.

### Australia<sup>75</sup>

Labor laws and enforcement in Australia are generally compliant with internationally recognized standards. However, there are a number of legal obstacles with regard to freedom of association and the right to collectively bargain. Unfortunately, the Fair Work Amendment Bill of 2014 passed both houses of Parliament and was signed into law in November 2015. This bill further restricts freedom of association and the right to collectively bargain, in particular by setting an expiry date for negotiations in greenfield workplaces, after which an employer's "draft agreement" will be treated as a collective bargaining agreement when in truth, the workers never agreed to it.

Forced and compulsory labor are explicitly prohibited by law. There have been a few reports of temporary workers in sectors such as agriculture, cleaning, construction, hospitality, manufacturing, and domestic service being subject to forced labor. There are also numerous instances of foreign workers on temporary work visas being underpaid, exploited, and denied their rights under Australian law. Several major corporations appear to have systematically used the temporary work visa provisions to undercut and evade Australian labor law.

*Freedom of Association and the Right to Collectively Bargain:* The Fair Work (Registered Organizations) Act 2009 imposes a number of restrictions related to trade union rights to elect representatives and to draw up their constitution and rules. The categories of workers that are eligible to join and form unions has been closed, which may have serious consequences for new economy participants.

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<sup>74</sup> UNFAIR ADVANTAGE: Workers' Freedom of Association in the United States under International Human Rights Standards, Human Rights Watch, 2000. Available at: <https://www.hrw.org/reports/2000/uslabor/>.

<sup>75</sup> ITUC, "Survey of Violations of Trade Union Rights: Australia," 2015. Available at: <http://survey.ituc-csi.org/Australia.html>.



Trade union elections must by default be conducted by the Australian Electoral Commission, an independent statutory authority. In addition, any person who has been convicted of a prescribed offense at any time is prohibited from holding trade union office. Very specific rules relating to election for and term of trade union office, disclosure requirements regarding remuneration of senior officers and payments made by the union, terms under which loans, grants and donation may be made and disciplining of trade union members are enumerated in the Fair Work (Registered Organizations) Act 2009. Finally, individuals in vocational placement are excluded from freedom of association and cannot join a registered union in connection with their work on that vocational placement.

Serious restrictions on collective bargaining also exist. The Fair Work Act allows the possibility of bargaining directly with workers' representatives rather than the trade union. The representative trade union may also be just one of a number of bargaining representatives taking part in the negotiations. With the exception of some greenfield agreements, union approval of the terms of an agreement is unnecessary for the official approval and entry into law of that agreement. As such, unions are never parties to collective agreements although the agreements will apply to them where the union was a bargaining representative during negotiations and notifies the Fair Work Commission (FWC) or where the agreement is a greenfield agreement.

Only four issues may be covered in a collective agreement that is approved under the Fair Work Act: 1) matters pertaining to the relationship between the employer and employees covered; 2) matters pertaining to the relationship between the employer(s) and trade union(s); 3) deduction from wages for purposes authorized by covered employee; and 4) how the agreement will operate. There are no bargaining rights enshrined in law to support the making of collective agreements outside of the Fair Work Act, and government procurement guidelines tend to prohibit the making of unregistered agreements in certain industries.<sup>76</sup>

Collective bargaining may only be conducted at the enterprise level and the Fair Work Act 2009 mandates that collective bargaining take place principally between a single employer and its employees or two or more single-interest employers and their employees. There are restrictions on bargaining for multi-enterprise agreements and pattern bargaining. Two additional caveats exist. The Fair Work Commission must approve a collective agreement in order for it to take effect. Employers have no statutory obligation to agree to enter into collective bargaining.

To hold a lawful strike, the Fair Work Commission must give approval and any extant agreement must have passed its expiry date (which in effect means strike action cannot be taken in support of a new claim or a dispute while an agreement is in operation). The Fair Work Act only protects strike actions specifically authorized by secret ballot or taken in

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<sup>76</sup> The legislation supports the making of "enterprise agreements" which in non-specific parlance is a collective agreement made through collective bargaining.

response to lockout by an employer. In addition, Ministers and employers may apply to the FWC to end the industrial action and refer the dispute to arbitration. The Minister may also unilaterally issue a declaration to this effect.

## Brunei

The human rights situation in Brunei is dire. Last year, the Sultan of Brunei, whose family has ruled Brunei for over six centuries, imposed a strict penal code based on Sharia law, which includes punishments such as flogging, dismemberment, and death by stoning for crimes such as adultery, alcohol consumption, and homosexuality. Despite widespread calls from U.S. labor, LGBT, and human rights groups to exclude Brunei from the TPP, it appears that the agreement and the consistency plan situate the U.S. and Brunei government to enter into a close and permanent trading relationship without ensuring that working people can exercise their fundamental labor rights in Brunei.

Under emergency measures in place for 65 years, freedom of speech is severely limited, and the country's legislature has a limited role.<sup>77</sup> It is difficult if not impossible to imagine true freedom of association will exist where it is not accompanied by the right to free speech to make the case for worker organizations and workers' rights. Under the Internal Security Act (ISA), activists deemed to be anti-government can be detained without trial indefinitely, renewable for two-year periods.<sup>78</sup> Harsh punishment stifles worker activism and there is a nationwide prohibition on collective bargaining.

The labor rights situation for workers in Brunei, and migrant workers in particular, is deplorable. The government prohibits strikes. The law does not provide for reinstatement for dismissal related to union activity. The government can refuse to register trade unions.<sup>79</sup> Government permission is required for holding a public meeting involving more than ten people, and the police can break up any unofficial meeting of more than five people if they regard it as liable to disturb the peace.<sup>80</sup> There is virtually no union activity in Brunei due to these restrictions. There is only one active union in the country, the Brunei Oilfield Workers Union (BOWU), representing workers at Shell Petroleum.

Many of the 85,000 migrant workers in Brunei face labor exploitation and trafficking related to debt bondage from labor recruitment fees, wage theft, passport confiscation, abuse, and

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<sup>77</sup> U.S. Department of State (hereinafter DOS), "Brunei 2014 Human Rights Report," 2014. Available at: <http://www.state.gov/documents/organization/236638.pdf>.

<sup>78</sup> Amnesty International, "Amnesty International Report 2014/15: Brunei Darussalam," 2015. Available at: <https://www.amnesty.org/en/countries/asia-and-the-pacific/brunei-darussalam/report-brunei/>.

<sup>79</sup> U.N. Human Rights Council, "Report of the Working Group on the Universal Periodic Review Brunei Darussalam," July 7, 2014. Available at: [http://www.upr-info.org/sites/default/files/document/brunei\\_darussalam/session\\_19\\_-\\_april\\_2014/a\\_hrc\\_27\\_11\\_e.pdf](http://www.upr-info.org/sites/default/files/document/brunei_darussalam/session_19_-_april_2014/a_hrc_27_11_e.pdf).

<sup>80</sup> DOS, "Brunei 2014 Human Rights Report.," ITUC, 2010 Annual Survey of violations of trade union rights - Brunei Darussalam," March 3, 2010. Available at: <http://survey.ituc-csi.org/Brunei-Darussalam.html?lang=en#tabs-2>.

confinement. Domestic workers are especially prone to this kind of abuse. Immigration law allows for prison sentences and caning for workers who overstay their visas, fall into irregular status, or work or change employers without a permit.<sup>81</sup> This traps migrant workers in abusive employment and impedes access to justice and compensation if a migrant worker chooses to leave an exploitative employment relationship.

The labor side letter with Brunei is wholly inadequate to deal with the serious problems indicated above. For example, it calls for an end to document confiscation and “an outreach program to inform and educate stakeholders,” but does not address excessive recruitment fees or the criminalization of migrant workers. While it requires that employment discrimination on a variety of grounds be made unlawful, it fails to include LGBT workers within this new protection. Moreover, it fails to provide for labor courts or other structures free from the political influence of the Sultan, where workers can bring complaints about labor abuses for an unbiased evaluation of their claims.

More holistically, the labor side letter fails to include any specific measurements or benchmarks to evaluate the implementation and enforcement of the required legal and regulatory changes. Moreover, while it specifies, “Brunei shall enact the legal and institutional reforms in Part II and Part III of this plan prior to the date of entry into force of the TPP,” the letter includes no independent evaluation mechanism. Thus, the LAC fears that this side letter will follow in the footsteps of the Colombia Labor Action Plan, in which partial and ineffective fulfillment of the plan’s elements substituted for actual fulfillment, and in which changes on paper substituted for changes in workers’ lives. In short, the Brunei side letter seems likely to be partially implemented on paper, but—given the lack of provisions to ensure on the ground monitoring, implementation, and enforcement—leave workers without the ability to freely exercise their fundamental labor rights.<sup>82</sup>

## Canada<sup>83</sup>

*Freedom of Association and the Right to Collectively Bargain:* Laws at the federal level and some at the provincial level provide for rights of workers to freedom of association and the right to collectively bargain. Federal labor law applies only to approximately 10 percent of workers; in workplaces and occupations that are not federally regulated, provincial, and territorial governments are responsible for labor laws.

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<sup>81</sup> U.S. DOS, “Brunei 2014 Human Rights Report,” 2014.

<sup>82</sup> For a thorough explanation of the need for labor provisions in trade agreements that incorporate robust monitoring and enforcement mechanisms, as well as measurable benchmarks for change instead of a rigid focus on rules to the exclusion of implementation, see Barenberg, Mark, “Sustaining Workers’ Bargaining Power in an Age of Globalization: Institutions for the meaningful enforcement of international labor rights,” EPI Briefing Paper No. 246, Oct. 9, 2009.

<sup>83</sup> ITUC, “Survey of Violations of Trade Union Rights: Canada,” 2015. Available at: <http://survey.ituc-csi.org/Canada.html>.

In a number of provinces, this translates into a number of categories of workers being prohibited or limited from forming or joining a union or holding a union office. In Ontario, several categories of professionals (members of the architectural, dental, land surveying, legal or medical professions), are excluded from protection, as are domestic workers. In Alberta, Ontario, and New Brunswick (in operations with fewer than five workers) agricultural workers are excluded from general labor legislation, thus depriving them of the right to form independent unions for the purposes of collective bargaining. All of the noncompliant laws should be changed before Congress votes on the TPP. The LAC has listed some of the most problematic laws below and would be pleased to work with the administration further in this regard. Given that NAFTA, which has been in force for more than 20 years, has been ineffective at improving labor law and practice in any of the three countries to which it applies, the LAC believes that action now, before Congress votes to permanently lock in preferential market access, has the best chance for success.

*Forced Labor and Child Labor:* Canadian law prohibits all forms of forced or compulsory labor and the government enforces the law. Some reports indicated that child labor occurred, especially in the agricultural sector. In British Columbia, children as young as 12 years old can work legally in any industry; a letter from the parent is all that is required, and the province places no legislative or regulatory restrictions on the occupations, tasks, or time of day a child can work. There is some evidence of forced labor trafficking of workers from Eastern Europe, Asia, Latin America, and Africa who are subjected to forced labor in agricultural, construction, restaurants, hospitality, food processing plants, and as domestic workers.

*Discrimination:* Discrimination is prohibited with respect to employment or occupation on the basis of race, gender, etc.

#### Specific Examples of Problematic Laws:

*Federal:* In March 2009, The Public Service Equitable Compensation Act (PSECA) was passed into law. Sections 36 and 41 of the PSECA make it a criminal offence for a union to encourage or assist any employee in filing or proceeding with a pay equity complaint. Unions are subject to summary conviction and fined up to \$50,000 if they assist their members in any way in advancing pay equity complaints.

*Federal:* In 2013, the Government of Canada gave itself the exclusive right to define what constitutes an essential service, and to unilaterally designate its employees as essential. If 80 percent or more of the bargaining unit are designated as essential, strikes are prohibited. Arbitrators are no longer independent, but must instead give special evidentiary weight to Canada's fiscal circumstances relative to its stated budgetary policies, as well as the ability to attract and retain public service employees.

*Ontario:* In 2011, the Government of Ontario passed legislation declaring the Toronto Transit

Commission an essential service, prohibiting strikes by TTC employees. Toronto's public transit system fails to meet the ILO requirement for an essential service such that interruption constitutes “a clear and imminent threat to the life, personal safety or health of the whole or part of the population.” It also conflicts with the principle that entire classes of personnel should not be deprived of the right to strike because the interruption of the job functions they perform does not in practice affect life, personal safety or health.

*Quebec:* Essential services law imposes severe and disproportionate sanctions in the event of an infringement of the provisions prohibiting recourse to strike action. These include unilateral suspension of the deduction of trade union dues by the employer or reduction of employees' salary by an amount equal to the salary they would have received for any period of the infringement (in addition to not being paid during that period).

*Manitoba and Prince Edward Island:* Pursuant to the Public School Act, Manitoba teachers are prohibited from striking. Prince Edward Island teachers are also formally denied the right to strike. This prohibition denies teachers their fundamental right to freedom of association and is inconsistent with ILO guidance.

*Federal:* In the public service of the Government of Canada, the Treasury Board of the Government of Canada refuse to negotiate pensions, classification, and staffing, which are declared out of scope of the Public Service Labour Relations Act.

## Chile<sup>84</sup>

Today, 25 years after the end of the Pinochet regime, workers confront a profound lack of legal guarantees and effective protection by the state. The current labor legislation remains largely the same as then and thus perpetuates the destructive legacy of the past. As a result, there has been a steep decline in the rate of unionization - from 30 percent in 1973 to only 8 percent today. Today, Chile has among the lowest unionization rates among all OECD members. While the current government has formulated amendments to address some of the issues described below, the legislation has yet to pass.

*Freedom of Association and the Right to Bargain Collectively:* Police, military personnel, and civil servants of the judiciary are prohibited from joining a union. The Constitution also provides that the holding of trade union office is incompatible with active membership in a political party and that the law shall lay down related sanctions (Political Constitution, Art. 23). Such restrictions are incompatible with freedom of association. In addition, broad powers are granted to the Directorate of Labor for supervision of union's accounts and financial and property transactions.

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<sup>84</sup> ITUC, “Survey of Violations of Trade Union Rights: Chile,” 2015. Available at: <http://survey.ituc-csi.org/Chile.html>.

Collective bargaining in Chile is severely restricted. Industry-wide agreements which set minimum standards for wages and working conditions for all workers were once common but have since largely disappeared as the law does not require bargaining above the enterprise level. In addition, workers without permanent contracts are excluded from collective negotiations, a serious problem as employers are shifting to short-term contracts even for work that in reality is full time. The provisions of the domestic legislation that violate international law include (but are not limited to):

- Section 303 provides for collective bargaining only at the level of the company.
- Section 304 of the Labor Code prohibits collective bargaining in state enterprises dependent on the Ministry of National Defense or in public or private enterprises or institutions in which the State has financed 50 per cent or more of the budget of either of the last two calendar years.
- Section 305 provides that temporary workers, among others, cannot bargain collectively.
- Sections 314bis and 315 provide that groups of workers may submit draft collective agreements, even when there are unions present, undermining the role of unions as a bargaining representative.
- Section 334 provides that bargaining above enterprise level is at the discretion of the employer.

Finally, Chile also circumscribes the right to strike. According to the Labor Code, a strike must be agreed to by an absolute majority of the company's employees (Sections 372 and 373) and must be carried out within three days of the decision to call the strike (374). No strike action may be taken by workers providing services of a public utility and/or services (384) whose interruption may, by their nature, present a serious threat to health, supplies to the public, the country's economy, or national security. This goes beyond the "essential services" strike restrictions acceptable under ILO guidance. Section 254 of the Penal Code provides for criminal penalties in the event of the interruption of public services or public utilities or dereliction of duty by public employees and Act No. 12927 authorizes the imprisonment of anyone involved in the interruption or collective suspension, stoppage or strike in public services or public utilities. Section 381 provides for the possibility of hiring replacement workers during a strike. Agricultural workers are not guaranteed the right to strike. All of these shortcomings should be corrected before Congress votes on the TPP.

## Japan<sup>85</sup>

In large measure, the government of Japan provides for freedom of association and the right to collective bargaining for employees in the private sector. There are, however, some problems in the public sector.

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<sup>85</sup> ITUC, "Survey of Violations of Trade Union Rights: Japan," 2015. Available at: <http://survey.ituc-csi.org/Japan.html>.

*Freedom of Association and the Right to Collective Bargaining:* Administrative and clerical employees in the public sector do not have the right to bargain collectively at the local or national level; their wages are set by law or regulations.

