

An Appraisal of the Labor Chapter of the Trans-Pacific Partnership

Remarks Submitted to the Committee on Ways and Means Democrats

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1. The Labour chapter of the Trans-Pacific Partnership (TPP) is the most progressive set of labor obligations ever to be negotiated in a free trade agreement.
2. The TPP is an enhanced second-generation worker rights chapter in a free trade agreement (FTA):

-- In the *first* generation of worker rights, US FTAs incorporated the labor principles and labor rights of the International Labour Organization (ILO) Declaration of 1998, yet did so only with a soft obligation.¹ The US trading partners were Australia, Bahrain, Central America/Dominican Republic, Chile, Jordan, Morocco, Oman, and Singapore. Those agreements also included an obligation not to fail to enforce domestic labor laws in a manner affecting trade between the parties.² This obligation grew out of a similar formulation in the labor side accord to the North American Free Trade Agreement (NAFTA).

-- The May 10, 2007 Bipartisan Trade Deal ushered in the *second* generation of worker rights in FTAs through a hard obligation to "adopt and maintain" in domestic law the fundamental rights enshrined in the ILO Declaration.³ This was the template used in the US FTAs with Colombia, Korea, Panama, and Peru. These FTAs also contain a commitment not to waive or derogate from regulations implementing these international rights. The significance of the second generation of FTA-related worker rights can be understood by looking at what it adds to the underlying regime of international labor law. Although all US FTA partners are member states of the ILO, the ILO Declaration does not have a compliance system and many countries (including the United States) have not ratified some of the

¹The precatory FTA language was "strive to ensure." This treaty language met the terms of the TPA labor negotiating objectives enacted in the Trade Act of 2002.

²This obligation was the cause of action in a 2014 complaint by the United States against Guatemala. This dispute is now before a tribunal.

³These rights are freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of compulsory or forced labor, effective abolition of child labor and prohibition of the worst forms of child labor, and the elimination of discrimination in respect of employment and occupation.

underlying ILO conventions protecting the fundamental rights. Therefore, the US FTAs graft on enforceability to the ILO Declaration.

3. The TPP labor chapter enhances second-generation worker rights in several key ways:

--First, the TPP obligates each party to "adopt and maintain" statutes, regulations, and practices governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, as determined by that party.

--Second, the obligation not to waive or derogate from fundamental labor rights or conditions of work is specifically applied to special trade or customs areas such as export processing zones (EPZs).

--Third, the TPP obligates each government to "discourage, through initiatives it considers appropriate" the importation of goods produced by forced or compulsory labor. In that regard, the TPP clarifies that it is not authorizing any initiative that would be inconsistent with World Trade Organization (WTO) law.

These three enhancements achieve a significant improvement to worker rights obligations as compared to the most recent set of US FTAs. Although the TPP's conditions-of-work provision does not incorporate the applicable ILO conventions, for countries that are not a party to those ILO conventions, this TPP commitment may be the only international obligation a country has on such issues. For example, consider the ILO Minimum Wage Fixing Convention (No. 131) of 1970. Only three TPP countries are party to the ILO Convention (Australia, Chile, and Japan), and therefore the remaining TPP countries will strengthen their international obligations on minimum wage fixing. The TPP's specific prohibition for EPZs promotes a longtime goal of labor rights advocates as far back as the 1970s. Therefore, the EPZ provision in the TPP is as an important milestone. The norm of discouraging imports produced by forced labor has been reflected in US law since 1890, but so far has surfaced in US trade agreements only as a reserved right rather than a mutual obligation. So here too the TPP makes a breakthrough.

4. To assess the accuracy of USTR's claim that "TPP has the strongest protections for workers of any trade agreement in history..." we need to examine other preferential agreements such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA) of 2014. In one respect, CETA's Trade and Labour chapter is stronger than TPP in linking labor law commitments to the ILO's Decent Work Agenda and in agreeing to "continued and sustained efforts" toward ratifying fundamental ILO conventions. On the other hand, CETA's labor chapter appears to lack remedies for non-compliance. So USTR's claim is warranted.

5. By contrast, the TPP Labor Chapter is enforceable through TPP's general dispute settlement chapter which makes some procedural improvements over previous FTA

dispute systems. Like the dispute settlement system of the WTO, the ultimate remedy for non-compliance of state-to-state disputes would be a trade sanction. Before utilizing this TPP dispute system for labor matters, however, the disputing parties must first engage in "Labour Consultations" (Article 19.15).

