

The U.S.-Peru Free Trade Agreement

**Report of the
Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC)**

February 1, 2006

Table of Contents

I. Purpose of the Committee Report	1
II. Executive Summary of the Committee Report.....	1
III. Brief Description of the Mandate of the Labor Advisory Committee.....	1
IV. Negotiating Objectives and Priorities of the Labor Advisory Committee.....	2
V. Advisory Committee Opinion on the Agreement	2
A. Trade Impacts of the Peru FTA	3
B. Labor Provisions of the Peru FTA	3
C. Other Issues in the Peru FTA	6
VI. Conclusion	8
VII. Membership of the Labor Advisory Committee	8

**Labor Advisory Committee for Trade Negotiations and Trade Policy
Report to the President, the Congress and the United States Trade Representative
on the U.S.-Peru Free Trade Agreement**

February 1, 2006

I. Purpose of the Committee Report

Section 2104(e) of the Trade Act of 2002 (TPA) requires that advisory committees provide the President, the U.S. Trade Representative (USTR), and Congress with reports required under Section 135(e)(1) of the Trade Act of 1974, as amended, not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135(e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principle negotiating objectives set forth in the Trade Act of 2002.

The committee report must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the relevant sectoral or functional area of the committee.

Pursuant to these requirements, the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC) hereby submits the following report.

II. Executive Summary of the Committee Report

This report reviews the mandate and priorities of the LAC, and presents the advisory opinion of the Committee regarding the U.S.-Peru Free Trade Agreement (FTA). It is the opinion of the LAC that the Peru FTA neither fully meets the negotiating objectives laid out by Congress in TPA, nor promotes the economic interest of the United States.

The labor provisions of the Peru FTA will not protect the fundamental human rights of workers in either country, and represent a big step backwards from the Jordan FTA and our unilateral trade preference programs, including the Generalized System of Preferences (GSP), which does apply to Peru currently. The Peru FTA's dispute settlement procedures completely exclude enforceable obligations for governments to meet international standards on workers' rights. The Peru FTA also contains no enforceable provisions preventing countries from waiving or weakening existing labor laws in order to increase trade. Provisions on investment, procurement, and services constrain both governments' ability to regulate in the public interest, pursue responsible procurement policies, and provide public services. Rules of origin and safeguards provisions invite producers to circumvent the intended beneficiaries of the trade agreement and fail to protect workers from the import surges that may result.

III. Brief Description of the Mandate of the Labor Advisory Committee

The LAC charter lays out broad objectives and scope for the committee's activity. It states that the mandate of the LAC is:

To provide information and advice with respect to negotiating objectives and bargaining positions 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.

The LAC is one of the most representative committees established by Congress to advise the administration on U.S. trade policy. The LAC is the only trade advisory committee with more than one labor representative as a member. The LAC includes unions from nearly every sector of the U.S. economy, including manufacturing, high technology, services, and the public sector. It includes representatives from unions at the local and national level, together representing more than 11 million American working men and women.

IV. Negotiating Objectives and Priorities of the Labor Advisory Committee

As workers' representatives, the members of the LAC judge U.S. trade policy based on its real-life outcomes for working people in America. Our trade policy must be formulated to improve economic growth, create good jobs, raise wages and benefits, and allow all workers to exercise their rights in the workplace. Too many trade agreements have had exactly the opposite result. Since NAFTA went into effect, for example, our combined trade deficit with Canada and Mexico grew from \$9 billion to more than \$111 billion, leading to the loss of more than one million job opportunities in the United States. Under NAFTA, U.S. employers took advantage of their new mobility and the lack of protections for workers' rights in the agreement to shift production, hold down domestic wages and benefits, and successfully intimidate workers trying to organize unions in the U.S. with threats to move to Mexico.