All national and local public employees and some employees of private companies or state-run companies that provide essential services such as electricity are banned from striking. Dismissal and fines or imprisonment for up to three years can be imposed if a trade union leader is convicted of inciting a strike action in the public sector—this limitation for public sector workers is a serious violation of the ILO forced labor convention (C. 105), which remains unratified by Japan.

Companies frequently refuse to bargain in good faith. In several cases management delayed negotiations with a view to blocking the bargaining process. Financial information about the companies that is essential for the bargaining process is sometimes only delivered after unions exert pressure.

*Forced Labor and Child Labor:* Japanese law prohibits forced and compulsory labor. However, there were reports of such practices in the manufacturing, construction and shipbuilding sectors where foreign nationals are employed through the Technical Intern Training Program (TITP). The TITP permits foreign workers to enter Japan and work for up to three years and many of these workers are reportedly forced to work under poor working conditions and paid less than statutory minimum wages.

*Discrimination:* The law in Japan mandates equal pay for men and women. However, the Japanese Trade Union Confederation (JTUC-RENGO) reports many cases of discrimination against union members or activists as well as gender discrimination in wages and working conditions.

## Malaysia

Malaysia has grave problems with every one of the five fundamental labor rights. Of particular note are its profound failures to protect workers from forced labor and human trafficking. The DOL reports that forced labor is prominent in the electronics, garment, and palm oil sector, which also uses child labor.<sup>86</sup> The majority of the victims of forced labor in Malaysia are among the country's 4 million migrant workers—40 percent of the overall workforce.<sup>87</sup> The government of Malaysia fails to comply with international labor standards or even uphold basic human dignity, putting the products of forced labor into the hands of U.S. consumers,

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<sup>86</sup>DOL ILAB, "List of Goods Produced by Child Labor or Forced Labor: Malaysia," 2014. Available at: <http://www.dol.gov/ilab/reports/child-labor/list-of-goods/countries/?q=Malaysia>.

<sup>87</sup> "Immigration in Malaysia: Assessment of its Economic Effects, and a Review of the Policy and System," The World Bank: Human Development Social Protection and Labor Unit East Asia and Pacific Region, 2013. Available at: <http://psu.um.edu.my/images/psu/doc/Recommended%20Reading/Immigration%20in%20Malaysia.pdf>.



and forcing U.S. workers to compete with a workforce with few rights and protections.<sup>88</sup> Under current conditions, it is difficult if not impossible to imagine these workers moving into the middle class and becoming a significant market for U.S. exports.

The rights to freedom of association and collective bargaining are regularly violated in Malaysia, contributing to the overall level of exploitation, suppressing wages, and driving demand down. Collective bargaining is severely restricted for migrant workers and in the public sector. Employers use provisions that allow for multiple unions at the enterprise level to set up company-dominated unions and erode the bargaining power of representative unions. Trade union leaders and workers report employers regularly terminate or penalized workers for expressing their political opinions or highlighting alleged wrongdoings by employers. Freedom of association is strictly limited, as there are many legal restrictions on industrial action and police permission is required for public gatherings of more than five people.<sup>89</sup>

The rights of migrant workers are of particular concern. Migrants to Malaysia face a range of abuses related to their recruitment and placement and are often threatened with deportation for speaking out. Migrant workers in Malaysia generally come from other Asian countries in search of greater opportunities, but instead too often encounter forced labor or debt bondage at the hands of their employers, staffing agents, or labor recruiters. Migrant workers in agriculture, construction, textile, electronics and domestic workers throughout Malaysia are subjected to restrictions on movement, deceit and fraud in wages, document confiscation, and unconscionable debts by recruitment agents or employers. Migrants are also limited in their ability to improve these conditions, as they are heavily restricted from engaging in organizing or collective bargaining. While the Malaysian Employment Act of 1955 guarantees all workers, including migrant workers, the right to join a trade union, employers and government authorities discourage union activity among migrants, and work contracts and subcontracting procedures often undermine worker agency.<sup>90</sup>

Some of the most recognizable electronics brands operate or source components from Malaysia, including Intel, Advanced Micro Devices, Dell, and Flextronics.<sup>91</sup> A recent report from Verité that relied on interviews with over 500 workers found that approximately 28 percent of electronics workers toiled in conditions of forced labor. Additionally, 73 percent of

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<sup>88</sup> Verite, "Forced Labor in the Production of Electronic Goods in Malaysia: A Comprehensive Study of Scope and Characteristics," 2014. Available at: <https://www.verite.org/research/electronicsmalaysia>.

<sup>89</sup> ITUC, "Survey of Violations of Trade Union Rights: Malaysia," 2015. Available at: <http://survey.ituc-csi.org/Malaysia.html?lang=en#tabs-2>.

<sup>90</sup> Human Rights Watch, "US/Malaysia: Letter to Secretary Kerry on Trafficking in Persons in Malaysia," July 31, 2015. Available at: <https://www.hrw.org/news/2015/07/31/us/malaysia-letter-secretary-kerry-trafficking-persons-malaysia>; Kosh Raj Koirala, "Malaysia flouts own law on migrants' trade union rights," *Nepal Republic Media*, June 26, 2015. Available at: <http://www.myrepublica.com/politics/story/23544/plight-of-nepalis-in-malaysia-flouting-own-law-malaysia-prevents-migrants-joining-trade-union.html#sthash.txEWzuIN.dpuf>.

<sup>91</sup> Malaysia Investment Development Authority, "Top 10 U.S. Companies in Malaysia," 2012. Available at: <http://www.mida.gov.my/env3/uploads/events/TIMUSA29042012/02Top10USCompanies.pdf>.



workers reported violations that put them at risk for forced labor, such as outsourcing, debt from recruitment fees, constrained movement, isolation, and document retention.<sup>92</sup>

In May of 2015, Malaysian police uncovered 139 makeshift graves in the jungle alongside abandoned cages used to detain migrant workers—an operation so massive many believe local officials were complicit.<sup>93</sup> Not long after, the U.S. State Department made the disastrous and apparently political decision to upgrade Malaysia in its annual Trafficking in Persons Report from Tier 3 to the Tier 2 watch list—removing the country from the threat of trade restrictions under the TPP or other sanctions tied to Tier 3 status.<sup>94</sup> The situation in Malaysia has not improved: forced labor, human trafficking, and exploitation remain pervasive. Fundamental reforms must be taken in terms of Malaysia’s labor, immigration, and industrial policies before workers will be able to escape the cycle of exploitation and vulnerability that often leads to labor abuses and trafficking.

The LAC proposed labor chapter provisions to deal with such abusive recruitment practices, but these suggestions were soundly rejected. Despite Malaysia’s pervasive and notorious failure to combat human trafficking and protect the rights of migrant workers, the TPP fails to even include any specific protections for equal treatment for migrant workers or against exploitive or fraudulent international labor recruitment.

The LAC would have liked the opportunity to provide advice on the Malaysia consistency plan but was unfortunately denied the opportunity to help develop this and both of the other plans. USTR and DOL repeatedly denied access to these plans throughout the TPP negotiations process. The LAC was unable to review them until they were released to the public. What makes this lack of opportunity even more galling is that embargoed versions of the plans were shared with reporters even as USTR continued to deny access to the LAC. As a result, these plans have a number of shortcomings that could have been remedied had we been allowed to give input.

The TPP labor provisions and the Malaysia consistency plan call on Malaysia to amend its laws to:

- limit the ability of labor officials to deny trade union registration and affiliation
- make it illegal to retain a worker’s passport
- expand the right to strike, and

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<sup>92</sup> Verite, “Forced Labor in the Production of Electronic Goods in Malaysia.”

<sup>93</sup> Wang Kelian, “Malaysia finds 139 graves in ‘cruel’ jungle trafficking camps,” *Reuters*, May 25, 2014. Available at: <http://www.reuters.com/article/2015/05/25/us-asia-migrants-idUSKBN00A06W20150525#1btiVKhvKl33D1cQ.97>; Ambiga Sreenevasan, “Malaysia’s deadly connection,” *MalayMail*, July 24, 2014. Available at: <http://www.themalaymailonline.com/what-you-think/article/malaysias-deadly-connection-ambiga-sreenevasan>.

<sup>94</sup> Office to Monitor and Combat Trafficking in Persons, 2015 Trafficking in Persons Report, “Malaysia.” Available at: <http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243485.htm>.

- allow migrant workers improved trade union rights

Despite these helpful provisions, they do not appear sufficient to ensure that working people in Malaysia will be able to freely exercise their fundamental labor rights.

For example, in a number of places the plan is too vague, including in its requirement that Malaysia shall “prohibit discrimination, in respect of employment and occupation” in Part II.D. Does this provision protect against discrimination in terms of pay? Does it protect against discrimination on all relevant grounds, including not only gender, race or ethnicity, national origin, immigrant status, religion, political opinion, and LGBT status? It would also have been helpful to be able to provide guidance on the meaning of “large-scale, repeated or egregious” in Part II.B.2.c, of “acceptable housing” under Part II.B.4.b, and guidance on the types of employment that must be included on the list of hazardous employment for minors in Part II.C.a.

The plan does not clearly call for an expansion of the right to bargain collectively in all sectors, nor does it appear to hold employers fully accountable for abuses in subcontracting and recruitment processes—major factors in the perpetuation of forced labor. Improved rules regarding access to justice, recruitment fees, targeted labor enforcement in industries known to be problematic, and victim services could still be lacking even under the agreement. Nor does the agreement address basic human rights including the right to free expression and assembly and lack of civil rights for LGBT persons. As such, employers and government officials may still attack workers for their advocacy, while simply claiming to be using a different section of Malaysia’s legal code to do so.

All workers in Malaysia must be broadly empowered to improve wages and working conditions. The side letter/consistency plan fails to meet this benchmark and lacks any specific measurements or criteria to evaluate the implementation and enforcement of the required legal and regulatory changes. Moreover, while it specifies, “Malaysia shall enact the legal and institutional reforms in Part II and Part III of this plan prior to the date of entry into force of the TPP,” the letter includes no independent evaluation mechanism. Thus, the LAC fears that this side letter will follow in the footsteps of the Colombia Labor Action Plan, in which partial and ineffective fulfillment of the plan’s elements substituted for actual fulfillment, and in which changes on paper substituted for changes in workers’ lives.

In short, the Malaysia side letter offers some promising provisions on paper, but—given the lack of provisions to ensure on the ground monitoring, implementation, and enforcement—could leave workers without the ability to freely exercise their fundamental labor rights. Given that Malaysia will be rewarded with greater market access under the Trans-Pacific Partnership without having to first enforce the changes it promises to make on paper, there will be little incentive for the government to end exploitative working conditions or the brutality of forced labor after entry into force.

## Mexico

The human and labor rights situation in Mexico is rapidly deteriorating. Mexico currently fails to adopt and implement laws that protect the rights enshrined in the International Labor Organization's (ILO) Declaration on Fundamental Principles and Rights at Work, including freedom of association and collective bargaining. Indeed, the State Department's Mexico 2014 Human Rights Report concludes that:

The government did not consistently protect worker rights in practice. Its general failure to enforce labor and other laws left workers without much recourse with regard to violations of freedom of association, working conditions, or other problems.<sup>95</sup>

The use of "protection contracts" (agreements masquerading as collective bargaining agreements (CBAs) signed between an employer and an employer-dominated union, often without the knowledge of the workers) is the single most serious threat to freedom of association and collective bargaining in Mexico. Today, there are thousands of protection contracts in Mexico covering millions of workers. In thousands of workplaces, including key sectors such as automotive and agricultural exports, workers are governed by contracts that they have never ratified, were never consulted on, and in many cases have never seen.

When workers attempt to bring complaints about protection contracts, these complaints are heard by Mexico's Conciliation and Arbitration Boards (CABs), which are politically biased and corrupt.<sup>96</sup> Indeed, a recent report on "everyday justice," prepared at the request of the Mexican Presidency by the Center for Economic Investigation and Teaching (CIDE), concluded that:

*The Conciliation and Arbitration Boards are the institution responsible for providing labor justice. There is a relatively broad consensus that their current*

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<sup>95</sup> DOS, DRL, "Country Reports on Human Rights Practices for 2014: Mexico," 2014. Available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>.

<sup>96</sup> Graciela Bensusán & Arturo Alcalde, El sistema de justicia laboral en México: situación actual y perspectivas (June 2013). Available at: [http://www.fesmex.org/common/Documentos/Libros/Paper\\_AP\\_Justicia\\_Laboral\\_Bensusan-Alcalde\\_Jun2013.pdf](http://www.fesmex.org/common/Documentos/Libros/Paper_AP_Justicia_Laboral_Bensusan-Alcalde_Jun2013.pdf); US National Administrative Office, public review of submission 9703 (Itapsa) (evidence "raises questions about the impartiality of the CAB and the fairness, equitableness and transparency of its proceedings and decisions); public review of submission 9702 (Han Young); Julie M. Wilson, "Mexican Arbitral Corruption and the North American Agreement on Labor Cooperation: A Case Study." Swords & Ploughshares: A Journal of International Affairs 12, no. 1 (Spring 2003): 61-77; Adam Bookman & Jeffrey K. Staton, A Political Narrative of Mexican Labour Arbitration Boards and Legal Strategies. Paper prepared for presentation at the Conference on the Scientific Study of Judicial Politics. Texas A&M. October 21-23. Political Science Working Paper #375. It has been suggested that the Boards can be made more efficient by adopting oral procedures. See Instituto Mexicano para la Competitividad, Por una mejor justicia laboral (2014). However, it has been reported that in some labor boards the recordings of these proceedings are being used to bring criminal complaints against workers and their attorneys. Manuel Fuentes Muñiz, La justicia laboral de embudo, Jul. 1, 2014. Available at: <http://manuel Fuentesmuniz.blogspot.com/2014/07/la-justicia-laboral-de-embudo-la-silla.html>.

*performance is not adequate and that they have serious operational problems. It is urgent to conduct a serious, documented and rigorously-designed review to propose fundamental solutions, while taking immediate action to advance the Boards' professionalism, protect vulnerable workers, and eliminate areas of discretion that exist today and often become sources of corruption. One of the first tasks would be to review the tripartite structure of boards and their eventual incorporation into the judiciary. The body responsible for conducting the dialogue proposed in this document may lead this effort.*<sup>97</sup>

Instead of ensuring that workers can exercise their rights under Mexican and international law, the CABs, the labor authorities, and sometimes police forces have interfered with workers' freedom of association. This situation presents itself at the worksites of many multinational companies, including Atento, Excellon, Honda, PKC and Teksid.<sup>98</sup> In the agricultural sector, too, violations of fundamental rights occur. Child labor, forced labor, and inhumane working conditions exist on farms that export fresh produce into the United States, which is then sold at major retailers, including Wal-Mart and Safeway.<sup>99</sup> The recent mobilizations in Baja California for better wages in the agricultural sector and the right to form independent unions were met with police repression.<sup>100</sup>

The union certification process is designed to limit worker representation. For example, a requirement known as *toma de nota* has been used by the labor authorities as a tool to deny union office to leaders who are politically disfavored under the guise of a union elections certification process. Labor authorities have also denied legal registration to independent unions on seemingly arbitrary or technical grounds. They continue to assert that unions may represent only workers in specific industries and that the state may restrict a union to a specific "radius of action" (*radio de acción*).<sup>101</sup> This violates freedom of association, as authorities have refused to recognize unions outside of a specific radius that have been democratically elected by workers or to allow unions to modify their statutes to represent workers in other industries.

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<sup>97</sup> Centro de Investigación y Docencia Económicas (CIDE), Informe de resultados de los Foros de Justicia Cotidiana, Abril 2015, pp. 150-151. Available at: [http://justiciacotidiana.mx/work/models/JusticiaCotidiana/Resource/101/1/images/Documento\\_JusticiaCotidiana\\_VoBo\\_270415.pdf](http://justiciacotidiana.mx/work/models/JusticiaCotidiana/Resource/101/1/images/Documento_JusticiaCotidiana_VoBo_270415.pdf). See also: Arturo Alcalde Justiniani, La simulación del tripartismo en México, *La Jornada*, 25 Julio 2015. Available at: <http://www.jornada.unam.mx/2015/07/25/opinion/014a2pol>.

<sup>98</sup> Sindicato Mexicano de Electricistas, Public Communication under the North American Agreement on Labor Cooperation (Nov. 4, 2011): 5-6. Available at: <http://www.dol.gov/ilab/programs/otla/MexicoSubmission2011.pdf>; ILO CFA Case No. 2919 (Atento), Report No 368, Jun. 2013.

<sup>99</sup> Marosi, Richard, "Product of Mexico," *Los Angeles Times*, December 7, 2014. Available at: <http://graphics.latimes.com/product-of-mexico-camps/>.

