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## **Initial Talking Points on Legal Texts Modifying Bush “Free Trade Agreements” - June 25, 2007**

- **Instead of delivering on the public’s demand for a new trade policy, the legal texts released on June 25 would facilitate passage by the majority of the minority GOP and a minority of the majority Democrats of more Bush trade deals that contain the worst provisions of NAFTA and CAFTA.**
- The legal text confirms that the essential changes to the core NAFTA-CAFTA investment, procurement, service sector, agriculture and other provisions listed early this year by labor unions, environmental, consumer, faith and family farm groups as necessary to avoid their opposition to the agreements were not made. The majority of essential “fixes” listed by such organizations as necessary to minimally de-NAFTA-ize the Bush FTAs are not included in the legal texts.
- **If the administration refused to modify the Bush-negotiated FTAs to remove the various NAFTA-CAFTA provisions that directly conflict with the majority Democrats’ values and goals, then Democrats should put the Bush FTAs on ice and move on to a Democratic trade agenda that addresses the many incentives to offshore U.S. jobs, the flood of unsafe imported foods and products, the endless “trade” pact attacks on our environmental and safety laws, and the nearly \$800 billion trade deficit that is slowing U.S. economic growth and threatening global economic stability.**
- The Democratic majority arrived with a fair trade mandate from a public strongly opposed to staying the course on the failed Bush trade agenda. It is incomprehensible why any Democrats would ever prioritize reviving Bush trade deals opposed by their entire base and the majority of congressional Democrats over launching their own proactive trade agenda. Instead, now Congress faces votes on yet more Bush NAFTA expansion agreements that suppress wage levels, promote job off-shoring, and expose our environmental laws to attack in foreign tribunals even though improved labor and environmental standards have been added on. It’s like adding a new roof on a dangerous, condemned building and expecting us to only focus on the roof and buy the building.

### **INVESTMENT**

- **The legal texts do not alter a single word of the outrageous NAFTA “Chapter 11” foreign investor privileges established in the FTAs’ Investment Chapters that create incentives for U.S. firms to move offshore and expose our most basic environmental, health, zoning and other laws to attack in foreign tribunals.** Passage of agreements incorporating the new legal text would extend the NAFTA foreign investor rules which have resulted in nearly 50 challenges of federal and state laws, leading to over \$36 million in taxpayer funds from NAFTA nations paid to corporations. The United States has spent millions in legal costs to defend against such attacks.

- **The “deal” fails to alter *any* of the FTAs’ Investment Chapters’ provisions.** A new sentence has been added to the FTAs’ Preamble: “[*The Parties*] AGREE that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement.” Language in agreements’ preambles is not binding. The only legal relevance of Preamble language is in the instance when the binding provisions of an agreement conflict with one another or are unclear, and then a dispute panel is to consider the preamble and other indications of “intent of the parties” in making a ruling. Unfortunately, the binding language in the FTAs’ investment chapters is NOT unclear. Rather, the *binding* language in the FTAs is identical to CAFTA’s – which Democrats attacked for not meeting the “no greater rights” standard.
- Further, the new legal text inserted into the FTA’s Preambles provides only that foreign investors are not accorded greater SUBSTANTIVE rights. In contrast, the 2002 Trade Promotion Authority negotiating objective regarding the investment requires that “foreign investors in the United States **are not accorded greater rights** than United States investors in the United States.” (emphasis added) This is a major difference. Even if the Preamble language were binding, it would not preclude foreign investors from having the right to challenge U.S. environmental, zoning, health and others laws and also timber, mining and other concession contracts with the U.S. federal government before foreign tribunals while U.S. investors and firms have no such rights and must take disputes to U.S. courts under U.S. law.
- USTR’s own summary of the legal text reveals that the new legal text does not represent any meaningful adjustment to the Bush-negotiated FTAs’ outrageous foreign investor privileges: “We believe that the four pending FTAs (as well as the other FTAs we have concluded in the past five years) fully achieve this [no greater rights] objective of the Trade Act.”<sup>1</sup>

