

U.S. House of Representatives Committee on Ways & Means

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TPP Issue Analysis: Worker Rights

I. Background on the May 10th Agreement

On May, 10, 2007, after more than a decade of effort, House Democrats succeeded in securing the incorporation of strong and enforceable labor provisions in U.S. free trade agreements for the first time.¹ As a result, the Peru, Panama, Colombia, and Korea agreements all incorporate what are now known as the “May 10” labor provisions that require parties to commit, on a reciprocal basis, to adopt and maintain the five basic labor rights stated in the

¹ The “May 10th Agreement” also incorporated for the first time in history strong and fully enforceable environmental obligations in trade agreements and included several other important new rules, including providing a better balance between strong intellectual property rights and access to affordable medicines. (The TPP’s Environment Chapter was addressed in an earlier forum on November 17, 2014 and Access to Medicines in the TPP was addressed in a previous forum on December 8, 2015. See: <http://democrats.waysandmeans.house.gov/trading-views-real-debates-key-issues-tpp>.) The U.S.-Peru trade agreement was the first to include the May 10 standards.

International Labor Organization's (ILO) *Declaration on Fundamental Principles and Rights at Work*, which comprise: (1) freedom of association; (2) effective recognition of the right to collective bargaining; (3) elimination of all forms of forced or compulsory labor; (4) effective abolition of child labor and prohibition of the worst forms of child labor; and (5) elimination of discrimination in employment and occupation.

Particularly poor labor standards in Peru, Panama, and Colombia necessitated enhanced efforts to ensure that the May 10 labor provisions would be meaningfully implemented by those partners. For Peru and Panama, House Democrats insisted that the parties involved took action to bring their laws into compliance with the trade agreement labor commitments before Congress voted. For Colombia, existing labor conditions were so concerning that the May 10th Agreement included a letter from Ways and Means Democratic leaders stating that "Colombia has special problems and considerations . . . including the systemic, persistent violence against trade unionists and other human rights defenders, the related problem of impunity" such that "Congress and the Administration must work with the Government of Colombia on these serious problems to determine what additional steps can be taken to allow for consideration of the FTA."²

II. Labor Obligations in the TPP

The Trans-Pacific Partnership Agreement (TPP) is the first U.S. trade agreement negotiated since the passage and entry into force of the four "May 10" agreements. Like those four agreements, the TPP labor chapter incorporates the May 10 labor commitments that apply to all 12 TPP parties, with some modest additional obligations included, such as the requirement that each TPP country have laws establishing some minimum wage (though the TPP does not require that the minimum wage be set at a particular level); a requirement to "discourage" importation of goods made by forced labor; and a prohibition on weakening labor protections in export processing zones.³

This paper describes the most prevalent labor concerns in the relevant countries and provides a preliminary assessment of whether and how provisions in the TPP Agreement will address those concerns. In all cases, but for different reasons in each case, significant and legitimate concerns remain as to whether the labor standards of the May 10th Agreement will be fully implemented and enforced.

A. Vietnam

Vietnam presents a unique challenge in the area of labor standards and obligations. The TPP represents the first time that the United States has negotiated a trade agreement with a communist country. The only representative that workers have had is a union controlled by the Communist Party.

² Letter to the U.S. Trade Representative from Charles B. Rangel and Sander M. Levin (May 10, 2007), available at: http://www.bilaterals.org/IMG/pdf/05_14_07.pdf at p 13.

³ An export processing zone is an industrial area where inputs, which are generally permitted to be imported duty-free, undergo processing and are then exported. These zones are usually set up to attract foreign investors and working conditions and worker protections are often very weak in these zones.

Workers do not have the right to freely form and join an independent union of their choosing at an individual workplace, nor to organize across enterprises, nor to form vertical umbrella organizations, i.e., affiliate with confederations. Efforts to form independent worker organizations have led to people being beaten and jailed. In order to comply with the labor obligations in the TPP, Vietnam must fundamentally reform its labor regime.