In order to create rather than destroy jobs, trade agreements must be designed to reduce our unsustainable trade deficit by providing fair and transparent market access, preserving our ability to use domestic trade laws, and addressing the negative impacts of currency manipulation, non-tariff trade barriers, financial instability, and high debt burdens on our trade relationships. In order to protect workers' rights, trade agreements must include enforceable obligations to respect the core labor standards of the International Labor Organization (ILO) – freedom of association, the right to organize and bargain collectively, and prohibitions on child labor, forced labor, and discrimination – in their core text and on parity with other provisions in the agreement.

The LAC is also concerned with the impact that U.S. trade policy has on other matters of interest to our members. Trade policy must protect our government's ability to regulate in the public interest; to use procurement dollars to create good jobs, promote economic development and achieve other legitimate social goals; and to provide high-quality public services. Finally, we believe that American workers must be able to participate meaningfully in the decisions our government makes on trade, based on a process that is open, democratic, and fair.

V. Advisory Committee Opinion on the Agreement

The Peru FTA fails to meet these basic goals. The FTA largely replicates the NAFTA, which has cost the U.S. more than one million jobs, allowed violations of core labor standards to continue, and resulted in numerous challenges to laws and regulations designed to protect the public interest. In the past three years, American workers have lost almost 3 million manufacturing jobs, many due to the failures of our trade policy. These same policies resulted in another record-breaking trade deficit last year, of \$618 billion. The U.S. ran a \$1.6 billion trade deficit with Peru last year, and, if history is any guide, the FTA will likely further erode our trade balance.

The LAC is not opposed in principle to expanding trade with Peru, if a trade agreement could be crafted that would promote the interests of working people in, and benefit the economies of, both countries. Unfortunately, the U.S. Trade Representative has failed to reach such an agreement with Peru. Instead, the labor provisions of the Peru FTA make little progress beyond the ineffective NAFTA labor side agreement and actually move backwards from the labor provisions of our unilateral trade preference programs and the Jordan FTA. Meanwhile, the commercial provisions of the agreement do more to protect the interests of U.S. multinational corporations than they do to promote balanced trade and equitable development.

A. Trade Impacts of the Peru FTA

In several prominent cases in which the United States has concluded a comprehensive “free trade agreement” with another country, the impact on our trade balance has been negative, despite promises to the contrary. Our combined trade deficit with Canada and Mexico is now more than ten times what it was before NAFTA went into effect. Since granting China Permanent Normal Trade Relations in 2000, the U.S. trade deficit with China has more than doubled, hitting a staggering \$162 billion last year – making it the largest bilateral trade deficit between any two countries in the history of the world. The U.S. has even managed to rack up a trade deficit with tiny Jordan, with whom we had a surplus when we entered into a free trade agreement in 2001. Our overall trade deficit continues to rise as we reach new trade deals. Even in the service sector, where we are supposed to enjoy a trade advantage, we have seen our surplus fall as U.S. investors move overseas to export services back into the U.S. market. In advanced technology products, another area in which many people assume the U.S. has a competitive edge, our 1999 trade surplus of \$19 billion turned into a \$37 billion deficit by 2004.

It is hard to know if our trade balance will fare much better under the Peru agreement. The administration has still not released any analysis of the economic impacts of the agreement, despite clear instructions from Congress to do so. Section 2102(c)(5) of TPA instructs the President to provide a public report to Congress on the impact of a future trade agreement on United States employment and labor markets. This review is supposed to be available as early as possible in the negotiations, before negotiating proposals are put forward. But now, even after negotiations have been concluded, there is still no such review available. The ITC review of the economic impact of the new trade agreement, also mandated by Congress in TPA, is not yet completed.

While the overall trade relationship with Peru is small relative to the economy of the United States, it is possible that the agreement will result in a deteriorating trade balance in some

sectors, including sensitive sectors such as apparel, which constituted our largest import from Peru in 2004 (knitted or crocheted items). Even where the market access provisions of the agreement themselves may not have much of a negative impact on our trade relationship, these provisions when combined with rules on investment, procurement, and services could further facilitate the shift of U.S. investment and production overseas, harming American workers.