6. The TPP provides a labor cooperation mechanism with an indicative agenda (see Article 19.10) that is broader than in previous US FTAs. The cooperation is to be spearheaded by a Labour Council composed of senior government representatives from each TPP country. This intergovernmental Council is specifically directed to receive and consider the views of interested persons and these public transparency and participation provisions evidence improvement over the cooperation mechanisms in previous FTAs. In my view, however, the bureaucratic nature of the TPP's labor cooperation mechanism demonstrates a failure of imagination and a missed opportunity to learn lessons from previous FTA labor mechanisms. The creation of the similarly bureaucratic North American Commission on Labor Cooperation was trumpeted with great fanfare in 1993, but that Commission failed to achieve anything of note and has become moribund in recent years.

7. One important feature of the TPP Labour chapter is that it includes bilateral agreements between the United States and Brunei, Malaysia, and Viet Nam. These agreements—termed Consistency Plans (for Brunei and Malaysia) and Plan for Enforcement of Trade and Labor Relations (for Viet Nam)—state that they are subject to TPP dispute settlement. Some of the reforms detailed in these bilateral plans are pledged to be enacted before the date of entry into force of the TPP agreement. The attachment of such detailed labor commitments is a valuable new feature in US FTAs. Although the US FTA with Colombia was complemented with a "Colombian Action Plan Related to Labor Rights" in April 2011, the Colombian Plan contains mainly time-delimited obligations and does not purport to be linked to an enforcement mechanism.

8. Although the United States undertakes some oversight, assistance, and procedural commitments in these three side deals, only the US counterparty undertakes substantive labor commitments. For example, Malaysia agrees to "ensure that the use of subcontracting or outsourcing is not used to circumvent the rights of association or collective bargaining," but the United States does not make a parallel commitment.

9. The three Labor Plans are notable in their specificity of the statutory changes that Brunei, Malaysia, and Viet Nam pledge to make. The pledges are responsive to well-known deficiencies in their domestic labor laws that render them inconsistent with fundamental ILO norms, particularly with the ILO Convention of Freedom of Association and Protection of the Right to Organise (No. 87). Both the Malaysia and Viet Nam agreements contain a pledge by those countries to seek assistance from the ILO and Viet Nam goes further in agreeing to "implement recommendations provided by the ILO."

10. Two landmark features of the Viet Nam accord should also be noted: First, Viet Nam is given five years to improve law and practice in order to allow grassroots labor unions to form and join organizations of workers across enterprises and at sectoral and regional levels.⁴ If Viet Nam fails to comply after five years, then a special mechanism allows the United States to withhold future TPP tariff reductions owed to Viet Nam. Should Viet Nam disagree with the United States as to whether Viet Nam has complied, then Viet Nam gains a right to bring a TPP dispute against the United States and the United States pre-commits to abide by the dispute panel's judgment. The second important new feature is that the Plan calls for an independent Labor Expert Committee to review Viet Nam's implementation of its commitments and to produce periodic reports containing findings and recommendations. The use of independent expert committees to monitor compliance with international labor law has been a central feature of the ILO's supervisory system since 1926. But until TPP, no FTA has employed ongoing independent monitoring for labor obligations.

11. The most detailed examination of the TPP Labour Chapter to come to my attention is contained in the December 2015 Report of the Labor Advisory Committee on Trade Negotiations and Trade Policy. Although many of the criticisms lodged by the Committee are cogent, the Committee's overall conclusions are unjustified by the facts:

-- The Committee asserts that the TPP's changes from the May 10 standard are "trivial" and that "none of the changes provide significant new protections for workers, nor do they remedy the completely discretionary nature of labor enforcement" (p. 16). Yet as detailed above, the changes from the May 10 standard are far more than trivial, and the detailed plans for Brunei, Malaysia, and Viet Nam clearly provide significant new protections for workers. While it is true that enforcement of TPP labor provisions is discretionary in that only governments can bring cases, that same limited standing exists for trade commitments too.

--The Committee asserts that the Brunei, Malaysia, and Viet Nam side letters "adopt the same failed approach as the Colombia Labor Action Plan" (p. 17). While reasonable observers might differ on whether the Colombia Plan was a failed approach,⁵ clearly the Committee is wrong in calling the new side letters the "same" approach. As pointed out above, the new side agreements have much greater specificity than the Colombia plan and provide for dispute settlement.

12. The moral arc of labor rights has influenced world trade for over a century and the new TPP labor chapter makes a signal contribution toward governing the social

⁴Currently, both Viet Nam and the United States have failed to ratify ILO Convention No. 87.

⁵In my view, the Plan has shown some success for the reasons outlined in <https://ustr.gov/uscolombiatpa/labor>.

dimension of global markets. This important labor chapter provides one more reason for the US Congress to enact TPP implementing legislation.

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