1. *The U.S.-Vietnam Labor Plan*

The United States and Vietnam have developed a consistency plan for Vietnam's implementation of its TPP labor chapter obligations on a bilateral basis, memorialized in the "United States – Viet Nam Plan for the Enhancement of Trade and Labor Relations"⁴ (Vietnam labor plan), and the plan is a part of the TPP Agreement and enforceable through the same dispute settlement mechanism that applies to the other obligations in the Agreement. The labor plan requires Vietnam to undertake several specific legal, institutional, and procedural reforms to ensure that Vietnam complies with basic ILO principles.

The plan includes the following commitments:

- Under Vietnamese laws and regulations workers shall be permitted to form unions of their own choosing and without prior authorization of the government. Each union shall have the right autonomously to elect its representatives. (See section II, para. 2.)
- "Viet Nam shall provide in its law and practice that grassroots labour unions may, if they so choose, form or join organizations of workers, including across enterprises and at the levels above the enterprise, including the sectoral and regional levels[.]" (Section II, A, para. 2.)
- "Noting that the Constitution of Viet Nam recognizes only labour unions affiliated with the [party- and state-controlled union, the Vietnam General Confederation of Labour or "VGCL"] as 'socio-political organizations', Viet Nam shall ensure that its law will not require labour unions registered with the competent government body to have mandatory political obligations and responsibilities that are inconsistent with the labour rights as stated in the ILO Declaration." (Section II, B, para. 4.)
- Vietnam shall ensure that it distinguishes between employees and those who have the interests of the employer, and shall prohibit employer interference with labour unions. (Section II, E., para. 1.)
- Vietnam shall ensure that its law allows for rights-based strikes. (Section II, G, para. 1.)
- Vietnam shall establish an effective complaint mechanism for workers to inform authorities confidentially and anonymously of alleged labor violations, and shall allocate sufficient resources to enforce labour laws. (Section III, C, para. 3.)

⁴ United States – Viet Nam Plan for the Enhancement of Trade and Labor Relations (Vietnam Labor Plan) (<https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labor-Relations.pdf>).

Vietnam is required to implement all of the commitments in the Plan – with one significant exception – by entry into force of the TPP Agreement. This includes the commitment to permit independent unions to form, for the first time, in individual enterprises.

The exception to the requirement of implementation on entry-into-force is the commitment to permit enterprise level unions to affiliate both “horizontally,” with other enterprise level unions at other enterprises (e.g., by trade or geographic area), and “vertically” with federations and confederations. This commitment is important to establishing meaningful freedom of association. Without it, any enterprise level unions formed would remain isolated and severely limited in their effectiveness. Vietnam has committed to implement this obligation within five years of the Agreement’s entry into force. Vietnam has agreed that, should the United States not be satisfied with Vietnam’s implementation of the commitment, the United States is authorized to withhold market access concessions unilaterally. Specifically, the mechanism will permit the United States to act, between years five and seven of the Agreement, unilaterally to withhold any tariff reductions that were not already reduced in the first five years of the Agreement until either the United States becomes satisfied with Vietnam’s implementation or a TPP dispute settlement panel concludes that Vietnam has in fact implemented the commitment to permit union affiliation both horizontally and vertically. The schedule for tariff reduction and elimination for many products in the textiles, apparel, and footwear sectors – sectors in which Vietnam is the most competitive and has the greatest economic interest – are back-loaded and tariffs will not be significantly reduced or eliminated for those products until years six, seven, 11 and 13 of the Agreement.⁵

2. *Issues Regarding the Worker Rights Provisions*

The substantive commitments in the labor plan reflect the enormity of the changes required for Vietnam to comply with the TPP’s labor obligations. The ability of workers to form independent unions and for unions to form across enterprises, e.g., by sector, and to affiliate vertically with confederations, would represent a major change in the Vietnamese economic structure. Changes of this enormity and in the context of a communist structure, present some real concerns as to the reality of implementation.