B. Labor Provisions of the Peru FTA

The Peru FTA's combination of unregulated trade and increased capital mobility not only puts jobs at risk, it places workers in both countries in more direct competition over the terms and conditions of their employment. High-road competition based on skills and productivity can benefit workers, but low-road competition based on weak protections for workers' rights drags all workers down into a race to the bottom. Congress recognized this danger in TPA, and directed USTR to ensure that workers' rights would be protected in new trade agreements. One of the overall negotiating objectives in TPA is "to promote respect for worker rights ... consistent with core labor standards of the ILO" in new trade agreements. TPA also includes negotiating objectives on the worst forms of child labor, non-derogation from labor laws, and effective enforcement of labor laws.

Unfortunately, the labor provisions of the Peru FTA fall far short of meeting these objectives. Instead, the agreement actually steps backwards from existing labor rights provisions in the U.S. – Jordan FTA and in our Generalized System of Preferences (GSP) program. In the Peru agreement, only one labor rights obligation – the obligation for a government to enforce its own labor laws – is actually enforceable through dispute settlement. All of the other obligations contained in the labor chapter, many of which are drawn from Congressional negotiating objectives, are explicitly not covered by the dispute settlement system and thus completely unenforceable.

It is worth noting that Peruvian President Alejandro Toledo publicly offered to incorporate stronger workers' rights provisions in this FTA, but that the U.S. government refused to do so. It is unfortunate that our government squandered an opportunity to negotiate meaningful protections for workers in this agreement.

Labor Rights in Peru

Peru does not meet International Labor Organization (ILO) criteria for compliance with core labor standards, and the weak and inadequate labor rights protections in this agreement will allow these deficiencies in Peru's labor laws to persist.

While the government of Peru has ratified the core ILO conventions and has reformed some of the most onerous labor law problems from the Fujimori era, several serious concerns remain. Labor laws remain deficient, workers continue to feel the negative repercussions of Fujimori's anti-worker policies, and the Government of Peru (GOP) continues to fail to adequately enforce its labor laws, especially with respect to freedom of association, the right to bargain collectively, and child labor.

Deficiencies in Peru's labor laws

Peru's labor laws deny the right to strike to workers in public services that are arbitrarily deemed "essential" by the government. According to the Ministry of Labor, the GOP declared 95 strikes illegal and only 2 legal during 2004, demonstrating the extreme difficulty in getting approval from the government for a strike.¹ The ILO has repeatedly asked the GOP to create an independent body to rule on whether a public service is "essential," because the state administrative body that currently makes the determination is an interested party involved in the labor dispute.²

The law places excessive conditions on the process for declaring a legal strike. Under Peruvian law, a union cannot legally decide to call a strike unless a majority of all workers in the workplace vote to strike. The ILO considers this condition excessive. In its 2005 report, the ILO Committee on Freedom of Association asked Government of Peru to amend its law so that a decision to call a strike only has to be adopted by the majority of those voting.³

The law allows companies to thwart union recruitment by hiring workers "temporarily." Under Peruvian law, temporary workers are prohibited from participating in the same union as permanent workers. Therefore, employers can hire "temporary" workers to prevent increases in the number of union members. While the law states that temporary workers must constitute no more than 20% of a company's workforce, workers' advocates documented that this was not enforced in practice.⁴

The law allows employers a variety of forms to contract workers without worker protections. Legislative Decree 728 #003 of 1997 governing Productivity and Competitiveness ("*Ley 728 de 1997: Ley de Productividad y competitividad*") defines a series of different forms under which an employer can contract with a worker, including sub-contracting to service companies, fixed term contracts (renewable), professional service contracts, and sub-contracting with "service cooperatives." All of these forms of contracting effectively eliminate the protections of law 25593 to join a union, or undertake collective bargaining [Law of Collective Work Relations ("*Ley 25593 de 1992: Ley de Relaciones Colectivas de Trabajo*")]. Workers hired under these contracts simply do not have their contracts renewed if they attempt to participate in union activity. In cooperatives, often set up by employers, workers are no longer employees, but cooperative members, thus no longer subject to any of the protections of labor law. In addition, they do not receive legally established benefits and protection

The law places an unfair financial burden on unions in the existing arbitration and conciliation system. The unions' proportionate share of arbitration costs exceed their resources, which inhibits their use of arbitration mechanisms.⁵

¹ U.S. Department of State, *Country Reports on Human Rights Practices - Peru*, 2004.