<sup>100</sup> Binkowski, Brooke, "Arrests as Mexico farming wage strike turns violent," Al Jazeera, May 12, 2015. Available at: <http://www.aljazeera.com/news/2015/05/150512051555205.html>.

<sup>101</sup> See Secretaria Auxiliar de Conflictos Colectivos, Junta Especial Numero Quince, Expediente Numero: IV-54J2012.

The magnitude of these problems has been well documented in public reports, submissions under the NAALC,<sup>102</sup> reports of the ILO Committee on Freedom of Association,<sup>103</sup> academic investigations,<sup>104</sup> and recent case studies.<sup>105</sup> Although Mexico and the U.S. have had more than twenty years to work on bringing Mexican labor law and practice up to minimum international standards through the NAALC process, labor abuses in many cases are worse now than before NAFTA, and these abuses appear to be concentrated in supply chains that feed U.S. markets.

Migrant workers face widespread abuse in the labor recruitment and placement process and in U.S. workplaces, which requires transnational governmental action. The TPP fails to even include any specific protections for equal rights and remedies for migrant workers or specific prohibitions against exploitive or fraudulent international labor recruitment (the LAC proposed labor chapter provisions to deal with both migrant protections and abusive recruitment practices, but these suggestions were soundly rejected).

In short, NAFTA has contributed to labor abuses, not improvements. NAFTA also contributed to massive displacement of Mexican *campesinos*.<sup>106</sup> Some of these workers searched for promised new jobs in the *maquiladoras*. Many others migrated north to the United States, either through irregular channels or by utilizing often-exploitative labor recruitment firms and guest worker visa programs. As documented in a 2011 NAALC petition, migrant workers in the United States are subject to a range of labor rights violations.<sup>107</sup> Meanwhile, companies have shifted manufacturing work to Mexico for decades to take advantage of displaced *campesinos* and other impoverished workers who lack the most basic workplace protections.

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<sup>102</sup> See U.S. National Administrative Office, public reports of review for public submissions 940003 (Sony), 2003-01 (Puebla), 2005-03 (Hidalgo), 9702 (Han Young), 9703 (Itapsa).

<sup>103</sup> See, e.g., ILO CFA cases 2115, 2207, 2282, 2308, 2346, 2347, 2393.

<sup>104</sup> José Alfonso Bouzas Ortiz (Coordinador) EVALUACIÓN DE LA CONTRATACIÓN COLECTIVA EN EL DISTRITO FEDERAL, Friedrich Ebert Foundation, 2009. Available at: [http://www.democraciaylibertadsindical.org.mx/media\\_files/LIBRO\\_BOUZAS.pdf](http://www.democraciaylibertadsindical.org.mx/media_files/LIBRO_BOUZAS.pdf); Carlos de Buen Unna, *Collective bargaining agreements for employer protection ("protection contracts") in Mexico*, Friedrich Ebert Foundation, 2011. Available at: [http://www.democraciaylibertadsindical.org.mx/media\\_files/Paper\\_Charles\\_De\\_Buen.pdf](http://www.democraciaylibertadsindical.org.mx/media_files/Paper_Charles_De_Buen.pdf); Chris Tilly and José Luis Alvarez Galván, Lousy Jobs, Invisible Unions: The Mexican Retail Sector in the Age of Globalization. *International Labor & Working-Class History* 70 (2006), pp. 1-25.

<sup>105</sup> See, e.g., Worker Rights Consortium, *Violations of International Labor Standards at Arneses Y Accesorios De Mexico, S.A. DE C.V. (PKC GROUP)*, Jun. 18, 2013. Available at: <http://workersrights.org/Freports/WRC%20Findings%20and%20Recommendations%20re%20Arneses%20y%20Accesorios%20de%20Mexico%2006.18.13.pdf>; Centro de Reflexión y Acción Laboral, *After the Reform: Fifth report about the labor conditions of Mexico's electronics industry*, August 2013. Available at: [http://cerealgdl.org/images/informes/CEREAL\\_report\\_2013.pdf](http://cerealgdl.org/images/informes/CEREAL_report_2013.pdf).

<sup>106</sup> M. Angeles Villarreal, "NAFTA and the Mexican Economy," Congressional Research Service, June 3, 2010.

<sup>107</sup> Petition on Labor Law Matters Arising in the United States submitted to the National Administrative Office (NAO) of Mexico under the NAALC, "Regarding the Failure of the U.S. Government to Effectively Enforce its Domestic Labor Laws, Promote Compliance with Minimum Employment Standards, and Protect Migrant Workers," September 19, 2011.

There is also currently a crisis of violence and impunity taking place in Mexico that raises doubts about whether the Mexican government can and will fulfill its obligations under the TPP. The root causes of the crisis are many and complex, including growing economic inequality, unemployment and the absence of decent work, rural displacement since NAFTA, public corruption, the continuing drug trade (including U.S. demand), and the absence of the rule of law. The disappearance last year of 43 students, now declared dead, from the teachers' college in Ayotzinapa, Guerrero by local police and criminal gangs is a horrific example of violence, corruption, and dissolution of the rule of law. More than 22,000 persons have been disappeared since 2007, including more than 5,000 in 2014 alone.<sup>108</sup> These crimes are rarely investigated and almost never prosecuted, allowing public security forces—the same that have sporadically engaged in violent worker repression over the years—to operate with impunity.

Sadly, there is nothing in the TPP's labor chapter that would ensure that Mexico's history of worker abuse and exploitation will be remedied. While the TPP would bring the labor commitments into the core of the agreement and would make all labor chapter obligations subject to trade sanctions (in the event that a labor case progresses that far), no provisions were added to the enforcement section to ensure that monitoring and enforcement of the labor obligations will be deliberate, consistent, timely, vigilant, effective, or automatic. There is not even a "consistency plan" for Mexico despite the U.S. government's extensive knowledge of the problems—problems that not only impoverish Mexico's workers, but act as an inducement to transfer production out of the U.S.

The AFL-CIO and democratic unions in Mexico have demanded specific changes to Mexican labor law, including:

- enacting constitutional reforms that include, in their labor provisions, the elimination of the Conciliation and Arbitration Boards at the state and federal level, replacing them with labor judges who are independent from the executive powers.
- requiring employers to provide all workers covered by collective bargaining agreements a hard copy of the agreement and the basic documents of the union that represents that worker.
- making it illegal to file in the public registry a collective bargaining agreement that has not been ratified by a majority of the workers covered by that agreement
- improving the union election (*recuento*) process by establishing fixed dates for stages in the process and stipulating that objections by the employer are to be resolved after the *recuento* process concludes.

Unfortunately, the government has refused to commit to any of these measures.

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<sup>108</sup> "Law and Order in Mexico," *New York Times*, November 11, 2014. Available at: \ [http://www.nytimes.com/2014/11/12/opinion/murder-in-mexico.html?\\_r=0](http://www.nytimes.com/2014/11/12/opinion/murder-in-mexico.html?_r=0); "Mexico's Disappeared," Human Rights Watch, February 20, 2013. Available at: <http://www.hrw.org/reports/2013/02/20/mexicos-disappeared-0>.



Labor rights must be enforced, not just potentially enforceable, to have an impact on the ground. As currently written, the TPP fails to meet this benchmark and would reward Mexico with more trade benefits before the government makes fundamental and structural changes to its labor system to bring it into compliance with international labor law.

### **New Zealand**<sup>109</sup>

Labor laws and enforcement in New Zealand are generally compliant with internationally recognized standards. Disturbingly, recent legal changes are moving in the wrong direction. At this time, New Zealand is not generally viewed as a major off-shoring target for employers; however, provisions in New Zealand's employment law allowing employers in the film and video game production to classify workers as contractors, denying them rights to collective bargaining and minimum labor standards, were introduced specifically to attract investment to that industry at the demand of Warner Brothers.<sup>110</sup>

*Freedom of Association and the Right to Collectively Bargain:* The Employment Relations Act of 2000 in nearly all cases provides for freedom of association (except for workers classed as contractors).

In March 2015, changes to the Employment Relations 2000 came into force. Key changes to collective bargaining allow employers to end negotiation more easily, weaken good faith negotiations, remove protections for new workers, and make collective bargaining more difficult. The changes specifically allow employers to opt out of multi-employer negotiations without providing reasons or being subject to industrial action. The New Zealand Council of Trade Unions is considering a complaint to the ILO's Committee on Freedom of Association regarding the New Zealand Government's backsliding on these fundamental rights to collective bargaining.

With regard to strikes, there are restrictions on the objective, level, and scope of strikes. Unless a strike is directed at bargaining for a new collective agreement and meets notice and balloting requirements or is on the grounds of health and safety it is likely to be declared unlawful. In general, notice of strike action may be served nearly contemporaneously with the beginning of the action, however the Employment Relations Act 2000 contains an extensive list of essential services for which between 14- and 28-day notification of a strike is required. Other services such as schools require three days' notice of action.

*Forced Labor and Child Labor:* New Zealand law prohibits forced or compulsory labor and these laws are generally enforced. However, New Zealand has no minimum age of employment.

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<sup>109</sup> ITUC, "Survey of Violations of Trade Union Rights: New Zealand," 2015. Available at: <http://survey.ituc-csi.org/New-Zealand.html>.

<sup>110</sup> Please see Annex 2 for additional information.

## Peru

Since the U.S.-Peru Free Trade Agreement came into force, the Peruvian government has reduced protections for workers and weakened mechanisms to enforce labor legislation. Peruvian unions report that there are low levels of public investment to eliminate child labor and forced labor, promote equality and non-discrimination in employment, and to ensure the right to organize and collectively bargain. Labor rights, generally, and rights in export sectors, in particular, have been eroded by a disproportionate increase in temporary employment that has undermined workers' ability to freely associate.

According to the U.S. Department of State (DOS), Peru does not fully comply with the minimum standards for the elimination of trafficking despite making positive progress. Peruvian workers are exploited in conditions of forced labor, primarily in informal gold mining, logging, agriculture, brick making, and domestic service. Many of these victims are indigenous, rural, or migrant workers who face deceptive recruitment, debt bondage, restricted freedom of movement or inability to leave, withholding of or nonpayment of wages, and threats and use of physical violence. Forced child labor occurs in begging, street vending, and criminal activities.<sup>111</sup> The Department of Labor has also found significant instances of child labor in the production of bricks, coca, fireworks, fish, gold, and timber.<sup>112</sup>

Last year, the Peruvian government passed a series of laws to roll back health, safety, and environmental regulations—purportedly to “to create a more friendly environment, to reduce the impediments to investment.” Despite the fact that regressive laws designed to jump-start trade and investment likely violated trade commitments, the government turned back 2011 improvements to occupational health and safety and labor inspections processes. It also weakened enforcement measures and fines and the need for substantial action plans.<sup>113</sup>

Further, it has been well documented by national and international organizations, including the ILO and the Office of the High Commissioner for Human Rights (OHCHR), that the Peruvian Government is not enforcing its own labor laws in the sectors of garments, textiles, and agricultural product exports, which together employ hundreds of thousands of workers who produce billions of dollars of goods for the U.S. market.<sup>114</sup> In the textile and garment

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<sup>111</sup> Office to Monitor and Combat Trafficking in Persons, 2015 Trafficking in Persons Report, “Peru.” Available at: <http://www.state.gov/documents/organization/243561.pdf>.

<sup>112</sup> DOL ILAB, “List of Goods Produced by Child Labor or Forced Labor: Peru,” 2014. Available at: <http://www.dol.gov/ilab/reports/child-labor/list-of-goods/countries/?q=Peru>.

<sup>113</sup> “Paquetazo laboral viola tres TLC,” *Diario Uno*, July 13, 2014. Available at:

[http://diariouno.pe/columna/paquetazo-laboral-viola-tres-tlc/?fb\\_action\\_ids=10203308215938885&fb\\_action\\_types=og.likes%20](http://diariouno.pe/columna/paquetazo-laboral-viola-tres-tlc/?fb_action_ids=10203308215938885&fb_action_types=og.likes%20); “Moody's: Perú crecerá hacia un 6% para el 2016, asegura ministro Castilla,” *America Noticias*, February 7, 2014. Available at: <http://www.americatv.com.pe/noticias/actualidad/miguel-castilla-sobre-informe-moodys-peru-crecera-hacia-6-2016-n143824>.

<sup>114</sup> See Report number 357 of the Committee on Freedom of Association (CFA), June 2010, case 2675; Office of the United Nations High Commissioner for Human Rights (OHCHR), ITUC submission to the URP. Available at:



industry, the Law for the Promotion of Non-Traditional Exports (Law No. 22342)—designed to encourage investment by allowing workers to be hired under an indefinite number of short-term contracts—has been a major obstacle to the promotion of fundamental labor rights. The largest textile and garment companies are the major beneficiaries of the law; and the 30 largest companies account for over 70 percent of the contracts covered by these regulations. Employers can issue contracts as short as 15 days and renew the contract every two weeks for as long as 15 years. The law allows employers to discriminate against trade unionists by firing them under the pretext of not renewing their contract because of “economic circumstances.”

As documented in a recent submission to the Office of Trade and Labor Affairs (OTLA) on the failure of the government of Peru to comply with labor standards under the FTA, employers have routinely abused their power to renew short-term contracts of their workers when they are trying to constitute or become members of a union, making them permanent victims of firings for this purpose.<sup>115</sup> The LAC notes that this is the second submission regarding Peru’s labor practices in less than a decade and that there has been a request for the U.S. to act on Peru’s violation of its environmental obligations as well.<sup>116</sup> The lack of robust and public action by the USTR to enforce the first “May 10” agreement sends the wrong message to TPP parties: that despite the “historic” nature of the obligations, these obligations are unlikely to be enforced.

The TPP Labor Chapter does not make significant and meaningful improvements to substantive labor provisions of the U.S.-Peru FTA and offers no improvements to the enforcement mechanisms. This, combined with 20 years of lackluster labor enforcement by the U.S. government, make the LAC doubtful that the TPP will improve working conditions or raise wages in Peru. Because Peru is currently in violation of the U.S.-Peru FTA, Peru will be in clear violation from the moment the TPP enters into force unless both governments take immediate actions to secure Peru’s compliance.

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[http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/PE/CSI\\_PER\\_UPR\\_S2\\_2008\\_InternationalTradeUnionConfederation\\_uprseubmission.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/PE/CSI_PER_UPR_S2_2008_InternationalTradeUnionConfederation_uprseubmission.pdf).

<sup>115</sup> “PUBLIC PRESENTATION TO THE OFFICE OF TRADE AND LABOR ISSUES (OTLA) UNDER CHAPTERS 17 (LABOR) AND 21 (DISPUTE SETTLEMENT) OF THE TRADE PROMOTION AGREEMENT BETWEEN THE U.S. AND PERU,” July 23, 2015.

<sup>116</sup> See: USTR, “Review of 2012 EIA Petition Regarding Bigleaf Mahogany and Spanish Cedar Exports,” 2013. Available at: <https://ustr.gov/sites/default/files/EIA%20Review%20Summary.pdf>. Environmental Investigation Agency, “Implementation and Enforcement Failures in the US-Peru Free Trade Agreement (FTA) Allows Illegal Logging Crisis to Continue,” June 2015. Available at: [http://eia-global.org/images/uploads/Implementation\\_and\\_Enforcement\\_Failures\\_in\\_the\\_US-Peru\\_Free\\_Trade\\_Agreement\\_\(FTA\)\\_Allows\\_Illegal\\_Logging\\_Crisis\\_to\\_Continue.pdf](http://eia-global.org/images/uploads/Implementation_and_Enforcement_Failures_in_the_US-Peru_Free_Trade_Agreement_(FTA)_Allows_Illegal_Logging_Crisis_to_Continue.pdf).

## Singapore<sup>117</sup>

Substantial legal limitations on freedom of association, collective bargaining and the right to strike exist.

*Freedom of Association and the Right to Collective Bargaining:* The Registrar of Trade Unions has wide-ranging powers to refuse to register a union and/or cancel registration, particularly when a union already exists for workers in a particular occupation or industry. Parliament may impose restrictions on the formation of a union on the grounds of security, public order, or morality. In addition, trade unions must submit new rules, or alterations to their existing rules, to the Registrar for approval within seven days of the rule change. The Registrar has the right to refuse the rule change if she or he deems it either unlawful or “oppressive or unreasonable.” The Trade Unions Act limits what unions can spend their funds on and prohibits payments to political parties or the use of funds for political purposes.

Although the Trade Unions Act prohibits government employees from joining trade unions, the law gives the President of Singapore the right to make exceptions to this provision. The Amalgamated Union of Public Employees (AUPE) was granted such an exemption, and its scope of representation now covers all public sector employees except the most senior civil servants. In addition to AUPE, 15 other public sector unions have been granted exceptions under the law. Uniformed personnel involved in maintaining security and public order are not allowed to organize.