Issue 1: When will the changes to law and practices occur?

As described above, Vietnam is required to make most of the changes to its laws before the TPP enters into force. What this means is that, after Congress votes, the Administration determines on its own whether it believes Vietnam has implemented the commitments. If it determines that it has, the Administration has the authority to allow the agreement to become effective (i.e., enter into force). If Congress disagrees with the determination, it will already have passed the implementing bill giving the President the authority to make the determination on his or her own.

⁵ See U.S. Schedule for Tariff Elimination for products in Chapters 50-60 (textiles), 61-63 (apparel), and 64 (footwear) for Vietnam (<https://ustr.gov/sites/default/files/TPP-Final-Text-US-Tariff-Elimination-Schedule.pdf>). See also U.S. General Notes to Tariff Schedule (<https://ustr.gov/sites/default/files/TPP-Final-Text-US-General-Notes-to-Tariff-Schedule.pdf>).

That is why Congressional Democrats insisted that the changes to laws in Peru, Panama, and Colombia, required as a result of the May 10th Agreement, happen before Congress voted.

Additionally, reports from Vietnam in the months after the TPP Agreement was reached in Atlanta and the President indicated his intent to sign, do not indicate that Vietnam is moving to meet its labor obligations. Labor activists remain imprisoned, serving out harsh sentences, even though their continued detention has been found by the U.N. Working Group on Arbitrary Detentions to be a deprivation of liberty for the exercise of the right of freedom of association, in breach of Vietnam's existing international legal obligations, apart from TPP.⁶ And recent reports allege that peaceful labor organizers continue to be subject to harassment and abuse by the state.⁷ Indeed, a labor organizer that met with a Congressional Delegation in Vietnam a year ago has been beaten and pressured to stay in her house in recent months.

Issue 2: Ensuring Compliance after the Agreement Enters into Force

Given the extraordinary challenges facing Vietnam, some had urged that TPP establish a special mechanism at the outset of the Agreement's entry into force to ensure ongoing compliance. An independent panel of experts that regularly examines and publicly reports on Vietnam's ongoing compliance with the TPP labor obligations, with a focus on the transformational reforms, could fulfill this function. The panel's findings could be treated as the legal findings of a dispute settlement panel, resulting – as a last resort – in the suspension of trade benefits if any instances of non-compliance are not remedied.

The labor plan does not include such a mechanism. It does establish a Labor Expert Committee (LEC).⁸ The LEC will comprise three members: one appointed by the United States, one appointed by Vietnam, and a Chairperson agreed by both countries who may be a representative of the ILO or, like the other two appointed members, some other individual with expertise in international labor standards who holds a position that is independent of both countries. The LEC will be responsible for producing four public reports at two-year intervals beginning two and a half years after the agreement's entry into force, after which time it will produce reports at five-year intervals at the request of either the United States or Vietnam. The reports will provide a factual review of Vietnam's performance of its commitments in the labor plan to implement its TPP labor obligations. The LEC will also provide "recommendations" regarding concerns that are identified in its factual review of Vietnam's implementation of the reforms outlined in the labor plan.

The LEC approximates in some respects such an independent panel of experts that reviews and reports on Vietnam's implementation of labor reforms. Importantly, however, the LEC lacks the critical authority to make legal findings equivalent to those that a dispute

⁶ Opinions Adopted by the Working Group on Arbitrary Detentions at its sixty-fifth session, 14-23 November 2012, No. 42/2012 (Vietnam) (A/HRC/WGAD/2012/42) (February 20, 2013).

⁷ See "Vietnam Beating Case Highlights TPP Labor Rights Issue," Trung Nguyen, Voice of America (November 23, 2015) available at: <http://www.voanews.com/content/vietnam-beating-case-highlights-tpp-labor-rights-issue/3072205.html>; and "Vietnamese Authorities Detain and Beat Two Human Rights Activists," Radio Free Asia (November 9, 2015) available at: <http://www.rfa.org/english/news/vietnam/vietnamese-authorities-detain-and-beat-two-human-rights-activists-11092015165356.html>.