² ILO CEACR: *Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Peru (ratification: 1960)* Published: 2005

³ Ibid.

⁴ U.S. Department of State, *Country Reports on Human Rights Practices - Peru*, 2004.

⁵ Ibid.

Workers' rights in Export Processing Zones are not protected. Special regulations govern Peru's four EPZs. They allow for greater use of temporary workforce and greater flexibility, which undermine labor stability and inhibit organizing.⁶

The law does not protect workers' organizations from interference by employers.⁷ There are no legal provisions that explicitly prohibit employers from interfering in trade union organizing. ILO Convention 98 concerning the Right to Organize and Collective Bargaining states that "workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration."⁸ Allowing employer interference and employer-led worker organizations undermines freedom of association due to the power imbalance in labor relations. Employers can wield undue influence over workers' decisions about joining a union if they are permitted to interfere in organizing efforts.

Employers are allowed to fire workers at their discretion. Decree 728 of 1997, in article 34, gives the employer the power to fire *any* workers without cause, and without the right to legally challenge the action (*despido sin derecho a causa*). This element effectively eliminates protections in Law 25593 to organize, bargain collectively, and strike for workers hired under direct, permanent contracts.

- In December 2002, petroleum workers at Petrotech Peruana S.A. formed a trade union affiliated with National Federation of Petroleum and Allied Workers of Peru (FENPETROL). After the union was officially registered, it submitted its proposals for a collective bargaining agreement in March 2003. For the next several months, Petrotech management refused to attend meetings or make concrete proposals, while engaging in harassment of workers affiliated with the union. In May 2003, the union filed a complaint with the ILO claiming that the employer harassed and dismissed several workers, including the union's general secretary, with the sole purpose of destroying the union.⁹
- In September 2003, the U.S.-owned electric company Luz del Sur fired Luis del Río Reategui the General Secretary of the Lima and Callao branch of the electricity workers union (SUTREL) and regional representative to the Union Network International (UNI). Prior to Reategui's dismissal, SUTREL had exposed the company's failure to pay some of its taxes. Thus, the firing is widely believed to be company retaliation.¹⁰

⁶ Ibid.

⁷ U.S. Department of State. *Country Reports on Human Rights Practices – Peru*, 2003.

⁸ ILO Convention concerning the Right to Organize and Collective Bargaining (ILO Convention 98), 96 U.N.T.S. 257, July 18, 1951, art. 2. Peru ratified ILO Convention 98 on March 13, 1964.

⁹ ILO Committee of Experts, Case 2286, Report No. 333 (Peru): *Complaint against the Government of Peru presented by the National Federation of Petroleum and Allied Workers of Peru (FENPETROL)*, 2004. and International Confederation of Free Trade Unions (ICFTU). *Annual Survey of Violations of Trade Union Rights, Peru*, 2004.

¹⁰ International Confederation of Free Trade Unions (ICFTU). *Annual Survey of Violations of Trade Union Rights, Peru*, 2004.

Companies may unilaterally change work schedules, conditions and wages and suspend collective bargaining agreements for 90 days, if they claim “worsening economic circumstances.” The law requires that employers notify employees of the changes at least 15 days in advance and provides an appeal mechanism by workers, but trade unions claim that employers often do not provide the advance notice.¹¹ Under this provision, employers may claim economic hardship in order to suspend collective bargaining agreements.