The Trade Unions Act bars any person “who is not a citizen of Singapore” from serving as a national or branch officer of a trade union unless prior written approval is received from the Minister. The Act also stipulates that a foreign national cannot be hired as an employee of a trade union without prior written agreement from the Minister. Similarly, a foreign national is forbidden to serve as a trustee of a trade union without the Minister's written permission. These restrictions could have been addressed had TPP negotiators accepted the LAC's recommendations on ensuring equal rights and remedies for migrant workers, but that recommendation, like other recommendations, was excluded from the agreement.

## Vietnam

Vietnam has an authoritarian government that limits political rights, civil liberties, and freedom of association. The government maintains a prohibition on independent human rights organizations and other civil society groups. Without the freedom to exercise fundamental labor rights, labor abuses in Vietnam are pervasive, artificially suppressing wages, stifling the ability of Vietnamese workers to escape poverty, and putting U.S. workers at a disadvantage in the global market. Labor provisions in the TPP and the labor consistency plan do not appear to be carefully crafted to effectively mitigate this urgent problem or empower

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<sup>117</sup> ITUC, “Survey of Violations of Trade Union Rights: Singapore,” 2015. Available at: <http://survey.ituc-csi.org/Singapore.html>.

workers to improve conditions. The LAC does not believe that the market opening benefits of the TPP should apply to Vietnam unless and until Vietnam comes into full compliance with fundamental labor rights.

The labor relations system in Vietnam suppresses freedom of association. The Vietnamese government currently restricts union activity outside the official unions affiliated with the Communist party's Vietnam General Confederation of Labor (VGCL), which actually controls the union registration process.<sup>118</sup> Workplace-level VGCL unions generally have management serving in leadership positions, and when that is not the case, workers cannot meet as the union without management present.<sup>119</sup> This effectively bars the possibility of establishing independent trade unions in Vietnam. Further, there is no right to strike in Vietnam. Wildcat strikes and other industrial actions outside VGCL unions have led to government retaliation, including the prosecuting and jailing of workers.

Government repression of civil liberties undermines industrial relations in Vietnam. Corruption in the judicial system and widespread abuse committed by police and other security forces, including arbitrary killings, stifles whistleblowers and labor activists, as well as human rights defenders.<sup>120</sup> The government blocks access to politically sensitive websites, and monitors the internet for the organization of unauthorized demonstrations.<sup>121</sup>

Additionally, Vietnam has significant problems with forced labor and child labor. The U.S. DOL finds that child labor is prevalent in the production of bricks and garments. Forced labor and human trafficking is also prevalent in the garment sector and in the informal economy.<sup>122</sup> Vietnam is the second largest source of apparel and textile imports to the United States, totaling just under \$10 billion in value<sup>123</sup> and employing over two million workers.<sup>124</sup> Many of the clothes contain textiles produced in small workshops subcontracted to larger factories. These workshops frequently use child labor, including forced labor involving the trafficking of children from rural areas into cities.<sup>125</sup> Migrant workers from Vietnam are particularly

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<sup>118</sup> U.S. DOS, "Vietnam 2014 Human Rights Report," 2014. Available at:

<http://www.state.gov/documents/organization/236702.pdf>.

<sup>119</sup> ITUC, "Survey of Violations of Trade Union Rights: Vietnam," 2014. Available at: <http://survey.ituc-csi.org/Vietnam.html?lang=en#tabs-3>.

<sup>120</sup> Human Rights Watch, "World Report 2015: Vietnam," 2015. Available at: <https://www.hrw.org/world-report/2015/country-chapters/vietnam>.

<sup>121</sup> DOS, "Vietnam 2014 Human Rights Report," 2014.

<sup>122</sup> DOL ILAB, "List of Goods Produced by Child Labor or Forced Labor: Vietnam," 2014. Available at: <http://www.dol.gov/ilab/reports/child-labor/list-of-goods/countries/?q=Vietnam>; Office to Monitor and Combat Trafficking in Persons, 2015 Trafficking in Persons Report, "Vietnam." Available at: <http://www.state.gov/documents/organization/243562.pdf>.

<sup>123</sup> ITA, Office of Textiles and Apparel, "Major Shippers Report: U.S. General Imports By Country," September 2015. Available at: <http://otexa.trade.gov/msrcty/v5520.htm>.

<sup>124</sup> Worker Rights Consortium, "Made in Vietnam," May 2013. Available at: [http://www.workersrights.org/linkeddocs/WRC\\_Vietnam\\_Briefing\\_Paper.pdf](http://www.workersrights.org/linkedddocs/WRC_Vietnam_Briefing_Paper.pdf).

<sup>125</sup> Ibid

vulnerable as labor recruitment firms operate in an unregulated manner, charging high fees and perpetuating debt bondage.<sup>126</sup>

The government of Vietnam also actively imposes compulsory labor on drug offenders. In these work centers styled as drug treatment centers, detainees are harassed and physically abused when they do not meet their daily factory quotas in so-called “labor therapy.” An estimated 309,000 people were detained in Vietnam’s drug detention centers from 2000 to 2010. The detainees receive little or no pay for their work.<sup>127</sup>

The LAC would have liked the opportunity to provide advice on the Vietnam side letter/labor consistency plan but was unfortunately not allowed to participate in the development of this and both of the other plans. USTR and DOL repeatedly denied access to these plans throughout the TPP negotiations process. The LAC was unable to review them until they were released to the public. What makes this shut out even more galling is that embargoed versions of the plans were shared with reporters even as USTR continued to deny access to the LAC. As a result, these plans have a number of shortcomings that could have been remedied had we been allowed to assist in their design.

The labor side letter/consistency plan with Vietnam offers many improvements on paper, but few of them are likely to be actualized given that full TPP membership and market access will be granted on Day One despite the fact that the consistency plan provides a five year free pass on the foundational right to freedom of association.

The plan contains a number of other shortcomings. For example, Part II.B.4 seems to allow Vietnam to give “independent” unions “mandatory political obligations and responsibilities” so long as they are not “inconsistent with labour rights as stated in the ILO Declaration.” It is inconsistent with the concept of free and independent unions to allow the government to saddle them with “political obligations” of any kind. Moreover, Part II.I.1 requires Vietnam to issue “clarifying policy guidance . . . to make clear that the law prohibits discrimination based on color, race, and national extraction.” Notably missing from this list are other important bases of discrimination, including religion, political opinion, immigration status, and sexual orientation/gender expression. Despite important language clarifying the right to strike and the right of unions to independently and democratically manage their own affairs and elect their own leadership, it is not clear that penalties for employer violation of these rights will be established—thus limiting the effectiveness of these provisions to deter rights-denying behavior.

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<sup>126</sup> Office to Monitor and Combat Trafficking in Persons, 2015 Trafficking in Persons Report, “Vietnam.”

<sup>127</sup> Human Rights Watch, “World Report 2015: Vietnam,” Adeline Zensius, “Forced Labor in Vietnam: A Violation of ILO Convention 29,” International Labor Rights Forum, December 2011. Available at: [http://laborrightsblog.typepad.com/international\\_labor\\_right/2011/09/forced-labor-in-vietnam-a-violation-of-ilo-convention-29-.html#sthash.FJEFKvw8.dpuf](http://laborrightsblog.typepad.com/international_labor_right/2011/09/forced-labor-in-vietnam-a-violation-of-ilo-convention-29-.html#sthash.FJEFKvw8.dpuf).

Part II.A.2 requires Vietnam to provide workers with the right to create independent unions and federations that extend beyond single enterprises, but Parts VIII.1 & 2 provide a free pass to Vietnam to deny these rights for *at least the first five years* after the TPP's entry into force. Part VIII outlines a process by which the U.S. may, if it so chooses, impose trade sanctions several years from now for Vietnam's failure to fully afford freedom of association under II.A.2. The LAC notes that the potential penalty is only a delay of future tariff reductions. However, by Year 6 of the agreements, Vietnam will already enjoy the bulk of the tariff reductions required by the TPP, including significant market access in the all-important garments sector.

It is difficult for the LAC to believe that if the U.S. government lacks the political will *now* to require Vietnam to afford its workers their fundamental labor rights consistent with the obligations of the labor chapter, that it will possess such will several years from now after U.S. investment in Vietnam has increased, along with the concomitant pressure from powerful commercial interests. Unfortunately, by providing a grace period, the agreement gives away important leverage that could improve the situation *now*. If the U.S. had denied additional access to the U.S. market unless and until Vietnam had come into full compliance, the same U.S.-based multinationals that are clamoring for the TPP because they want to expand production Vietnam could have become allies in ensuring Vietnam acted swiftly to make needed changes to its labor regime before entry into force. Instead, such firms will become lobbyists against U.S. government action in a number of years.

We now have years of experience with labor rights language in trade agreements. The model has failed. Even the improvements made in the "May 10" labor provisions fall far short. Unlike corporations that are able to unilaterally access dispute settlement mechanisms, workers do not have the power to initiate complaints and must petition their governments to advocate on their behalf. For workers denied their rights, trying to convince another government to initiate a complaints has resulted in an unworkable process. The LAC has no confidence that the enforcement mechanisms of the TPP will protect labor rights in Vietnam. The fact is no worker in the global economy has won the right to form an independent union and to bargain collectively as a result of the enforcement of a worker rights provision in a trade agreement. There has never been a single monetary fine or tariff penalty imposed for labor violations in any of the U.S.'s trade agreements.

The LAC restates its long held view that Vietnam must undertake these structural reforms to its labor relations system *before* receiving trade benefits. Anything less will essentially create a permanent ceiling on labor and human rights in Vietnam, stunting Vietnamese wage growth, suppressing Vietnamese demand, and continuing to allow social dumping on world markets.

# Annex I

**BEFORE THE UNITED STATES  
TRADE REPRESENTATIVE**

**TESTIMONY REGARDING THE PROPOSED UNITED STATES –  
TRANS-PACIFIC PARTNERSHIP TRADE AGREEMENT**

**filed by**

**THE AMERICAN FEDERATION OF LABOR &  
CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)**

**JANUARY 25, 2010**

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## **INTRODUCTION**

On December 16, 2009, the Office of the U.S. Trade Representative (USTR) published in the Federal Register a request for public comments concerning the proposed Trans-Pacific Partnership Trade Agreement (TPPTA) with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam. The USTR states that it seeks to negotiate a “high-standard, 21st century agreement with a membership and coverage that provides economically significant market access opportunities for America’s workers, farmers, ranchers, service providers, and small businesses” and now invites public comments to assist it in developing its negotiating objectives for such an agreement. These comments are filed in response to that request and supplement our previous comments on the TPPTA filed with the USTR on February 25 and March 10, 2009.

The AFL-CIO welcomes the Obama Administration’s pledge to conduct a comprehensive review of the U.S. trade agreement template, though it believes that this should be done in advance of entering into new trade negotiations – not during such negotiations. The AFL-CIO also welcomes the administration’s promise to conduct frequent and substantive consultations with the Congress and civil society now and throughout the course of TPPTA negotiations. This signals a major shift from the way trade policy was formulated under the Bush Administration, which ignored the substantive input of unions and civil society organizations until the congressional elections of 2006 forced the Bush Administration to address in part some of our concerns.

The AFL-CIO is not opposed in principle to negotiating a trade agreement with countries in the Asia-Pacific region. As always, however, the AFL-CIO will be unable to support a trade agreement unless it is well balanced, foments the creation of good jobs, protects the rights and interests of working people and promotes a healthy environment. We also note that to work, trade agreements must also be fairly and consistently enforced. Further, trade agreements, without complementary policies such as infrastructure development, export promotion strategies and active labor market policies, will not produce the outcomes desired. This document attempts to spell out many of the changes needed in our national trade policy to produce a good agreement that benefits us all.

### **I. PRELIMINARY ISSUES**

Before addressing specific changes needed to the trade agreement template, we would like to raise a number of antecedent issues.

#### *A. JOBS*

The Obama Administration took office in the middle of the worst economic crisis since the Great Depression. The recovery package passed last year has helped but we are still down more than 10 million jobs since the recession began and we have not yet hit bottom, though we are now falling more slowly. The economic consequences of the current jobs crisis - weak consumer spending, unemployment-driven foreclosures, deep cutbacks in essential state and local government services, and the damage to communities - jeopardize a sustainable economic recovery and will leave long-lasting scars on both the labor force and our economic base.

The AFL-CIO is evaluating governmental policies and initiatives in light of their capacity to contribute to sustained economic growth, both nationally and globally, and to create good jobs quickly. Too often, trade has meant the loss of well-paid, unionized manufacturing jobs, while newly created jobs (especially



for those without professional degrees) have been found in the less secure, lower-paying, non-traded service sectors. Indeed, the loss of manufacturing capacity and the well-paying jobs that went with them was an important precondition to the economic crisis of 2008. We believe that we need a coherent national economic strategy to coordinate our trade policy with our domestic investment/infrastructure/industrial policies and to ensure that trade contributes to the creation of good jobs in the future. We urge the administration, throughout the negotiations, to adopt a jobs lens – one which asks how any decision at the negotiating table contributes to a coordinated governmental strategy for the promotion of high-quality jobs here in the United States. We cannot afford another trade agreement that privileges substantial new opportunities for investors over good jobs for workers.

### *B. MARKET ACCESS*

The USTR must pay particular attention, and should give particular emphasis, to ensuring that any market access expected from this – or any other trade agreement – is actually achieved. All too often, trade negotiations separate tariff and non-tariff measures, assigning negotiating tasks to different negotiators. This approach fails to recognize that effective market access depends on addressing both forms of market access impediments. In many trade agreements, tariff reductions have not resulted in enhanced access, as signatory countries either maintain, or erect, non-tariff measures to block access to U.S. products. A results-oriented approach that allows for automatic responsive measures when market access limitations are not lifted should be included in a TPPTA. Additionally, while taking into account the complexity of the global supply chain, the rules of origin should be negotiated such that the signatories are the primary beneficiaries of new market access. Finally, transfers of technology or production must not be a condition for gaining market access.

### *C. LEARNING FROM PAST EXPERIENCE*

The U.S. already has trade agreements with four of the seven potential TPP partners (Australia, Chile, Singapore and Peru). However, the U.S. government (USG) does not appear to have prepared a comprehensive analysis of the economic and social impacts – either positive or negative – of these trade agreements. In order to enter into informed negotiations with these four countries for a TPPTA, we first need to know what did and did not work with the existing agreements and seek to address any problems through the new agreement. We therefore strongly urge the USG to undertake a comprehensive impact review of the four existing FTAs, which includes, to the extent relevant, information on the subjects listed in Section 3 of the proposed Trade Act of 2009 (H.R. 3012 / S. 2821). Of particular interest to us are wage and employment impacts overall and by sector. Further, we urge USTR to develop a comprehensive action plan to address any negative consequences that may have resulted from those agreements.

Further, to the extent that there are enforcement problems with these agreements, the USG should direct attention and resources to address the obstacles to enforcement. For example, the Government Accountability Office (GAO) recently found that compliance with the labor and environmental provisions of the Jordan, Chile, Singapore and Morocco FTAs was uneven at best and that USG engagement with these countries on these issues was minimal.<sup>128</sup> Serious efforts must be undertaken to learn from past mistakes and neglect so that the public has confidence in the administration to fully enforce these and other provisions of our trade agreements.

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<sup>128</sup> See, e.g., General Accountability Office, *Four Free Trade Agreements GAO Reviewed Have Resulted in Commercial Benefits, but Challenges on Labor and Environment Remain*, July 2009.

#### *D. ONE OR MANY AGREEMENTS*

The TPPTA negotiations represent only the second time that the U.S. has sought to enter into a regional trade agreement when it already had a trade agreement in force with at least one of the potential regional trade partners. The first was the North American Free Trade Agreement (NAFTA), which entered into force on January 1, 1994, exactly five years after the bilateral U.S.-Canada FTA.

The NAFTA resulted from bilateral negotiations between the U.S. and Mexico, which commenced on June 10, 1990, through which the U.S. largely sought to extend the terms of the U.S.-Canada FTA to Mexico. Additional provisions were negotiated to address issues specific to Mexico and labor and environmental side agreements were negotiated in order to obtain congressional approval in the United States. When NAFTA entered into force, it superseded entirely the bilateral U.S.-Canada FTA, though differences between that agreement and NAFTA were few to begin with.<sup>129</sup>

The potential TPPTA agreement is more complicated. First, the four extant U.S. agreements have several major differences among them. The U.S.-Australia FTA has, for example, no investor-to-state dispute resolution clause in its investment chapter. The Singapore and Chile FTAs created (wrongly, in our opinion) entire new visa categories for the temporary entry of professionals, in addition to our existing H-1B system, while others FTAs are silent on the issue. Most recently, the U.S-Peru FTA contains modifications in several chapters the result of the May 10, 2007 trade framework. Harmonization of the existing agreements would be difficult at best. More importantly, the result of such harmonization would be an agreement that we simply could not support.