⁸ Vietnam Labor Plan, Section V.B.3.

settlement panel would make.⁹ As a result, if Vietnam fails to comply with its obligations, a U.S. administration will still need to decide to initiate a dispute settlement proceeding – a process which has taken too long under other agreements. And, even if a U.S. administration eventually decides to initiate a dispute, the resolution of that dispute could take several more years, with further delays possible before the United States could take action (“suspend concessions,” i.e., reimpose duties on imports from Vietnam) to induce Vietnam to comply.

The ability for the United States to withhold benefits of the agreement pursuant to a unilateral determination that Vietnam has not adequately implemented the commitment to allow for vertical and horizontal affiliation of enterprise level unions, five years after the agreement enters into force, could help maintain leverage and ensure continued implementation if used effectively from the beginning. But given substantial delays or inaction in the enforcement of labor obligations under existing trade agreements, legitimate concerns remain regarding whether any U.S. administration will be willing to take this action to delay TPP benefits or initiate any labor enforcement action under the TPP.

B. Malaysia

Labor standards in Malaysia are also severely lacking, with human trafficking being a particularly concerning problem. This remains true even and especially as the 2015 U.S. Trafficking in Persons (TIP) Report issued by the State Department at the end of July upgraded Malaysia from Tier 3, the ranking reserved for countries with the worst record on human trafficking, a decision that has been widely criticized and scrutinized in Congress and by outside experts.

Malaysia’s human trafficking problem – which is part of its forced labor problem – puts it in direct violation of the ILO’s basic standards and the TPP agreement. Forced labor is a problem in several trade-related sectors in Malaysia including plantation agriculture, fishing, electronics,¹⁰ and textiles and apparel.¹¹ According to the State Department’s annual Trafficking in Persons (TIP) Report published in July 2015, the majority of trafficking victims in Malaysia are among its approximately two million documented and more than two million undocumented foreign workers (primarily from Indonesia, Bangladesh, the Philippines, Nepal, Burma, Cambodia, Vietnam, India, Thailand, and Laos).¹² These workers are particularly susceptible to debt bondage and passport confiscation. In May 2015, authorities uncovered dozens of hidden human smuggling camps in Malaysia along the Thai border and multiple mass graves comprising

⁹ It is worth noting that the LEC can make “recommendations,” which may suggest some kind of review of Vietnam’s compliance record. But this is unclear, and even if it does suggest some kind of compliance review, any recommendation would have no legal consequence under the Agreement. For example, the United States does not have the right to suspend concessions to Vietnam under TPP if Vietnam fails to act on the recommendations.

¹⁰ See *Forced Labor in the Production of Electronic Goods in Malaysia: A Comprehensive Study of Scope and Characteristics* (Verité) (September 2014), available at: https://www.verite.org/sites/default/files/images/VeriteForcedLaborMalaysianElectronics2014_ExecutiveSummary.pdf

¹¹ See 2015 Trafficking in Persons Report (July 2015) (U.S. Department of State); 2014 Human Rights Country Reports (June 2015) (U.S. Department of State).

¹² See also 2014 Trafficking in Persons Report (June 2014) (U.S. Department of State).

nearly 140 different grave sites containing the remains of trafficking victims.¹³ The brutality and enormity of the trafficking problem in Malaysia, evidenced by these gruesome findings, have been attributed by observers to a pervasive corruption and complicity by the police and other state officials.¹⁴

Malaysia's laws provide for a considerable amount of governmental discretion in canceling unions and in placing restrictions on strikes. This means that, in addition to the problem of human trafficking and forced labor, freedom of association and the right to collective bargaining have yet to be fully established in Malaysia.