The law limits the scope of collective bargaining agreements in the public sector. The GOP passed two labor reforms in January 2005, in order to cut costs in the public sector. The first, the Law of Framework for Public Employees, changes the employment status and collective rights in specific public sector areas.¹² In addition, President Toledo passed an “emergency decree,” which limits costs in public companies and entities, such as Perto-Peru, Essalud, the National Reserve Bank, and the Congress.¹³ The decree cuts benefits and limits payments, thereby limiting collective bargaining agreements.

Trade union rights violations in practice

While deficiencies in the laws continue to exist, also of concern is the government’s failure to enforce existing laws. The legacy of anti-worker repression from the Fujimori regime continues in Peru. Privatization during the Fujimori era was used as an effective tool to eliminate the gains achieved by trade unions. Newly privatized companies hired workers under poorer conditions of employment, with lower pay, and with no union representation. Many workers continue to feel the effects of the anti-union discrimination, which occurred in this period, as they have been forced into sub-contracted positions with considerably less job security and poorer conditions than their previous employment.¹⁴ The Fujimori legacy continues in other ways, as new labor laws are not adequately enforced, and government authorities remain slow to respond to violations.

The Government of Peru has failed to act to protect unions’ right to sector-wide bargaining. President Fujimori’s administration revoked the right to sectoral collective bargaining, but the Peruvian Congress reinstated the right in 2001. Nevertheless, attempts since 2001 to engage in sectoral collective bargaining have met with repression.

- In early 2003, construction workers representing the Civil Construction Workers' Federation of Peru (FTCCP) attempted to negotiate a sectoral-wide collective bargaining agreement with the employers' body, the Cámara Peruana de la Construcción Civil (CAPECO). When CAPECO refused to negotiate, despite rulings by the Supreme Court of Justice and the Constitutional Court ordering them to do so, the workers held a strike from January 28 to February 1, 2003. Eighteen union

¹¹ U.S. Department of State. *Country Reports on Human Rights Practices – Peru*, 2003.

¹² Ley Número 28175. *Ley Marco del Empleo Público*. January 1, 2005.

¹³ Decreto de Urgencia 003-2005. *Dictan disposiciones destinadas a la reestructuración de niveles salariales en entidades y organismos dentro del ámbito del Poder Ejecutivo, Entidades de Tratamiento Empresarial y empresas sujetas al FONAFE*, January 23, 2005.

¹⁴ International Confederation of Free Trade Unions (ICFTU). *Annual Survey of Violations of Trade Union Rights, Peru*, 2004.

members were arrested during the strike. They were formally charged with disturbing the peace and illegal association and were held in a high security prison for several months. Finally, the charges against them were dropped. The last two were released in August 2003. The labor dispute continued until the Ministry of Labor granted a back-dated pay increase to all workers.¹⁵ In September of 2004, after yet another general strike, CAPECO capitulated and signed the first sector-wide agreement with the FTCCP. It is the only sector that has been able to exercise this right.

The Government of Peru has infringed on the right to collectively bargain by freezing public sector salaries. The ILO states that “if as part of a stabilization policy a government considers that wage rates cannot be determined freely through collective bargaining, such a restriction should be imposed as an exceptional measure, and only to the extent that it is necessary, without exceeding a reasonable period.”¹⁶

- In July 2003, the National Fund for Financing State Enterprise activity issued an Executive Decision which prohibited increasing remuneration, remuneration scales, bonuses, allowances and benefits of any kind, preventing workers at these enterprises from receiving any increase in remuneration and/or better salaries or working conditions of an economic nature. The unions representing petroleum and healthcare workers complained to the ILO because these restrictions paralyzed their collective bargaining. While the salary freeze did have an expiration date, in its ruling on the case, ILO reiterated that any limitation on collective bargaining should be preceded by consultation between employers and workers organizations to achieve agreement.¹⁷

Peru has ratified ILO Convention No. 138 on the Minimum Age for Admission to Employment and Convention No. 182 on the Worst Forms of Child Labor. The legal minimum age for employment is 14; however, children between the ages of 12 and 14 may work in certain jobs for up to 4 hours per day, and adolescents between ages 15 to 17 may work up to 6 hours per day if they obtain special permission from the Ministry of Labor and certify that they also were attending school.¹⁸

Despite these laws, child labor in Peru remains pervasive. The U.S. State Department reported that, in 2004:

“An estimated 1.9 million children labored primarily in the informal sector to help support their families. Of this total, NGOs estimated that approximately 600,000 children were less than 12 years of age. Significant numbers of children from rural areas, most of them female, often were

¹⁵ International Confederation of Free Trade Unions (ICFTU). *Annual Survey of Violations of Trade Union Rights, Peru*, 2004.