Second, in 2005, New Zealand, Chile, Singapore and Brunei signed onto the Trans-Pacific Strategic Economic Partnership Agreement (P-4). The P-4 does cover many of the same issues included in U.S.-model FTAs but differs in several respects, including the absence of chapters on investment, labor and the environment (with only weak side agreements for the latter two) and a number of policy differences in some of the chapters for which there is overlap. As such, the P-4 is at odds with the kind of agreement that President Obama has signaled that he wants. The P-4 should therefore not serve as the basis for the TPPTA.

It appears that the USG has three choices.

1. Develop the TPP as a central, integrated agreement that would supersede existing trade agreements.
2. Develop the TPP as a grouping of existing and new FTAs. Under this scenario, there would be wide diversity in the content of the agreements in the TPP grouping.
3. Develop the TPP to create one set of rules, but also keep in place existing trade agreements. The question arises then as to who decides which set of rules applies and when. Can a country simply take advantage of the more favorable of the commercial rules, e.g. the FTA or TPP? Would this choice also apply with regard to the labor and environmental chapters?

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<sup>129</sup> It is important to note that, prior to negotiations, the Mexican government commissioned comprehensive sector studies to identify its negotiating objectives to ensure economic success for its producers and its people. The USG performed no similar analysis.

The AFL-CIO believes strongly that the first option is the only way to truly bring our trade policy into the 21<sup>st</sup> century. Of course, some individual countries may pose unique challenges that may call for some variation in the text from country to country. However, we should not simply leave the existing FTAs in place.

## **II. LABOR LAW REFORM**

The labor laws in each of the potential TPP member states fall short, to varying degrees, of the international minimum labor standards established by the ILO even though each of the potential TPP member states, all members of the ILO, have already agree to respect, promote and realize these minimum rights. The U.S. government must begin a conversation now with each of the proposed TPP member states, as well as representatives of workers and employers, about labor law reform and encourage the creation of local processes by which the social partners in each country may work towards the reforms necessary to bring labor codes into compliance with international minimum standards. It is critical that all potential TPPTA signatories be in compliance with these standards prior to implementation of the agreement. The U.S. government should avoid strictly government-to-government negotiations on labor law reform that marginalize worker views in the labor law reform process.

Our observations with regard to the deficiencies of the labor laws of the potential TPP member states was filed with USTR on March 10, 2009. We urge USTR to revisit that testimony, as well as the comments the AFL-CIO filed on July 25, 2008 with regard to GSP eligibility for Vietnam.

## **III. FIXING THE TRADE TEMPLATE**

### *A. NEW ISSUES FOR CONSIDERATION*

#### *a. CURRENCY*

The valuation of currency is an important trade issue. However, no U.S. bilateral or regional trade agreement currently contains tools necessary to address either rapid fluctuation in exchange rates or cases of persistent currency undervaluation. For example, the 1994 peso devaluation in Mexico, in which the value of the peso against the dollar fell by roughly 40%, had a substantial impact on the trade flow between the U.S. and Mexico. With U.S. exports suddenly much more expensive in the Mexican market and Mexican goods suddenly much cheaper in the U.S. market, it was no surprise that goods suddenly flowed northward at a much faster clip than before. Future regional agreements must include temporary measures specifically to deal with trade imbalances resulting from sudden currency devaluation while, hopefully, other tools at the multilateral level are being used to address the causes of the devaluation and to shore up the currency.

At the same time, we need an effective tool to deal with misaligned or manipulated currency in the TPPTA area. The U.S. cannot effectively export to countries that intervene systematically to keep their currency artificially low in relation to the dollar, as China, in particular, is doing. This practice gives foreign production an effective subsidy – making their goods cheaper in the U.S. market and U.S. exports more expensive in their market. The failure of the dollar to fall against the yuan produced a \$165 billion trade deficit as of the first nine months of 2009. Like China, the government of Vietnam also intentionally undervalues its currency. The TPPTA should include tools to effectively address such practices, including explicitly defining currency misalignment and/or manipulation as a countervailable subsidy. Where

temporary measures are ineffective, structural measures should be available to ensure that the impact of currency manipulation or misalignment is addressed.

#### b. DEMOCRACY

For years, governments have used trade and investment sanctions or the threat of such sanctions as a means, in conjunction with other tools, to pressure authoritarian regimes to respect fundamental human rights and to embrace democratic principles. However, the trade agreements we have negotiated have substantially limited the ability of the U.S. to employ trade and investment sanctions when extreme circumstances would justify their use.

For example, in June 2009, the democratically-elected Zelaya Administration was overthrown in a military-backed coup. Neighboring countries immediately sealed the borders to commerce and other Latin American countries immediately threatened trade and other economic sanctions in an effort to restore democratic rule. While the USG was not without options, some of which were exercised, there was no possibility of suspending preferential trade and investment relations under the Central America Free Trade Agreement (CAFTA), short of withdrawing from the agreement altogether.

The USG should negotiate a democracy clause in the TPPTA. Linking market access and democracy is not without precedent in regional economic agreements. For example, the members of the Southern Cone Common Market (MERCOSUR), which includes Brazil, Argentina, Uruguay and Paraguay, signed onto the Ushuaia Protocol on Democratic Commitment in the Southern Common Market in 1998.<sup>130</sup> In the event of a “breakdown of democracy” in any of the member states, Article 5 of the Protocol allows that the other state parties may apply measures that range from suspension of the right of the offending nation to participate in various bodies to the suspension of the party’s rights and obligations under the Treaty of Asuncion (the MERCOSUR foundational agreement).

The adoption of such a clause in the TPPTA would signal an unambiguous commitment by the U.S., as well as the other potential TPP partners, to democratic principles, as well as to deter potential challenges to democracy and provide a potentially useful instrument for addressing threats to democracy should they arise. A democracy clause should include language on accession (see below), requiring that future members must adhere to basic democratic conditions. Such a clause would provide an explicit incentive to nations in the region to democratize or to dissuade anti-democratic elements in the region.

Our concern for democracy in this region is not academic. Several APEC nations have suffered lapses in democracy in their relatively recent history (Indonesia, Malaysia and the Philippines), some more recently than others (Thailand). Others remain largely undemocratic, including Brunei Darussalam,<sup>131</sup> Singapore and China.

#### c. ACCESSION OF NEW MEMBER STATES

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<sup>130</sup> Text of the Protocol is available online at [http://untreaty.un.org/unts/144078\\_158780/20/3/9923.pdf](http://untreaty.un.org/unts/144078_158780/20/3/9923.pdf). Associate Mercosur members Chile and Bolivia also signed onto the Protocol in 1998.

<sup>131</sup> The Sultan of Brunei, Hassanal Bolkiah, maintains complete control over the executive branch of the nation and appoints nearly every members of the legislature. Mr. Hassanal Bolkiah is also among the richest persons in the world. He is known for a luxury auto collection that includes several hundred luxury vehicles. He also owns a personal aircraft fitted with gold plated fixtures.

The TPPTA is the first U.S. trade agreement that contemplates the potential accession of additional FTA partners after the initial implementation. This poses several interesting substantive and procedural questions that should be addressed both in the text of TPPTA, as well as in the implementing language in the U.S. Congress.

### Trade Agreement

If new members are to be added, the TPPTA must include text which clearly describes the process for accession. In principle, accession to the TPPTA must be on negotiated terms with all existing parties. The accession process should commence with a formal written request from an eligible APEC member state. The request should result in the creation of a working group comprised of representatives of each of the TPP member states to examine the accession request.

The applicant government should present a detailed report covering all relevant aspects of its trade and legal regime to the working group. Thereafter, the working group should examine the report to ensure that the acceding member either complies with the provisions of the TPPTA and other objective eligibility criteria or lays out a clear plan and timeline by which it shall come into compliance. After examining the existing trade and legal regimes of the acceding government, the working group should begin to determine the terms and conditions of entry for the applicant government. Terms and conditions include commitments to observe TPPTA rules upon accession and transitional periods required to make any legislative or structural changes where necessary to implement these commitments. At the same time, the applicant government should engage in bilateral negotiations with TPPTA members on concessions and commitments on market access for goods and services. The results of these bilateral negotiations would form the proposed final accession package. The package should be submitted to the working group for final approval. A final decision on accession must be by consensus of the TPPTA member states.

It may be the case that a new entrant may pose unique challenges not contemplated at the time the TPPTA was originally negotiated. The TPPTA should explicitly provide for amendment on the consensus of existing members to address such challenges.

### U.S. Congress

In the TPPTA implementing legislation, the U.S. Congress must be sure to reserve to itself authority with regard to accessions, including: a) substantial consultations on which APEC members should be invited to join prior to any offer to negotiate; b) consultations and review of any applications to join, including the final accession package; c) approval of the bilateral package negotiated with the acceding member; and d) advance consultation on, and approval of any modifications to the TPPTA should they be necessary to address new challenges posed by an acceding member. USTR must also engage in comprehensive consultations with the trade advisory committees and civil society in developing the terms of the accession demands. Before any congressional vote on accession may be scheduled, however, a comprehensive impact assessment of the entry of the new member must be prepared based on the terms of the proposed final accession package. Congress should be given at least 90 days to consider the report before any vote. We would support the adoption of similar procedures in the legislatures of our potential TPPTA partners.

#### d. READINESS CRITERIA

The AFL-CIO believes that additional criteria, beyond compliance with the terms of the agreement, should be considered in determining whether a country is a suitable future TPP partner. For example, while

compliance with the full range of international human rights is not now an obligation in U.S. trade agreements, a country's human rights record (including labor rights) should be considered in determining whether to initiate negotiations with a country. The AFL-CIO has long maintained, for example, that the USG should never have commenced negotiations with Colombia in light of the widespread and systemic violation of civil and political human rights committed by the military, police and paramilitary actors – including but not limited to murder and torture. The withholding of the commencement of trade negotiations, we believe, could have provided a considerable incentive for Colombia to improve human rights conditions in order to enjoy permanent preferential trade relations with the U.S. We also know, as substantial experience with China's membership in the WTO has shown, that expanded trade does not automatically lead to enhanced human rights and freedom.

International human rights compliance may not be the only worthwhile criterion to consider. For example, governments that are more transparent and take substantial measures to combat official corruption should be viewed more favorably than those that do not. Section 3(c) of the proposed Trade Act of 2009 (H.R. 3012 / S. 2821) sets out a number of issues that should be considered in determining whether or not a country is a worthy trade partner.

## *B. CHAPTER BY CHAPTER REFORMS*

The following observations are not exhaustive. This represents at the present moment some of our key concerns. However, as negotiations progress and we learn more about some of the potential partners and the region, as well as the potential opportunities and challenges of the agreement, especially as the terms of the agreement begin to crystallize, we will be sure to supplement this document with regular updates.

### *a. Labor*

As we signaled at the time, we believe that the May 10, 2007 compromise on labor represented an important step forward but did not contain all of the essential elements of an effective labor chapter. As the TPPTA represents a regional, rather than bilateral, agreement, there are also strong arguments for the creation of effective super-national institutions that will help to oversee labor law and labor market policy among potential signatories. Finally, it is time to consider mechanisms in addition to the important labor standards enforcement tools that give workers channels for consultation with common employers in the TPPTA region. It should go without saying that the Labor Memorandum of Understanding (MOU) negotiated between the P-4 countries as part of the Trans Pacific Strategic Economic Partnership Agreement should not serve as a model labor chapter for the TPPTA negotiations, as the obligations in the MOU are extremely weak and there is no enforcement mechanism.

Below are some, but not all, of the issues that should be negotiated in any future agreement.

## STANDARDS AND LEVEL OF ENFORCEMENT FOR LABOR RIGHTS

### *1. The minimum standard*

The minimum standard in the Peru FTA, though still inadequate, is the strongest in a U.S. trade agreement to date.

## **Article 17.2: Fundamental Labor Rights**

1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration):

- (a) freedom of association;
- (b) the effective recognition of the right to collective bargaining;
- (c) the elimination of all forms of compulsory or forced labor;
- (d) the effective abolition of child labor and, for purposes of this Agreement, a prohibition on the worst forms of child labor; and
- (e) the elimination of discrimination in respect of employment and occupation.

Footnote 2 of Chapter 17, which modifies Article 17.2.1, states, “The obligations set out in Article 17.2, as they relate to the ILO, refer only to the ILO Declaration.” This footnote could be interpreted in arbitration to require a party to respect only the broad principles underlying the ILO core labor rights, not the rights themselves. While we strongly disagree with such an interpretation, we believe that the footnote should be omitted in any future agreement. Better, the agreement should explicitly reference the ILO core conventions.

Further, many have also argued that “core labor standards” is too restrictive a concept and that reference should therefore be to a broader list of rights. Indeed, the NAFTA labor side agreement refers to additional issues such as workers’ compensation and migrant workers’ rights. A further obligation to enforce existing laws and regulations with regard to these issues would be another step forward. Language in the text that provided clear guarantees with regard to labor recruitment and contracting among TPPTA parties would also be an advance.

## 2. Non-Derogation

Chapter 17 of the Peru FTA states the following:

17.2(2) No Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes and regulations implementing paragraph 1 in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph.

We continue to have serious concerns with this formulation.

First, in referring to statutes or regulations implementing paragraph 1, it excludes from the clause “acceptable conditions of work.” This allows a country to weaken its wage, hour and health and safety laws to attract trade and investment without sanction. In fact, the Peruvian government, shortly after the vote on the FTA, reduced overtime compensation and vacation time for workers in micro and small enterprises – which as redefined now covers most enterprises. Nothing can be done to challenge this weakening of labor laws under the Peru FTA.

Second, the last clause of the article allows a country to weaken laws related to a fundamental right to attract trade and investment, so long as they are not reduced to a point where they would be inconsistent with the minimum guarantee of that fundamental right. If a country were to have better laws than what is internationally required, they could be reduced to the minimum level at which they would comply with

international standards without sanction. Backsliding in the protection of ILO fundamental rights must be prohibited.

Finally, further clarification is needed with regard to the language “in a manner affecting trade or investment.” Does a petitioner have an obligation to show that more trade or investment actually resulted from a given waiver or derogation? If the trade and investment linkage is maintained, it should be modified so that any worker employed in a firm engaged in international trade or investment could raise a non-derogation claim if a labor law governing that worker is weakened or is routinely not applied.

### 3. Level of Enforcement

Article 17.3 of the Peru FTA reflects the level to which labor laws must be enforced. It currently provides the following:

#### **Article 17.3: Enforcement of Labor Laws**

1. (a) A Party shall not fail to effectively enforce its labor laws, including those it adopts or maintains in accordance with Article 17.2.1, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement.

(b) A decision a Party makes on the distribution of enforcement resources shall not be a reason for not complying with the provisions of this Chapter. Each Party retains the right to the reasonable exercise of discretion and to *bona fide* decisions with regard to the allocation of resources between labor enforcement activities among the fundamental labor rights enumerated in Article 17.2.1, provided the exercise of such discretion and such decisions are not inconsistent with the obligations of this Chapter.

2. Nothing in this Chapter shall be construed to empower a Party’s authorities to undertake labor law enforcement activities in the territory of another Party.

This formulation raises several questions.

The requirement that a violation occur only when there is a *sustained or recurring course of action or inaction* is problematic. The agreement ought to clarify that a violation has occurred if a right, e.g. to join a union, is violated more than once without redress. The recurring course of action should not need to be the same kind of violation (e.g. firing a union organizer) or failure to enforce (e.g. failure to inspect) in order to meet the threshold of violation. Nor should a petitioner need to show a violation in more than one sector of the economy (garments and agriculture). The agreement also needs to specify how unreasonable delays in the judicial process are addressed.

Notably, the North American Agreement on Labor Cooperation (NAALC) has no such requirement; any single failure to enforce a party’s labor law may be brought under that agreement. Indeed, most petitions under the NAALC concern an unremediated violation or violations in a single enterprise, though the violation is often illustrative of a broader pattern of non-compliance or of obstacles in law. Of course, it is in the interest of any petitioner to marshal as many examples as possible in order to make a case for broader remedies. But, the current Peru FTA language would appear to make it difficult to file a claim



concerning even the most egregious violation in need of immediate redress if it were a one-time occurrence (or if the petitioner were unable to gather sufficient evidence of a pattern or practice). This is unacceptable.