## **PROCUREMENT**

- **The legal text does absolutely nothing to address the FTAs’ ban on anti-offshoring and Buy America policies.** How could Democrats fighting to expand and preserve such important U.S. policies support a trade agreement that explicitly bans the very same policies? Fixing this problem was a key labor demand. Jobs created with government money are some of the only U.S. jobs Congress has direct authority to safeguard for U.S. workers in the global economy.
- **The legal text does not remove the key provision that exposes U.S. renewable source energy, recycled content and various labor-related laws to challenge.** This provision states that: “A *procuring entity may not prepare, adopt, or apply any technical specification or prescribe any conformity assessment procedure with the purpose or **the effect of creating an unnecessary obstacle to trade between the Parties.***” (emphasis added) This language provides enormous discretion for FTA tribunals to make substantive judgments about whether a U.S. policy, whatever its intent, has the “effect” of creating what the panel decides is an “unnecessary” obstacle to trade. Added to the legal text is new language that states: “*For greater certainty, this Article is not intended to preclude a procuring entity 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 (ii) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, in the territory in which the good is produced or the service is*

performed.” However, by failing to remove the “**effect of creating an unnecessary obstacle to trade between the Parties,**” the new clause is subjected to FTA panels’ subjective judgment about whether such labor laws have the effect of creating an unnecessary obstacle, meaning domestic laws remain subject to challenge and FTA tribunals remain empowered to second guess whether U.S. laws that treat foreign and domestic firms the same nonetheless violate FTA constraints. Laws that are judged to violate the FTA must be altered or indefinite trade sanctions can be imposed against the United States.

- **The text does nothing to remove the provisions that forbid U.S. law to condition procurement on a country or company’s human rights conduct,** for instance using the procurement policies employed against South Africa during apartheid. These provisions would also subject to challenge laws that forbid government contracts with companies operating in an FTA partner country that are doing business in the Sudan or Burma or companies that have terrible labor or environmental records.

### **PERU SOCIAL SECURITY PRIVATIZATION**

- **Nothing was done to fix the Peru FTA terms that could allow Citibank or other U.S. investors providing “private retirement accounts” to sue Peru for compensation if Peru reverses its failed social security privatization.** Citibank, which is an investor in one of the private retirement account providers under the privatized system, is the only apparent beneficiary of this provision. Peru’s labor federations consider this aspect of the FTA to be a major impediment to reversing their failed privatization. Seeing Democrats beat back the Bush proposal here, Peru’s labor federations and a Peruvian Archbishop asked Democratic trade leaders to fix this problem. “For 25 years, Peru’s governments have faithfully implemented neo-liberal policies supported by Washington. While essential services have been privatized, and institutions that are so important to people’s health and retirement security – like social security – have become harder for people to access, income per person in Peru has scarcely grown in a generation. The Peru-U.S. FTA not only freezes us in this socioeconomic hole, it gives corporations like Citibank the tools to make sure we’re forced to stay there,” said Julio Cesar Bazán, president of the Unitary Confederation of Peruvian Workers (CUT), one of the country’s two labor federations.<sup>2</sup> The needed repair was simple: adding one sentence to the Peru FTA’s Investment Chapter that would forbid investor-state demands for compensation if “foreign investments” in the privatized social security system were nationalized. Such a clause would resolve conflicting language in other parts of the text that could allow such a challenge.

### **AGRICULTURE**

- **The legal text does not provide any modifications to the FTAs’ NAFTA-style agriculture rules that will foreseeably result in widespread displacement of peasant farmers – increasing hunger, social unrest, and desperate migration.** According to Peruvian and Colombian government reports, the FTAs’ agriculture rules will lead to an increase in drug cultivation, trade and violence. After similar NAFTA agriculture rules were implemented, immigration from Mexico increased 60 percent<sup>3</sup> as 1.3 million peasant farmers lost their livelihoods to imports of subsidized U.S. commodities.<sup>4</sup> Economists at the Inter- American Development Bank (IDB) estimate that the Peru FTA’s agricultural provisions would displace significant numbers of *campesino* farmers by eliminating an array of programs that regulate staple food markets for rice and other foods and provide low-interest credit and other supports.<sup>5</sup> Young Lives, a project of the U.K. government and Save the Children, estimates that the Peru FTA will cause a welfare loss of almost nine percent