¹⁶ ILO Committee of Experts, Case 2293. *Complaint against the Government of Peru presented by Peruvian Petroleum Workers' Federation (FETRAPEP), the Single Trade Union of Talar Petroleum Refinery of Peru S.A. (SUTREPPSA) and the National Trade Union of Health Social Security Workers (SINACUT ESSALUD)*. Report 335, 2004.

¹⁷ Ibid.

¹⁸ U.S. Department of State, *Country Reports on Human Rights Practices - Peru*, 2004.

moved to cities where they lived and worked in families as domestics. Employers frequently required longer hours from their live-in charges, compelling them to carry out comprehensive duties, including cooking and childcare, for wages as low as \$20-30 (70-105 soles) per month. Child and adolescent laborers worked long hours in the agricultural sector. Other children reportedly were employed at times in dangerous occupations or in high-risk environments, such as informal gold mining, garbage collection, brick making, coca cultivation, or work in stone quarries and fireworks factories. Although there were no reliable statistics on its extent, NGOs and other observers maintained that the country suffered a growing problem with adolescent prostitution.”¹⁹

The Ministry of Labor has responsibility for enforcing child labor laws. In 2004, the Ministry employed 170 labor inspectors responsible for all labor inspections. Of the 170 inspectors, 120 were assigned to Lima, and inspections were carried out primarily in the formal sector.²⁰ Given that much child labor occurs outside major cities and that most child labor occurs in the informal sector, the current capacity and focus of the Ministry of Labor’s inspections are inadequate.

Conclusion

The proposed FTA would allow Peru to maintain these restrictions on workers’ rights in its law, and even to further limit workers’ fundamental rights in the future. Even for the one labor obligation in the FTA that is subject to dispute resolution – the requirement to effectively enforce domestic laws – the procedures and remedies for addressing violations are significantly weaker than those available for commercial disputes in the agreement. This directly violates TPA, which instructs our negotiators to seek provisions in trade agreements that treat all negotiating objectives equally and provide equivalent dispute settlement procedures and equivalent remedies for all disputes.

The labor enforcement procedures cap the maximum amount of fines and sanctions available at an unacceptably low level, and allow violators to pay fines that end up back in their own territory with inadequate oversight. These provisions not only make the labor provisions of the agreement virtually unenforceable, they also differ dramatically from the enforcement procedures and remedies available for commercial disputes:

- Under the rules governing commercial disputes, trade sanctions are supposed to have “an effect equivalent to that of the disputed measure [i.e., the measure that violates the agreement].” Yet under the rules governing labor disputes, the amount of a monetary assessment is not just based on the harm caused by the disputed measure. Instead, the panel also takes into consideration numerous other factors, many of which could be used to justify a lower, and thus less effective, sanction. Factors to be considered include the reason a party failed to enforce its labor law, the level of enforcement that could be reasonably expected, and “any other relevant factors.” The agreement does not state whether these issues should be considered only as mitigating or aggravating factors, presenting the possibility that a panel could cite these additional factors to reduce the amount of a monetary assessment for a labor

¹⁹ U.S. Department of State, *Country Reports on Human Rights Practices - Peru*, 2004.

²⁰ Ibid.

violation below the level necessary to remedy the violation – an outcome not permitted for commercial violations.