The requirement that a violation occur *in a manner affecting trade or investment between the Parties* is also problematic. This element also raises several questions? Does the “in a manner” prong require the petitioner to demonstrate that the government acted with some quantum of intent to affect trade or investment in not effectively enforcing the law? As for “affecting,” does the petitioner need to demonstrate a measurable trade-distortion between the parties? Also, does a violation “affect” trade if the failure to enforce the law is in a sector that does not produce goods for export but rather produces inputs for goods that are later exported?

For the AFL-CIO, it is important that any such trade or investment nexus, if maintained, be read broadly so that it would reach any violation in any workplace that produces a good or performs a service that at any time enters into international commerce between the parties or which is otherwise related to the direct or indirect investment of a party, no matter how small. What is important is that any unremediated violation that has any relationship with trade at any point in the supply chain be covered. Further, it should not be required that the petitioner need demonstrate any quantifiable impact of the labor violation on trade or investment. The NAALC has no such requirement, instead imposing in the end a penalty based on the volume of trade between the parties.

#### 4. Forced Labor Free Trade Zone:

An important advance in our agreements would be an import ban on goods made in whole or in part from forced labor. As forced labor, at least in the form of slavery and slave-like practices, is a *jus cogens* norm from which no country may derogate, there is a strong argument that no party in the TPPTA zone should be permitted to import or export goods or services that are the product of forced labor, as the term is expressed in the two relevant conventions.<sup>132</sup> Each Party would be required to establish procedures necessary to ensure that prohibited goods are not exported from or imported into the territory of another Party. A strong case can also be made for a ban on the import of goods or services that are the product of the worst forms of child labor.

### DISPUTE RESOLUTION

Each of the various dispute resolution procedure models for labor in existing FTAs (NAFTA, Jordan, CAFTA and Peru models) has strengths and weaknesses. However, all of them are too long, too cumbersome, grant too much to discretion as whether to accept and prosecute the complaint and have insufficient remedies.

In general, labor dispute resolution should be as follows:

1. The OTLA should accept for review any labor complaint that sets forth facts that, if proven, would establish a violation of the labor chapter of the trade agreement. Upon acceptance of the petition, OTLA should conduct a thorough investigation of the complaint, including site visits and interviews with the

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<sup>132</sup> Goods produced forced or indentured labor are already prohibited from entry into the United States pursuant to 19 USC 1307, though only if the imported good competes with a product produced in the U.S. in such quantities as to satisfy consumptive demand. The removal of the consumptive demand element is currently under consideration in Congress.

petitioners, other aggrieved workers, employers and the government. The process should also include a public hearing where evidence with regard to whether the employers violated the labor laws of the party and whether the party failed to effectively enforce those laws can be presented. A report should be issued setting forth findings of fact and law on all of the claims and providing specific recommendations to the employers and the government for resolving the matter. Following its issuance, the parties should engage in ministerial consultations, be based on the recommendations and in consultation with the petitioners. The purpose of the consultations should be to negotiate an action plan with clear timelines and benchmarks for fully addressing the violations raised in the petition.

2. If the matter is not resolved through consultations, or if the plan has not been implemented, a party shall take the matter to arbitration. An arbitration panel comprised of a panel of labor law experts would review the record de novo and issue a final report, including its findings and recommendations. Based on the arbitrators' report, a binding action plan would be issued. The violating party would be given a reasonable and specific timeline to implement the action plan.

3. If a part believes that the plan has not been fully implemented, the same panel of arbitrators would be empanelled to determine if the party did in fact fail to implement the action plan, in whole or in part. If the party has failed to implement the final report, the panel should authorize suspension of benefits in the sectors in which the labor violations occurred. In addition to penalizing the government, arbitrators should be empowered to impose sanctions on employers implicated in the petition who have failed to comply with the arbitrators' report.

In order to enact this approach, specific changes would be needed in both the OTLA Guidelines and in the text of a trade agreement. Amendments to the Guidelines are not covered here. However, below are some of the amendments needed to the Peru FTA.

1. Throughout Chapter 17 and 21, parties are given complete discretion as to whether to move the petition through the consultation and dispute resolution process. See, e.g., 17.7.1, 17.7.4, 17.7.6, 21.4.1, 21.5.1 and 2, 21.6.1, 21.16 (various), 21.17 (various). Once a labor complaint has been accepted, proceeding through dispute resolution on all meritorious claims until the matter has been fully resolved should be mandatory.

2. The Peru FTA provides for Cooperative Labor Consultations at Article 17.7. We have no problem with having a separate mechanism for the parties to hold routine consultations on labor matters between the parties. However, we do object to the requirement to engage in consultations and the intervention of the council before proceeding to yet more consultations under the dispute resolution procedures of Chapter 21. The consultations and intervention of the commission under Chapter 21 is more than sufficient for the parties to review the dispute before moving forward to arbitration. If the consultation and council process in Article 17 are maintained, then a party should be able to skip similar consultations under Chapter 21.

3. The provisions regarding consultations would need to be modified in order to adopt the action plan concept described above.

4. Article 21.16 provides that if a party does not implement the final report, the parties may enter into negotiations for compensation. This makes little sense. Negotiating the transfer of funds of a mutually agreeable amount of funds from one treasury to another will likely do little to improve labor conditions on the ground. The option to buy one's way out here should be eliminated. Similarly, the agreement

allows a party to offer to pay an annual monetary assessment in lieu of suspension of benefits. The assessment is half the value of the suspension of benefits, unless otherwise agreed. This too seems ill suited for labor complaints. Targeted suspension of benefits would have the purpose of encouraging compliance with the law by employers in that sector, and would also likely result in pressure on the government from better performing firms to crack down on the worse actors in the sector. Simply paying off the US would not create the incentives needed to change corporate and governmental behavior, especially if the monetary assessment is not sufficiently high to dissuade future bad behavior.

5. There should be established a minimum suspension of benefits, regardless of the number or severity of the cases, which would be high enough to encourage parties to resolve violations of the labor chapter at the initial stages of dispute resolution. Further, it should be possible to escalate the level or breadth of suspension if, year on year, the behavior has not changed – meaning either that the country has failed to comply with the final report of a case or a new case has been filed against the same country leading to another final report. Finally, arbitrators should have the authority to sanction employers directly, in addition to governments, and to order payment of costs to successful petitioners.

6. Finally, it should be noted that the procedure articulated here takes a substantial amount of time. While major commercial actors will have the time and resources to litigate and then wait for a final report nearly a year after the process has commenced, farm and factory workers who find themselves out of work for exercising their rights do not have that luxury. The procedures for labor complaints should be shortened where possible.

## INSTITUTIONS

While it would not make sense for new labor institutions to be created every time that the U.S. signs a bilateral trade agreement, there is a strong argument that transnational institutions that address labor relations make sense in a regional context. Indeed, NAFTA, which covers a tightly integrated North American region, established the Commission for Labor Cooperation. The concept of a labor commission, restructured and reformed to address the many lessons learned from the NAALC experience, could be very valuable, especially as the proposed TPPTA membership potentially expands to an APEC-wide agreement.

A potential institution would be a labor secretariat. The purpose of such a secretariat would be to act both as a forum for the social partners to address transnational labor issues, and to provide research on, for example, labor law and labor inspection, labor market trends in and among countries, labor migration, industry studies and the like. The secretariat could also be entrusted with providing regular, independent reports on compliance with the labor clause of the TPPTA. An advisory council made of up government, labor and business would also help to shape and guide the institution. In order to make such an institution effective, however, we would need to overcome the problems that plagued the NAALC Secretariat, including underfunding, lack of political independence, and, in the later years, allegations of incompetence and corruption.<sup>133</sup>

## TRANSNATIONAL LABOR RELATIONS

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<sup>133</sup> For example, Mark Knouse, who headed the secretariat for the NAFTA Commission for Labor Cooperation was forced to resign in 2006. A Pennsylvania business lobbyist, he was accused of using commission funds to finance his outside lobbying activities, including meals with clients and trips to meetings.

The labor chapters of trade agreements follow a standards enforcement model (to varying degrees of success) but do very little to actually enhance cross-border labor relations. Such mechanisms could increase efficiency by giving employers and workers the ability to address labor relations matters across supply chains within an economic region. It makes sense that the US consider the adoption of language that would allow organized workers employed by a common employer in two or more TPP countries to form a council to address labor relations matters.

Such language would apply to all companies with 500 or more workers, and at least 100 employees in each of two or more TPP member states. Such an employer would be obliged to establish a council to bring together workers' representatives from all of the TPP member states that the company operates in, to meet with management, receive information and give their views on current strategies and decisions affecting the enterprise and its workforce. The TPPTA should allow a reasonable time period, say two years, to transpose the provisions into national legislation. Councils would meet annually, with extra meetings as required. Councils should deal with a range of economic, financial and social issues, including research, environment, investment, health and safety and equal opportunities.

## 2. INVESTMENT

In the now-lapsed Trade Promotion Act (TPA), the Congress directed USTR to ensure "that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States." Yet the investment provisions of our FTAs, while improved since NAFTA, still contain provisions that allow foreign investors to claim rights above and beyond those that our domestic investors enjoy. In addition, the agreement's deeply flawed investor-to-state dispute resolution mechanism contains none of the controls (such as a standing appellate mechanism, exhaustion requirements, or a diplomatic screen) that could limit abuse of this private right of action. Finally, the marked difference between the dispute resolution procedures and remedies available to individual investors and the enforcement provisions available for the violation of workers' rights and environmental standards flouts TPA's requirement that all negotiating objectives be treated equally, with recourse to equivalent dispute settlement procedures and remedies.

The TPP also presents a unique situation with regard to investment, in that the U.S.-Australia FTA contains no investor-to-state dispute resolution mechanism, while the FTAs with Chile, Singapore and Peru do. This raises a number of questions: 1) will there be a common approach with all TPPTA members with regard to the investor-to-state provisions; 2) if so, what would happen to those existing FTAs that would not conform to the TPPTA approach; 3) if not, on what basis would the USG distinguish between TPP members?

Below are some specific recommendations to fix the investment template.

### LABOR

The model investment chapter should be amended in the following two ways to ensure that laws and regulations related to labor are not placed in any potential jeopardy.

1. Article 10.11 of the Peru FTA provides that the investment chapter should not be read in a way to prevent a party from adopting, maintaining, or enforcing a measure that it considers appropriate to ensure

that investment activity is done in an environmentally sensitive manner. Though we have not yet experienced a problem in this area, a parallel provision with regard to labor should be negotiated.

2. Annex 10-B on Expropriation currently enumerates a number of legitimate public welfare objectives, the non-discriminatory regulation of which will not constitute indirect expropriation. This non-exhaustive list currently includes “public health, safety, and the environment.” The list should also explicitly include “decent work” as that term is understood by the ILO.

#### DISPUTE SETTLEMENT:

##### **1. Replace investor-state dispute settlement with a state-to-state mechanism.**

The international dispute resolution mechanism provided in FTAs poses significant risks to the public interest. Because international arbitrators frequently lack expertise in and understanding of local laws and societal values that are often at the heart of investment disputes, their decisions risk undermining these laws and values. Especially where investment disputes raise constitutional questions, such as in the allocation of powers among governmental organs or permissible limitations of property rights, principles of democratic accountability require that domestic courts adjudicate such disputes whenever possible.

When international dispute resolution is appropriate, the FTA should provide for state-to-state dispute settlement, which guarantees the crucial role of governments in determining and protecting the public interest. Some claim that state-to-state mechanisms politicize the dispute. This fails to account for the fact that a government-to-government legal dispute settlement mechanism is designed to resolve disputes on the basis of law, in an open process where both state Parties are able to present their legal arguments. Moreover, it fails to appreciate the distinction between political means of dispute settlement, such as mediation and good offices, and legal means like arbitration. Finally, by fully engaging both of the States that established the investment protection framework of the BIT, government-to-government dispute settlement is better suited than investor-state arbitration to address, in the manner intended by the Parties, public law and policy issues that arise in the adjudication of investment disputes.

##### **2. If the administration includes an investor-state dispute settlement mechanism, investors should be required to exhaust domestic remedies before filing a claim before an international tribunal.**

The requirement that domestic remedies be exhausted before a claim may be brought through investor-state arbitration strikes an appropriate balance between the sovereign right of nations to address claims through their domestic legal systems and the interests of foreign investors in obtaining an international forum when they are denied justice in domestic courts. The exhaustion requirement is a fundamental principle of international law. It is also U.S. policy with regard to most claims by U.S. citizens against foreign governments.

By eliminating the exhaustion requirement, U.S. FTAs reflect a presumption that domestic judicial systems lack the capacity to resolve the claims of foreign investors fairly. The U.S. legal system provides strong protections for property rights and an impartial judiciary to adjudicate those rights. There is simply no need for foreign investors to pursue claims against the United States outside of the U.S. judicial system, unless it is in an attempt to obtain greater rights than those provided under U.S. law. Exhaustion would also promote the rule of law in countries with less developed legal systems by requiring local courts to clarify the relevant domestic legal standards concerning both the scope of property rights and the relevant regulatory standards affecting those rights.

Requiring exhaustion of domestic remedies would also restore some balance to a system that currently elevates the interests of foreign investors over other groups – including labor, environmental and human rights organizations – which do not enjoy comparable private rights of action to enforce international legal obligations.

This reform would not impose an unreasonable burden on foreign investors. An investor would only need to exhaust those remedies which were effective and adequate for addressing its claim. Accordingly, an investor would not need to pursue its claim before domestic courts if, for example, the domestic courts lacked jurisdiction to provide relief. In such a case, the investor would be able to proceed directly to investor-state arbitration and raise the issue of futility if a jurisdictional objection based on non-exhaustion was asserted during the proceedings. Similarly, an investor would not be required to exhaust domestic remedies if doing so would involve undue delay. Even if the domestic courts lacked jurisdiction to hear international law claims, the exhaustion requirement could be satisfied by raising the substance of the claim under domestic law. If no such domestic legal remedy were available, exhaustion would not be required.

In addition to requiring exhaustion of domestic remedies, the dispute settlement mechanism should also provide a screen that allows the Party governments to prevent claims that are inappropriate, without merit, or would cause serious public harm.

#### NO GREATER RIGHTS

There is broad, bipartisan support for the principle that the investor protection standards contained in U.S. investment agreements should not provide foreign investors with greater rights than those enjoyed by U.S. investors in the United States. Congress first instructed U.S. negotiators to comply with the “no greater rights” principle in the Trade Act of 2002.<sup>134</sup> In May of 2007, the Bush Administration and the Democratic leadership in the House of Representatives agreed that this principle would be explicitly stated in the preamble of the investment chapters of trade agreements.

The provisions concerning indirect expropriation and the minimum standard of treatment in U.S. investment agreements are intended to reflect the relevant standards under customary international law, which is created through the “general and consistent practice of states followed by them from a sense of legal obligation.”<sup>135</sup> Given that the U.S. Constitution provides among the highest levels of protection for property rights of any country, standards that are based on the general and consistent practice of nations regarding the protection of property rights would generally comply with the no greater rights principle.

Unfortunately, arbitral tribunals have not based their interpretations of the “indirect expropriation” and “minimum standard of treatment” provisions of investment agreements on the actual practice of nations, but rather have simply cited the characterization of these standards by other tribunals, using essentially a common law methodology to create “evolving” standards of investor protection.<sup>136</sup> The following recommendations respond to these and other provisions of the Model BIT that could conflict with the “no greater rights” mandate.

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<sup>134</sup> Trade Act of 2002, H.R. 3009, 107th Cong. § 2102(b)(3) (2002).

<sup>135</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987).

<sup>136</sup> See generally Matthew C. Porterfield, *An International Common Law of Investor Rights?* 27 U. Pa. J. Int'l Econ. L. 79 (2006).

**1. Codify the State Department’s position in *Glamis* regarding the standard of proof for identifying principles of Customary International Law (CIL).**

Article 10.5 of the Peru FTA, for example, states that the minimum standard of treatment – including its “fair and equitable treatment” component – is limited to the customary international law standard for the treatment of aliens and does not encompass any additional rights. FTAs similarly state that the prohibition on uncompensated expropriation “is intended to reflect customary international law concerning the obligation of States with respect to expropriation.”

Annex 10-A of the Peru FTA further clarifies that customary international law “results from a general and consistent practice of States that they follow from a sense of legal obligation.” This language does not provide adequate guidance on the standard for demonstrating that a purported principle of customary international law exists. This uncertainty about the standard for demonstrating CIL has created uncertainty about the scope of the indirect expropriation and minimum standard of treatment obligations, which are derived from CIL.