among the poorest rural households. Moreover, the Peru FTA could reduce the probability of children attending school in rural areas, and also increase the probability of child labor in local agriculture and informal activities. This is because of the income strain that these families will be under as a result of the FTAs.<sup>6</sup> Monsignor Pedro Barreto, the Catholic Archbishop of the Peruvian highland city of Huancayo noted: “We’re fairly certain that [the trade agreement] will increase the cultivation of coca, which brings along with it a series of negative consequences such as drug trafficking, terrorism and increasing violence.”<sup>7</sup> The Colombian Ministry of Agriculture that argued that without proper agricultural protections, rural problems could worsen under the similar FTA negotiated with Colombia, and many rural Colombians “would have no more than three options: migration to the cities or to other countries (especially the United States), working in drug cultivation zones, or affiliating with illegal armed groups.”<sup>8</sup>

## **FOOD SAFETY**

- **The legal text does not provide any modifications to address limits on imported food safety and inspection.** Even as we face a crisis over the safety of imported food,<sup>9</sup> the FTAs contain language that requires us to accept imports of meat that does not meet our safety standards.

## **PORTS**

- **New legal text of the Peru FTA makes the FTA’s “Essential Security” provision automatically applicable if raised by a country, allowing the United States to deny without penalty the right otherwise provided in the agreement for foreign investors to acquire and operate landside port activities within the United States.** This is an important change to the Peru FTA, as Dubai Ports World now operates a large Peruvian port,<sup>10</sup> and thus absent this change could use the FTA to demand access to U.S. port operations or compensation for denial. However, it remains unclear if the same change has been made to the other three pending FTAs, which contains the same rights for foreign firms to operate U.S. landside port activities. Many Democrats opposed the Oman FTA based on these provisions and the prospect that Dubai Ports World or another firm of concern could acquire port operations in the future.

## **ENDNOTES**

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<sup>1</sup> [http://ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2007/asset\\_upload\\_file146\\_11282.pdf](http://ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file146_11282.pdf).

<sup>2</sup> Press release, June 20, 2007.

<sup>3</sup> Jeffrey S. Passel and Roberto Suro, “Rise, Peak and Decline: Trends in U.S. Immigration 1992 – 2004,” Sept. 27, 2005, Pew Hispanic Center, at 39.

<sup>4</sup> John Audley, Sandra Polaski, Demetrios G. Papademetriou, and Scott Vaughan, “NAFTA’s Promise and Reality: Lessons from Mexico for the Hemisphere,” Carnegie Endowment for International Peace Report, Nov. 19, 2003.

<sup>5</sup> One early estimate by economists from the Inter-American Development Bank predicted that the Peruvian grains, meat, and several manufacturing sectors would experience significant employment contractions if a U.S.-Andean Free Trade Agreement were implemented. See Josefina Monteagudo, Laura Rojas, Augusto Stabilito and Masakazu Watanuki, “The New Challenges of the Regional Trade Agenda for the Andean Countries,” paper presented at the Inter-American Development Bank’s seventh annual conference on global economic analysis, June 17-19, 2004, at 33.

<sup>6</sup> “The Social Impacts of Trade Liberalization: How Can Childhood Poverty Be Reduced?” Young Lives Project Brief, 2005, at 4-5.

<sup>7</sup> “U.S., Peru trade accord receives mixed feelings,” *The Miami Herald*, April 13, 2006.

<sup>8</sup> “Colombian Agriculture Before the Free Trade Agreement with the U.S.,” Min. of Agriculture and Rural Development, July 2004.

<sup>9</sup> Alexei Barrionuevo, “Food imports often escape scrutiny,” *New York Times*, May 1, 2007.

<sup>10</sup> “Peruvian dockers in privatization strike,” *Lloyd’s List*, June 21, 2006.