- In commercial disputes, the violating party can choose to pay a monetary assessment instead of facing trade sanctions, and in such cases the assessment will be capped at half the value of the sanctions. In labor disputes, however, the assessment is capped at an absolute level, no matter what the level of harm caused by the offending measure. Not only are the fines for labor disputes capped, but the level of the cap is so low that the fines will have little deterrence effect. The cap in the Peru agreement is \$15 million – a small percentage of our total two-way trade in goods with Peru last year.
- Not only are the caps on fines much lower for labor disputes, but any possibility of trade sanctions is much lower as well. In commercial disputes, a party can suspend the full original amount of trade benefits (equal to the harm caused by the offending measure) if a monetary assessment (capped at half that value) is not paid. In a labor dispute, the level of trade benefits a party can revoke if a monetary assessment is not paid is limited to the value of the assessment itself – capped at \$15 million.
- Finally, the fines are robbed of much of their punitive or deterrent effect by the manner of their payment. While the LAC supports providing financial and technical assistance to help countries improve labor rights (and all members of the LAC were appalled to see the funds for such activities in the administration's budget for 2005 slashed from \$99.5 million to just \$18 million), such assistance is not a substitute for the availability of sanctions in cases where governments refuse to respect workers' rights in order to gain economic or political advantage. In commercial disputes under the Peru FTA, the deterrent effect of punitive remedies is clearly recognized – it is presumed that any monetary assessment will be paid out by the violating party to the complaining party, unless a panel decides otherwise. Yet for labor disputes, the violating country pays the fine to a joint commission to improve labor rights enforcement, and the fine ends up back in its own territory. No rules prevent a government from simply transferring an equal amount of money out of its labor budget at the same time it pays the fine. And there is no guarantee that the fine will actually be used to ensure effective labor law enforcement, since trade benefits can only be withdrawn if a fine is not paid. If the commission pays the fine back to the offending government, but the government uses the money on unrelated or ineffective programs so that enforcement problems continue un-addressed, no trade action can be taken.

The labor provisions in the Peru FTA are woefully inadequate, and clearly fall short of the TPA negotiating objectives. They will be extremely difficult to enforce with any efficacy, and monetary assessments that are imposed may be inadequate to actually remedy violations. The Peru FTA will do very little to actually ensure that core workers' rights are respected and improved in the U.S. and Peru. Given Peru's failure to respect core workers' rights and the inadequacies in its labor laws, it is especially problematic to implement an FTA with weak labor protections at this time.

C. Other Issues in the Peru FTA

In addition to the very serious problems with the labor provisions of the Peru agreement outlined above, commercial provisions of the agreement also raise serious concerns for the LAC. These issues have been discussed in detail in previous LAC reports. Unfortunately, the Peru FTA contains many of the same provisions as these previous agreements, and raises many of the same concerns, summarized in brief below.

Investment: In TPA, 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 the Peru FTA contain large loopholes that allow foreign investors to claim rights above and beyond those that our domestic investors enjoy. The agreement’s rules on expropriation, its extremely broad definition of what constitutes property, and its definition of “fair and equitable treatment” are not based directly on U.S. law, and annexes to the agreement clarifying these provisions also fail to provide adequate guidance to dispute panels. As a result, arbitrators could interpret the agreement’s rules to grant foreign investors greater rights than they would enjoy under our domestic law. 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.

Intellectual Property Rights: In TPA, Congress instructed our trade negotiators to ensure that future trade agreements respect the declaration on the Trade Related Aspects on Intellectual Property Rights (TRIPs) agreement and public health, adopted by the WTO at its Fourth Ministerial Conference at Doha, Qatar. The Peru FTA contains a number of “TRIPs-plus” provisions on pharmaceutical patents, including on test data and marketing approval, which could be used to constrain the ability of a government to issue compulsory licenses as permitted under TRIPs and the Doha Declaration.

Government Procurement: The FTA’s rules on procurement restrict the public policy aims that may be met through procurement policies at the federal level. These rules could be used to challenge a variety of important procurement provisions including domestic sourcing preferences, prevailing wage laws, project-labor agreements, and responsible contractor requirements. The LAC believes that governments must retain their ability to invest tax dollars in domestic job creation and to pursue other legitimate social objectives, and that procurement rules which restrict this authority are inappropriate.