The State Department has provided useful guidance on this point in the memoranda it submitted on behalf of the United States in the recently concluded *Glamis Gold Ltd. v. United States* arbitration. The following two principles in particular are relevant:

- a. The claimant has the burden of demonstrating both the existence of a rule of customary international law and of demonstrating that the respondent State has violated that rule with regard to the investor;<sup>137</sup> and
- b. the awards of arbitral tribunals are insufficient to demonstrate the content of customary international law, particularly when the arbitral awards do not examine relevant state practice.<sup>138</sup>

The investment chapter should codify the State Department’s positions on these important principles in order to clarify the proper standard for establishing CIL, particularly as it relates to the minimum standard of treatment and expropriation.

**2. Codify the State Department’s position in *Glamis* regarding the content of the minimum standard of treatment in the Model BIT.**

In *Glamis*, the State Department noted that state practice and *opinio juris* had established minimum standards of treatment with regard to foreign investors and investment in only a “few areas.” The State Department identified three such areas:

- the obligation to provide internal security and police protection to foreign investors and investment (*i.e.* “full protection and security”),

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<sup>137</sup> Counter-Memorial of Respondent United States of America, *Glamis Gold v. United States of America* at 222 (Sept. 19, 2006), available at <http://www.state.gov/documents/organization/73686.pdf>

<sup>138</sup> Rejoinder of Respondent United States of America, *Glamis Gold v. United States of America* at 150-54 (March 15, 2007), available at <http://www.state.gov/documents/organization/82700.pdf>

- the obligation not to “deny justice” by engaging in “notoriously unjust” or “egregious” conduct in judicial or administrative proceedings (*i.e.* the *Neer* standard), and
- the obligation to provide compensation for expropriation (which is redundant with the expropriation articles of BITs and FTA investment chapters).<sup>139</sup>

Conversely, the State Department rejected Glamis’ assertion that the minimum standard of treatment prohibits either conduct that frustrates an investor’s expectations concerning an investment<sup>140</sup> or “arbitrary”<sup>141</sup> conduct. Regarding Glamis’ claim that the minimum standard of treatment required compensation for measures that adversely affect an investor’s expectations, the State Department noted that such an interpretation was both inconsistent with the no greater rights mandate and unsupported by state practice:

United States law does not compensate plaintiffs solely upon a showing that regulations interfered with their expectations, as such a showing is insufficient to support a regulatory takings claim . . . It is inconceivable that the *minimum standard of treatment* required by international law would proscribe action commonly undertaken by States pursuant to national law.<sup>142</sup>

The asserted right to compensation for government measures that a tribunal deems “arbitrary” would similarly provide greater rights than the comparable standard under U.S. law.

**3. The FTA should clarify that an “indirect expropriation” occurs only when a host state seizes or appropriates an investment for its own use or the use of a third party, and that regulatory measures that adversely affect the value of an investment but do not transfer ownership of the investment do not constitute acts of indirect expropriation.**

Annex 10-B of the Peru FTA, for example, contains several important clarifications concerning the standard for “indirect expropriation.” Two provisions in particular are significant: the language indicating that in order to constitute an expropriation a measure must affect a property right, and the statement that “[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.”

Despite these reforms, however, there remains the potential that the indirect expropriation provisions of BITs could be applied in a manner that would violate the “no greater rights” principle by providing foreign investors with greater rights than the comparable protections of the Takings Clause of the Fifth Amendment of the U.S. Constitution.

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<sup>139</sup> See U.S. Counter-Memorial at 221

<sup>140</sup> See U.S. Counter-Memorial at 233

<sup>141</sup> See U.S. Counter-Memorial at 227 (“Glamis has also failed to present any evidence of relevant State practice to support its contention that Article 1105(1) imposes a general obligation on States to refrain from ‘arbitrary’ conduct.”)

<sup>142</sup> U.S. Counter-Memorial at 234 and note 1017, citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (“our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations”); and *United States v. Carlton*, 512 U.S. 26, 33-34 (1994) (“An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process.”).



For example, the restriction of expropriation claims to situations involving “property” as opposed to the more broadly defined “investment” is also inadequate to ensure compliance with the “no greater rights” principle, because it does not reflect that the requirement of compensation for “regulatory takings” under the Fifth Amendment of the U.S. Constitution has generally been only held to apply to regulations affecting *real* property. For example, the Supreme Court has indicated that personal property is unlikely to be the basis for a successful regulatory takings claim given that “in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless.”<sup>143</sup>

Moreover, the indirect expropriation provision in investment agreements has been interpreted to require compensation based on the impact of the government measure on the value of the investment, regardless of whether there has actually been some appropriation of an asset by the government. This interpretation of the standard for indirect expropriation cannot be justified as reflecting the general practice of states, given that the dominant practice of nations is to provide for compensation only when the government has actually acquired an asset, not when the value of an asset has been adversely affected by regulatory measures.

It may be argued that domestic legal standards regarding expropriation do not constitute relevant state practice with regard to international relations for the purposes of identifying customary international law. Domestic legal standards for expropriation, however, are relevant to the identification of state practice given that they generally define the standard of protection for both domestic and foreign property owners. There is no indication that it is the general and consistent practice of nations to provide foreign investors with a higher standard of protection with regard to regulatory expropriations than is provided to domestic investors. To the contrary, some jurisdictions – such as the United States with its “no greater rights” principle – explicitly link their international practice to their domestic standards of protection for property rights.

Accordingly, we recommend that the FTA clarify that an indirect expropriation occurs only when the government acts indirectly to seize or transfer ownership of an investment, and not when the government merely acts in a manner that decreases the value of profitability of an investment. This approach would be consistent with both the “no greater rights” mandate and the general practice of states that forms the basis of customary international law.

**4. Narrow the definition of investment to include only the kinds of property that are protected by the U.S. Constitution. This would mean excluding the expectation of gain or profit and the assumption of risk.**

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<sup>143</sup> *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1027-28 (1992). The Supreme Court's decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), which involved a claim that the disclosure of trade secrets by the federal government constituted a taking, is sometimes cited as an example of the application of the regulatory takings analysis outside the context of real property. The Court in *Monsanto*, however, stressed that “[w]ith respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.” *Monsanto*, 467 U.S. at 1012. Accordingly, “*Monsanto* is a case in which the government conduct in question was the functional equivalent of a direct appropriation of the entire piece of property, as opposed to a mere regulation of that property.” Eduardo Moisés Peñalver, *Is Land Special?* 31 Ecology L.Q. 227, 231, n. 20 (2004).

The definition of “Investment” in Article 10.28 of the Peru FTA, for example, is much broader than the real property rights and other specific interests in property that are protected under the U.S. Constitution, and includes “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” Under the U.S. Constitution, in contrast, such broad economic interests are not considered protected forms of property. Moreover, the FTA definition does not recognize the Supreme Court’s holdings that property interests are limited by background principles of property and nuisance law.

We also recommend that no special protections be given to financial instruments such as futures, options, and derivatives.

**5. Explicitly limit national treatment to instances in which a regulatory measure is enacted for a primarily discriminatory purpose.**

The broad scope of the “national treatment” non-discrimination principle in FTAs (e.g., Article 10.3 of the Peru FTA) leaves the principle open to interpretations by international tribunals that could have negative consequences for appropriate environmental, health and safety, and other public interest protections. As has been the case in WTO jurisprudence, the principle can be interpreted by tribunals as prohibiting regulatory actions that result in “de facto” discrimination, even when there is no facial or intentional discrimination involved. For example, an otherwise neutral regulatory action to protect the environment that results in a disproportionate impact on a foreign investor could run afoul of this standard.

**6. Revise the FTA template to ensure that foreign subsidiaries are not allowed to bring investment claims against a nation that is the home of their parent company.**

FTA language on Denial of Benefits contains a loophole that allows corporations to bypass their own country’s domestic courts by filing investor-state claims through foreign subsidiaries located in a partner nation. This is explicitly permitted in, for example, Article 10.12 of the Peru FTA, so long as the corporation has “substantial business activities” in the other Party. We are concerned that global corporations will inappropriately use this provision to avoid the normal “diversity of nationality” requirement for investor to state arbitration before international tribunals.

## STATE OWNED ENTERPRISES

It can be anticipated that the TPPTA will lead to more foreign direct investment from the parties into the U.S. market. The consequences of inward investments made by foreign state-owned enterprises from the current and future proposed parties on our domestic industries and workers must be taken into account. Therefore, investment rights can no longer be viewed in the main as a package of rights to protect outward bound investment.

Any agreement must ensure that SOEs are not permitted to gain an unfair advantage when acquiring U.S. assets, for example, by receiving financing for covered investments at below-market interest rates or access to other anti-competitive subsidization by the foreign government. Any investment chapter needs to strike a balance that ensures foreign SOEs investing and operating in the U.S. do not engage in anti-competitive behavior that undermines our domestic competitiveness, job creation and innovation. An investment chapter should provide meaningful disciplines to ensure open and fair competition in the U.S. market free from anti-competitive foreign government intervention.

### 3. PROCUREMENT

The AFL-CIO has long maintained that trade agreements should not constrain federal and sub-federal procurement rules that serve important public policy aims such as local economic development and job creation, environmental protection and social justice – including respect for human and workers’ rights. Maintaining this policy space is not an academic issue. In 2008, the contours of our procurement policy came into sharp focus with the congressional debate over the American Recovery and Reinvestment Act (ARRA), the largest domestic economic stimulus program since the Great Depression. Even as the U.S. reiterated our adherence to our procurement obligations under the WTO Agreement on Government Procurement (AGP) and our various FTAs, the limitations placed on foreign firms to bid on ARRA-financed projects sparked an intense international debate on trade and procurement policy.

It is unclear how long the TPPTA will take to be negotiated, ratified and to come into force, nor do we know how long the USG will continue to employ fiscal measures to stimulate the economy. However, it should be taken into consideration that Brunei, New Zealand and Vietnam, potential TPPTA partners with whom the USG does not already have an FTA, are not signatories to the AGP. Thus, any procurement concessions made in the TPPTA would mean new procurement access for those countries as to future covered procurement, including any federal jobs funding that may have Buy America provisions akin to those found in the ARRA (again assuming such funds are still being distributed at the time the TPPTA should come into force). Even after this recovery, we need to carefully consider the diminished impact of fiscal stimulus during future economic recessions the more we open up procurement to foreign firms (and thereby lose the ability to direct funds to domestic job creation). Thus, the USG should negotiate language that would carve out all procurement projects funded by stimulus funds appropriated in response to a verified recession.

Even after stimulus or jobs funds are fully exhausted, however, the TPPTA would still represent at the federal level, and any states that may bind themselves to the TPPTA procurement provisions, new procurement access for those three countries. New Zealand has signaled that procurement access is a major objective in this negotiation.<sup>144</sup>

Of course, we are also aware that access to foreign procurement does create opportunities for U.S. firms, some of which may support jobs in the United States. The question is whether the jobs potentially lost to opening U.S. procurement to foreign bidders are greater than the jobs potentially gained by U.S. firms’ access to foreign procurement markets. Also important are the kinds of jobs at stake. These questions deserve careful, comprehensive analysis. Based on careful analysis of the potential impacts of procurement liberalization under the TPPTA, both positive and negative, USTR should adjust its offers and requests accordingly.

We also still have concerns left unaddressed by the May 10, 2007 compromise. For many years, the AFL-CIO has raised concerns about technical specifications in procurement chapters. The procurement chapter of the U.S.-Peru FTA took a good step forward by providing that a procuring entity is also not precluded from preparing, adopting, or applying technical specifications:

- (b) to require a supplier to comply with generally applicable laws regarding
- (i) fundamental principles and rights at work; and

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<sup>144</sup> Also notable, many of the potential partners that could eventually accede to the TPPTA are neither AGP signatories nor signatories to a pre-existing FTA, including China, Indonesia, Malaysia, Papua New Guinea, the Philippines, Russia, Taiwan and Thailand.

(ii) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health

We urge the administration to expand the language above to include living wage laws and, for the sake of clarity, prevailing wage laws.

We also urge that negotiations proceed on a “positive list” approach whereby only entities, goods and services that are specifically listed be covered by the agreement’s procurement rules. Such an approach would be more in keeping with the approach taken under the AGP, which employs a positive list for federal entities and goods, though not services. U.S. trade agreements currently employ a negative list approach that covers all goods and services of listed entities that exceed a threshold dollar amount unless otherwise excepted.

Finally, we expect that no sub-federal entities, including those that may have bound themselves under one or more of the previous FTAs with Chile, Singapore, Australia and/or Peru, will be bound to the procurement provisions of the TPPTA without their expressed consent. Further, the goods and services covered under the existing FTAs should not automatically form the basis of the U.S. offer under the TPPTA.

#### **4. SERVICES**

##### **a. Public Services**

Except for the very limited situation in which *no* private providers compete with a government provided service, a public service can be subject to the rules of a trade agreement. Thus, under existing FTAs, a party may challenge domestic policies that protect governmental services if they believe these policies put private providers at a competitive disadvantage - even where government involvement is necessary to guarantee access to essential services in areas such as health care, education, and utilities. FTA rules also penalize governments that reverse privatizations, even if such privatizations have lowered service quality or have led to less public accountability and access. This should be prohibited.

In the past, the USG exempted some existing laws and regulations from some of the rules of the services and investment chapters of the agreement, but many existing and future laws or policies could still be challenged under our FTAs. The exemptions the USG have taken in past trade agreements for public services have been inadequate. For example, the USG has filed exemptions from some investment and services rules for measures relating to law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care. However, the USG has in the past left out a number of important public services, such as energy services, water services, sanitation services, and public transportation services. The USG must exempt essential public services from otherwise applicable TPPTA service and investment rules.

##### **b. Financial Services**

Article 12.10 of the Peru FTA is aimed at protecting government actions to secure the integrity and stability of its financial system from challenge. However, the final sentence of that provision is unclear and could be interpreted in a manner that would undermine the overall prudential exception.

1. Notwithstanding any other provision of this Chapter or Chapter Ten (Investment), Fourteen (Telecommunications), or Fifteen (Electronic Commerce), including specifically Articles 14.16 (Relationship to Other Chapters) and 11.1 (Scope and Coverage) with respect to the supply of financial services in the territory of a Party by a covered investment, a Party shall not be prevented from adopting or maintaining measures for prudential reasons,<sup>4</sup> including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of this Agreement referred to in this paragraph, they shall not be used as a means of avoiding the Party's commitments or obligations under such provisions.

Although this sentence is based on language in the GATS, this is not a strong argument for retaining it, particularly as the administration works to apply lessons from the recent financial crisis. It's worth noting that this potentially "self-canceling" sentence is absent from an otherwise similar section of North American Free Trade Agreement (Article 1410.1). Yet even the NAFTA provision has been interpreted as permitting tribunals to review financial measures to determine whether they are "reasonable" or "arbitrary."<sup>145</sup> Accordingly, even if the second sentence of Article 12.10 is deleted, language clarifying that the prudential measures exception is intended to be self-judging is necessary unless the U.S. government intends to subject its applications of the exception to review by investment tribunals.

We therefore recommend that the administration conduct a thorough legal review of the "prudential measures" exception. Based on the outcome of these legal reviews, the U.S. government should consider including a stronger prudential measures exception. Specifically, the U.S. government should consider eliminating the arguably self-canceling second sentence and including language indicating that the prudential measures exception is self-judging (similar to the language in the essential security provisions of recent FTAs).

## 5. TRADE REMEDIES AND SAFEGUARDS

### Anti-Dumping & Countervailing Duties

Laws designed to provide relief to domestic industries that have been injured or threatened with injury by imports are an important trade policy tool for workers and U.S.-based manufacturers. It is absolutely critical that our trade laws, including antidumping, countervailing duty and safeguard laws not be weakened through the TPPTA. Indeed, the preservation of our trade remedy laws was a principal negotiating objective included in the now expired Trade Promotion Authority (TPA). The USG should continue to resist any efforts, most recently attempted by South Korea, to weaken trade remedy laws in any way.<sup>146</sup> For example, the AFL-CIO believes that it is important that the TPPTA explicitly provide that *zeroing* is an acceptable methodology in AD calculations among the signatory countries in investigative and administrative proceedings.

