

**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)**

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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>1</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.

#### *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>2</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

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<sup>1</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.

<sup>2</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.

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?

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>3</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>4</sup> Singapore and China.

#### c. ACCESSION OF NEW MEMBER STATES

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

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<sup>3</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>4</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.



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>5</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 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

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<sup>5</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.

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>6</sup>

## TRANSNATIONAL LABOR RELATIONS

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.

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<sup>6</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.



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>7</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

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<sup>7</sup> Trade Act of 2002, H.R. 3009, 107th Cong. § 2102(b)(3) (2002).

of states followed by them from a sense of legal obligation.”<sup>8</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>9</sup> The following recommendations respond to these and other provisions of the Model BIT that could conflict with the “no greater rights” mandate.

**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>10</sup> and

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<sup>8</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987).

<sup>9</sup> See generally Matthew C. Porterfield, *An International Common Law of Investor Rights?* 27 U. Pa. J. Int’l Econ. L. 79 (2006).

<sup>10</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>

- 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>11</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"),
- 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>12</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>13</sup> or "arbitrary"<sup>14</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>15</sup>

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<sup>11</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>

<sup>12</sup> See U.S. Counter-Memorial at 221

<sup>13</sup> See U.S. Counter-Memorial at 233

<sup>14</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>15</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

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.

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>16</sup>

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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.”).

<sup>16</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).

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.**

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>17</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>17</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>18</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

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<sup>18</sup> See *Fireman's Fund Insurance v. United Mexican States*, ICSID Case No. ARB(AF)/02/01 (Awa

any efforts, most recently attempted by South Korea, to weaken trade remedy laws in any way.<sup>19</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 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.

Upon further analysis, USTR may identify goods that are particularly sensitive. Special safeguard mechanisms should be considered where sensitivities have been identified.

## **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

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<sup>19</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.

the most onerous requirements for the intellectual property protection of pharmaceuticals. However, harmful language on data exclusivity remains in the Peru FTA agreement.<sup>20</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 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

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<sup>20</sup> The data exclusivity provisions are found in Article 16.10, sub-sections 2 (b) and (c) of the Peru FTA.

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.