1. *The Malaysia – U.S. Labor Consistency Plan*

The United States and Malaysia have also developed a consistency plan for Malaysia's implementation of its TPP labor chapter obligations on a bilateral basis.¹⁵ The consistency plan is part of the TPP Agreement. This means that the specific reforms and undertakings that Malaysia has agreed to in its plan have the same status as the commitments Malaysia has made in the TPP labor chapter and in the other chapters of the TPP Agreement. They will be enforceable through the same dispute settlement mechanism that applies to the other obligations in the TPP Agreement.

The labor plan requires Malaysia to undertake several specific legal, institutional, and procedural reforms to ensure that Malaysia complies with basic ILO principles. These include changes required to address the forced labor/human trafficking problem in Malaysia (among other things, specific actions Malaysia must take to provide protections to foreign workers against the withholding of their passports; regulations governing recruitment practices, contracts, and fees for foreign workers; implementing the law passed earlier this year to protect and empower trafficking victims), deficiencies in freedom of association and the right to collective bargaining (e.g., curtailing the government's discretion to cancel union registrations), and child labor abuses.

Malaysia has also committed to making changes to bolster its enforcement of its labor laws and protections, including with respect to: allocating resources necessary for effective enforcement, including increasing the number of labor officers and inspectors; revising inspection and enforcement procedures for labor inspections to enforce new and existing provisions, including ones that address forced labor and trafficking abuses; developing, in coordination with the ILO, training programs for labor inspectors and increasing labor inspections, with explicit reference to inspections relating to forced labor practices; and requiring statistical reporting by Malaysia's anti-corruption commission on complaints received,

¹³ "Malaysia Migrant Mass Graves: Police Reveal 139 Sites, Some with Multiple Corpses," Beh Lih Yi, The Guardian (May 25, 2015) available at: <http://www.theguardian.com/world/2015/may/25/malaysia-migrant-mass-graves-police-reveal-139-sites-some-with-multiple-corpses>.

¹⁴ "Mass Graves of Suspected Trafficking Victims Found," Simon Lewis, The Guardian (May 24, 2015) available at: <http://www.theguardian.com/world/2015/may/24/mass-graves-trafficking-malaysia-perlis>.

¹⁵ Malaysia – United States Labor Consistency Plan (Malaysia labor plan) (<https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-MY-Labor-Consistency-Plan.pdf>).

investigations conducted, and dispositions of cases initiated with the commission. Malaysia is required to implement all of these commitments by entry into force of the TPP Agreement.¹⁶

2. *Issues Regarding the Worker Rights Provisions*

While substantive commitments in the Malaysia labor plan appear to address the particular challenges presented by Malaysia's labor conditions, including the specific commitments related to forced labor and human trafficking, real questions remain regarding Malaysia's ability and willingness to enforce its reformed laws, particularly given reports of corruption among Malaysian law enforcement.

The U.N. Special Rapporteur on trafficking in persons, especially women and children, issued a report after her visit to Malaysia in February 2015.¹⁷ In that report, she expressed concerns with Malaysia's "focus on trafficking for the purpose of sexual exploitation to the neglect of other forms of trafficking, particularly labor trafficking" and "the capacity gap of enforcement officials which is further exacerbated by reported prevalence of corruption of some officials." The report concludes with a substantial number of recommendations for Malaysia, including the strengthening of national legislation and policies to combat trafficking and increasing the capacity-building activities for government officials.

It remains unclear whether the enforcement obligations in the labor plan are sufficiently precise and meaningful to address concerns regarding enforcement of Malaysia's labor laws – particularly given concerns regarding the role that corrupt officials play in human trafficking in Malaysia. Thus, even if Malaysia fully implements all aspects of the labor plan, it remains unclear whether Malaysia will meet internationally recognized standards regarding forced labor and human trafficking.

Moreover, as with the Vietnam labor plan, the commitments in the Malaysia labor plan are not required until entry into force of the agreement. What this means is that, after Congress votes, the Administration determines on its own whether it believes Malaysia has implemented the commitments. If it determines that it has, the Administration has the authority to allow the agreement to become effective (i.e., enter into force). If Congress disagrees with the determination, it will already have passed the implementing bill giving the President the authority to make the determination on his or her own.