### Safeguards

As with earlier FTAs, the trade remedies provisions also authorize a party to the trade agreement to apply a transitional safeguard measure for a limited time against imports of the other party if, as the result of the

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<sup>145</sup> See *Fireman's Fund Insurance v. United Mexican States*, ICSID Case No. ARB(AF)/02/01 (Awa

<sup>146</sup> Although the KORUS FTA provides that each party retains all rights and obligations under the WTO agreements, we urge that the new procedural language included in Sections B and C of the KORUS FTA Trade Remedy Chapter not be replicated elsewhere, as it may have the effect of weakening available trade remedies. See Labor Advisory Committee (LAC) Report on the KORUS FTA for a full articulation of those concerns.

reduction or elimination of a duty mandated by the agreement, a product is being imported in increased quantities as to be a substantial cause of serious injury to a domestic industry that produces a like or directly competitive good. The party imposing the safeguard must provide a mutually agreed-upon amount of compensation. If the parties do not agree, the other party may suspend concessions on imports of the other party in an amount that has trade effects substantially equivalent to the safeguard measure.

We oppose any weakening of the safeguard measures available under the WTO. As explained above, this is one of the few remedies in place to address the serious harm caused by surging imports that result in market disruption in the U.S. market, which cost good-paying manufacturing jobs. The USG should not negotiate safeguard provisions in the TPPTA but instead should retain full use of the WTO safeguard measures. If a safeguard chapter is included in the agreement, it should be substantially strengthened. For example, the safeguard measures available should go beyond a tariff snap-back, should be automatic if established criteria are met; should not be limited to two years and should not sunset after ten years. Further, the imposition of safeguards should not give rise to compensation, given the serious harm that import surges have on our industrial capacity and workers.

## **6. INTELLECTUAL PROPERTY.**

For years, the IPR chapters of our FTAs have provided excessive protections for the producers of brand-name pharmaceuticals. Indeed, these agreements far exceeded the international standards for patent protection established in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Together, these provisions jeopardized access to affordable medicines, particularly in developing countries. The May 10, 2007 compromise took a significant step forward in cutting back the most onerous requirements for the intellectual property protection of pharmaceuticals. However, harmful language on data exclusivity remains in the Peru FTA agreement.<sup>147</sup>

In most cases, drug regulatory agencies rely upon clinical trial data produced by patent-holding pharmaceutical companies to approve generic versions of those medicines. Article 39.3 of the TRIPS Agreement requires protection of clinical trial data against unauthorized public disclosure. However, a government drug regulatory authority can rely upon the trial data to establish the effectiveness and safety of a generic version of a patented medicine. When a generic version of a medicine is produced or imported, a generic manufacturer thus only has to establish 'bio-equivalence' between its medicine and the patented version. The regulatory authority can rely upon the previously submitted clinical trial data to establish the drug's efficacy and safety.

Data exclusivity precludes use of clinical trial data of an originator company by a drug regulatory authority, even establishing marketing approval, normally for a defined period (five years in US FTAs). As a result, when a generic producer wishes to introduce a generic version of a patented medicine, it cannot rely upon the already produced data. The company would have to produce new clinical data to establish a drug's efficacy and safety, which would be both costly and unethical, since patients would be required to take placebos when a known treatment is already available. Since generic manufacturers rely upon narrow margins to produce cheap medicines, they would be precluded from entering the market to produce affordable, generic versions.

Data exclusivity thus imposes unnecessary costs – in financial and human health term - on public health systems, which are forced to purchase brand-name pharmaceuticals at elevated prices when cheaper generic medicines would otherwise be available, but for the FTA. For example, a 2007 study by Oxfam

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<sup>147</sup> The data exclusivity provisions are found in Article 16.10, sub-sections 2 (b) and (c) of the Peru FTA.

International found that the IPR provisions of the US-Jordan FTA, especially the data exclusivity provisions, prevented generic competition for 79 percent of medicines launched by 21 multinational pharmaceutical companies since 2001, when the agreement entered into force. Further, the study found that the government faced between \$6.3 and 22 million in additional expenditures for medicines with no generic competitor as a result of enforcement of data exclusivity.

No TRIPS “plus” provisions, such as data exclusivity, should be included in the TPPTA.

As if the IPR chapter was not already enough of a gift to the pharmaceutical industry, the US-Australia and the proposed KORUS-FTA both include additional annexes on pharmaceutical products that allow, for example, private sector challenges to the pricing decisions of public pharmaceutical benefit schemes. Annex 2-C of the US-Australia FTA appears to have had little to no effect on the U.S and the potential future impact of the KORUS-FTA Chapter on Pharmaceutical Products and Medical Devices will likely be small as it appears that most U.S. programs have been exempted. However, the impact of such language on working families in Australia and Korea is of concern.

In Australia, for example, the U.S. pharmaceutical industry targeted the price control mechanism of the national pharmaceutical benefits plan. In Australia, the benefits scheme paid out far less for common prescription medicines than in the US, in part by employing a panel of experts to compare the price and effectiveness of new medicines with comparable, cheaper generics. Listed medicines are then made available at a regulated, subsidized price. The pharmaceutical industry argued that this system prevented them realizing the full benefits of their intellectual property. As a result, a Medicines Working Group was established under Annex 2-C, which gave priority to the “need to recognize the value of innovative pharmaceutical products.” The inclusion of the working group ensured that the pharmaceutical industry could influence policy decisions and challenge public health policy decisions on trade grounds. In the following years, it was reported that the Australian government made changes to its benefits scheme to enable pharmaceutical companies to receive higher wholesale prices for some medicines.

The AFL-CIO is also aware that the U.S. pharmaceutical industry has complained for some time that the national health insurance program in New Zealand has been reluctant to pay for high-priced imported medications – favoring instead low-cost generics. The AFL-CIO strongly supports governmental efforts to control costs of medicines so as to be able to provide affordable medicines through national health care plans. We would be opposed to any U.S. government efforts in the context of the TPPTA to negotiate language that would have the effect of raising drug costs or reducing access to more affordable medicines to workers in any country.

## **7. CONSUMER PROTECTION**

In the past few years, numerous imported consumer and industrial goods, including toys, food, medicines, toothpaste, auto parts and tires, among many others, have been found to be either tainted or defective. These goods present a serious threat to the general public that cannot be tolerated. Our domestic consumer safety and trade policies must be crafted to prevent such dangerous products from reaching our shores and, subsequently, our shelves.

A major part of the problem is a breathtaking lack of inspection capacity. Federal agencies, such as the Consumer Product Safety Administration (CPSC), simply do not have the budget or the staff to inspect even a small fraction of the goods that are imported every day. Indeed, most U.S. ports of entry have no full time CPSC staff inspecting incoming cargo. The FDA, USDA, CPSC and other relevant agencies

must be given the resources necessary to prevent the continued entry of tainted and defective consumer and industrial goods, especially as the volume of imported consumer goods could increase with a new trade agreement. The U.S. should consider additional regulation that would enhance its ability to stop unsafe imports.

Further, the TPPTA should be negotiated to include language that would facilitate cross-border food and consumer and industrial product safety inspections by, for example, giving safety inspectors of a TPPTA member enhanced rights to inspect the facilities of another member. The TPPTA should also include language requiring country of origin labeling, which would clearly identify the origin of food and consumer goods.

#### **IV. ADDITIONAL CONSIDERATIONS**

In addition to the changes suggested above to the trade template, the government needs to adopt complementary policies that will allow the U.S. to remain competitive in the global marketplace. Negotiating market access is insufficient without a comprehensive domestic strategy. Implementing the recommendations below is absolutely necessary to making progress on real trade policy reform.

##### *A. The U.S. Needs an Export Promotion Strategy*

Exports of high value-added industrial goods, including exports to the major emerging market economies, are key to the strength of the world's largest developed economies. However, the United States has allowed a once strong manufacturing economy to deteriorate. Roughly 40,000 manufacturing plants closed between 2001 and 2008, with overall manufacturing employment falling 20% between 1998 and 2007.

The result of this neglect is a \$360 billion trade deficit just in the first nine months of 2009. \$165 billion of that deficit is with China, and our China imbalance is almost impervious to the recent decline of the dollar – because, of course, the dollar has not declined much against the yuan. Most dramatically, we are losing ground in high tech manufacturing. Even in the manufacture of “green” goods, which is supposed to be the new backbone of U.S. manufacturing, the U.S. is lagging far behind other countries. Only one U.S.-based wind turbine manufacturer, General Electric, is among the top ten producers of wind turbines in the world – with a 16% market share.

The United States will not have export-led growth, which will be necessary to address the still enormous trade deficit – which has deep structural roots - until we adopt a serious strategy for export promotion that includes at least the following initiatives:

##### **1. Act Immediately Against Currency Manipulation**

The U.S. cannot effectively export to countries that intervene systematically to keep their currency artificially low in relation to the dollar, as China, in particular, is doing. This practice gives foreign production an effective subsidy – making their goods cheaper in the U.S. market and U.S. exports more expensive in their market. Statements by the Obama Administration on the need to end currency imbalances are positive, but need to be followed by actions in the very near future.

##### **2. Ending Tax Policies that Discourage Exports**



The United States is uniquely disadvantaged in global markets by our tax system. Most countries have a Value Added Tax (VAT), which can be rebated on exported goods under WTO rules. U.S. exporters have no such advantage in foreign markets. The U.S. must negotiate the elimination of the VAT rebate, or adjust our own tax system accordingly.

### **3. Effective Enforcement of U.S. Trade Laws to Encourage Fair Trade Practices**

The United States must enforce its own trade laws more consistently and comprehensively. The Obama Administration has taken steps in the right direction, such as the recent Section 421 China Tire case. The relief granted in that case has already produced demonstrable results – U.S. workers are being rehired. Many other industries need similar relief from import surges and dumped and subsidized exports. Further, the United States must also aggressively promote compliance with core labor standards. This is important as a human rights and development issue. But systemic non-enforcement of labor laws also acts as a subsidy that substantially undercuts U.S. production in certain sectors. If necessary, the United States should pursue enforcement action under Sec. 301 to address labor repression when other avenues have clearly failed.

### **4. Invest in Research and Development**

The U.S. must invest in strategic research and development. Research and development grants and tax credits for commercialization should be required to result in domestic manufacturing employment for those investments.

### **5. Workforce Training and Development**

At the same time, the U.S. must also invest in its workers. Lifelong skills development, including for incumbent workers, is essential to keep U.S. workers engaged at their highest potential (see Section B below).

### **6. Press Ex-Im Bank and OPIC to Put a Premium on Domestic Job Promotion**

The Export-Import (Ex-Im) Bank and the Overseas Private Investment Corporation (OPIC) currently provide loan guarantees or credit for exports or foreign investment projects. Both institutions are charged by Congress to support the creation of U.S. jobs through enhanced exports. Ex-Im and OPIC policies could both be much better administered to support exports that are directly related to the creation and maintenance of domestic jobs.

#### ***B. Beyond Trade Adjustment Assistance***

Trade Adjustment Assistance has progressively improved over time, now covering more workers in more sectors - both manufacturing and service - who have been dislocated by trade. Additional resources have also been appropriated. And, under the Obama Administration, the chances that a meritorious claim for TAA benefits will actually get certified have greatly improved. Nevertheless, the AFL-CIO urges the USG to think about labor market policy in a comprehensive way that attempts not only to provide assistance (in the form of additional but insufficient extended unemployment benefits, medical insurance subsidies and retraining) to trade dislocated workers but rather provides to all workers lifelong education and skills training so that we develop and maintain a high-skilled competitive workforce. Workers who have jobs can improve their skill sets and make the firm more competitive; workers who lose their jobs

for whatever reason are provided the tools necessary to re-enter the labor market in a position that best utilizes his or her skills.

As of 2009, the U.S. spent only 0.3 percent of its GDP, or roughly \$50 billion, on active labor market interventions annually. This pales in comparison to the policies of successful, high wage, globally integrated societies. Denmark, for example, invests 4.5 percent of GDP to ensure that it maintains a highly efficient, globally competitive, workforce. An equivalent amount of spending in the U.S. would total roughly \$600 billion. We are not suggesting a \$600 billion investment. Nor do we suggest that we could or should import wholesale Danish labor market policies. However, we should at least try to learn lessons on how this small country has succeeded in maintaining a dynamic economy which generates new high-skilled, high wage jobs and has prepared its workers adequately for those jobs.

In short, the U.S. must invest far more systematically in its workforce to ensure both greater competitiveness and equality. We cannot rely solely on industry to adequately educate and train workers for future opportunities - public investment in workforce development is needed to do this. Such investments would enhance market dynamism, reduce reluctance to change jobs and would create a more productive worker in the long term. Workforce development should also be lifelong, providing skills development to incumbent workers, not only those that have lost jobs due to trade, technology or other reasons. Contrast this approach with programs such as wage insurance, which emphasizes pushing older unemployed workers quickly into the workplace – temporarily subsidizing the difference between their likely new, lower salaries in jobs that do not match their skill sets. While it is important that capable workers do return to the workforce, every effort should be made to reintroduce these workers with the skills necessary to move both themselves and the economy forward.

Another characteristic of many high-wage, globally competitive countries is high union density. In these countries, unions are important social partners both at the bargaining table and in matters of national social and economic policy. In the U.S., workers who belong to unions earn 28 percent more than nonunion workers, are 52 percent more likely to have employer-provided health coverage and nearly three times more likely to have guaranteed pensions. Importantly, union workers are often also much better trained, innovative and efficient. That is why passage of the Employee Free Choice Act is critical to building a high skilled, high wage workforce in the U.S.

We also need to improve quality and standards in the service sector. Many necessary services are often performed by poorly trained, poorly paid workers. Such work should be professionalized, and workers given the training, respect and remuneration that comes with professional work. We as a nation deserve better than to treat essential services as low-skilled work to be performed by an expendable, low-skilled workforce.

Of course, more robust training is necessary but insufficient. Workers will be much more likely to take risks, take advantage of new opportunities and change jobs with more frequency (to those best suited to the worker) if the cost of unemployment in the U.S. were not so devastating. We need to work towards upgrading the social safety net so that unemployment does not mean ruin for an individual or family. Well-funded programs to prepare and place unemployed workers back into the workforce would ensure that the safety net is just that, and not abused.

## **V. CONCLUSION**

We welcome the opportunity to present our views on the TPPTA and look forward to working with the Obama Administration to create a just trade policy for the 21<sup>st</sup> Century.

## Annex II

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November 15, 2010

Honorable Tim Groser, Minister of Trade  
Ministry of Foreign Affairs and Trade  
Government of New Zealand  
Wellington, New Zealand

Email: [t.groser@ministers.govt.nz](mailto:t.groser@ministers.govt.nz)

Dear Minister Groser:

When I met with Ambassador Moore on September 3, I recall well our discussion about labor standards in New Zealand and his assurances that because New Zealand's labor standards are so high, there could be no issue with regard to trade between our two countries as to whether low labor standards could be used for competitive advantage.

I was therefore taken aback to learn from our colleagues at the New Zealand Council of Trade Unions that on October 27, 2010, Prime Minister John Key announced that the government of New Zealand had agreed to provide a number of incentives to Warner Bros. in order that the studio would make two "Hobbit" films, part of the popular *Lord of the Rings* series, in New Zealand. In addition to generous subsidies in the form of rebates and offsets, the government of New Zealand also agreed to amend the Employment Relations Act of 2000 to classify all workers employed in the film production industry as independent contractors (except in the unlikely case that the employer agrees to recognize the worker as an employee).

The misclassification of workers in the film production industry is a serious problem that not only robs workers of decent wages, working conditions and benefits but also deprives workers of the right to organize, form a union and bargain collectively. Instead of ensuring that these workers are properly classified,

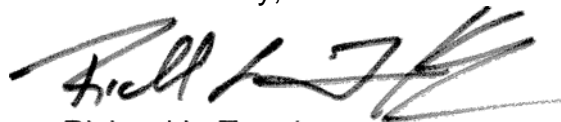
the amendment perpetuates without remedy a pernicious industry practice that lowers wages and working conditions in this industry worldwide.

The amendment violates the government of New Zealand's clear obligation under the 1998 ILO Declaration on Fundamental Principles and Rights at Work to "respect, to promote and to realize" the principles concerning the ILO core labor rights. Further, the amendment would also violate the labor provisions of every free trade agreement to which the United States is a party since NAFTA, and would be subject to the dispute settlement mechanisms under the most recent agreements.

The amendment to the Employment Relations Act is particularly troubling in light of the ongoing negotiations for a Trans-Pacific Partnership Trade Agreement, to which both the United States and New Zealand are now parties. The government's move to eliminate the fundamental rights of workers in order to attract investment would violate the labor provisions of any future trade agreement between our two countries that we could support.

We urge you to repeal the recent amendment to allow those workers who should be properly classified as employees to enjoy the rights to which they are otherwise entitled under national law.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard L. Trumka", with a stylized flourish at the end.

Richard L. Trumka  
President

RLT/CF/ca