Safeguards: Workers have extensive experience with large international transfers of production in the wake of the negotiation of free trade agreements and thus are acutely aware of the need for effective safeguards. The safeguard provisions in the Peru agreement, which offer no more protection than the limited safeguard mechanism in NAFTA, are not acceptable. A surge of imports from large multinational corporations can overwhelm domestic producers very quickly, causing job losses and economic dislocation that can be devastating to workers and their

communities. For many American workers losing their jobs to imports, it may be their own employer that is responsible for the surge of imports. In such a case, and similar situations in which an international sourcing decision has been made on the basis of a free trade agreement, the usual remedy of restoration of the previous tariff on the imports will not be enough to reverse the company's decision to move production abroad. U.S. negotiators should have recognized that much faster, stronger safeguard remedies are needed. The Peru FTA has failed to provide the necessary import surge protections for American workers.

Services: NAFTA and WTO rules restrict the ability of governments to regulate services – even public services. Increased pressure to deregulate and privatize could raise the cost and reduce the quality of basic services. Yet the Peru agreement does not contain a broad, explicit carve-out for important public services. Public services provided on a commercial basis or in competition with private providers are generally subject to the rules on trade in services in the Peru FTA, unless specifically exempted. The specific exemptions for services in the Peru agreement fall short of what is needed to protect important sectors. There are, for example, no U.S. exceptions for energy services, water services, sanitation services, or public transportation services. Even for those services the U.S. did make exceptions for, such as public education and health care, the exemption only applies to some of the core rules of the FTA, not all. These partial exceptions are particularly worrisome given the tendency of trade dispute panels to interpret liberalization commitments expansively, and to interpret exceptions to those commitments narrowly. One manifestation of this problem is the recent WTO decision against the U.S. on gambling services – the U.S. argued unsuccessfully that gambling was not covered by the WTO's General Agreement on Trade in Services, and now potentially faces the prospect of facing challenges to our state and federal gambling regulations.

VI. Conclusion

The LAC recommends that the President not sign the Peru agreement until it is renegotiated to fully address each of the concerns raised in this report. If the President does send the agreement to Congress in its current form, Congress should reject the agreement, and send a strong message to USTR that future agreements must make a radical departure from the failed NAFTA model in order to succeed.

The LAC recommends that USTR reorder its priorities before continuing with negotiations towards new free trade agreements with Colombia and Ecuador, Panama, the United Arab Emirates, Southern Africa, and Thailand. American workers are willing to support increased trade if the rules that govern it stimulate growth, create good jobs, and protect fundamental rights. The LAC is committed to fighting for better trade policies that benefit U.S. workers and the U.S. economy as a whole. We will oppose trade agreements that do not meet these basic standards.

VII. Membership of the Labor Advisory Committee

Paul Almeida, Department of Professional Employees, AFL-CIO
Ron Ault, Metal Trades Department, AFL-CIO
Morton Bahr, CWA (emeritus)
George Becker, USW (emeritus)

Barbara Blakeney, ANA
Thomas Buffenbarger, IAMAW
Francis Chiappardi, Jr. NFIU
Jeff L. Fiedler, FAST
Patricia A. Friend, AFA-CWA
Leo Gerard, USW
Ron Gettelfinger, UAW
Melissa Gilbert, SAG (former)
Stephen Goldberg, Northwestern University Law School
Joseph T. Hansen, UFCW
Edwin Hill, IBEW
Cheryl Johnson, UAN
Edward McElroy, AFT
Charles E. Mercer, Union Label and Service Trades Department
Bruce Raynor, UNITE HERE
Michael Sacco, Seafarers International Union of North America
Andrew Stern, SEIU
John J. Sweeney, AFL-CIO
Duane Woerth, ALPA
Edward Wytkind, TTD
Boyd Young, USW (former)
William H. Young (NALC)