Also, as in the case of Vietnam, legitimate concerns remain regarding whether a future administration will actually take the step of initiating a labor enforcement action against Malaysia under the TPP. The Administration's actions in July 2015 to upgrade Malaysia in the State Department's annual Trafficking in Persons Report tier rankings, to avoid the withdrawal of TPA, fuel these misgivings with respect to Malaysia in particular.

¹⁶ Malaysia Labor Plan, Section VII, para. 1.

¹⁷ Report of the Special Rapporteur on trafficking in persons on her mission to Malaysia (A/HRC/29/38/Add.1) (June 1, 2015) (http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_38_Add.1_AUV.doc).

C. Brunei

Brunei is a small country with a population of approximately 400,000 and an economy based primarily on oil and gas production. Brunei's laws and practices relating to the core international labor standards and the state of Brunei's labor conditions are un-developed, uneven, and deficient.

Other than one union composed of petroleum workers, Brunei does not have any other active unions or worker organizations. On their face, Brunei's security laws provide the government with enormous latitude to impinge on the freedom of association and right to collective bargaining of workers. Brunei also has a relatively large number of foreign workers who are vulnerable to abuses and exploitation. Although Brunei's laws prohibit forced labor, foreign workers are often excluded from the few protections that are provided by the law.

1. *The Brunei – U.S. Labor Plan*

The United States and Brunei have developed a consistency plan for Brunei's implementation of its TPP labor chapter obligations on a bilateral basis.¹⁸ The implementation plan is a part of the TPP Agreement. This means that the specific reforms and undertakings that Brunei has agreed to in its plan have the same status as the commitments Brunei has made in the TPP labor chapter and in the other chapters of the TPP Agreement. They will be enforceable through the same dispute settlement mechanism that applies to the other obligations in the TPP Agreement.

The labor plan requires Brunei to undertake several specific legal, institutional, and procedural reforms to ensure that Brunei provides the basic ILO principles in a meaningful way. These include changes required to address deficiencies in freedom of association and the right to collective bargaining (such as ensuring that Brunei's security laws do not limit the rights of workers to organize); provide protections against forced labor among Brunei's foreign worker population (e.g., amending regulations governing the rights of foreign workers to retain and access their passports); and to adopt laws that formally prohibit discrimination in employment and occupation and establish a minimum wage for all private sector workers. Brunei is required to implement all of these commitments by entry into force of the TPP Agreement.¹⁹

2. *Issues Regarding the Worker Rights Provisions*

The substantive commitments in the Brunei labor plan appear to address the particular challenges presented by Brunei's labor conditions, including a lack of laws on the books addressing labor and employment rights.

As with Vietnam and Malaysia, commitments are not required until entry into force of the agreement. What this means is that, after Congress votes, the Administration determines on its own whether it believes Malaysia has implemented the commitments. If it determines that it

¹⁸ Brunei – United States Labor Consistency Plan (Brunei Labor Plan) (<https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-BN-Labor-Consistency-Plan.pdf>).

¹⁹ Brunei Labor Plan, Section VII, para. 1

has, the Administration has the authority to allow the agreement to become effective (i.e., enter into force). If Congress disagrees with the determination, it will already have passed the implementing bill giving the President the authority to make the determination on his or her own.

D. Mexico

Despite the fact that Mexico's poor labor standards were a defining point of contention in the debate over the North American Free Trade Agreement (NAFTA) in the early 1990s and the fact that NAFTA has been in effect for over twenty years now, labor standards in Mexico today continue to be poor and have not improved. The lack of any voice or real representation in the workplace means that Mexico's workers have been and remain vulnerable to exploitation in economic and personal terms. For example, wages for workers in Mexico's manufacturing sector declined significantly in the years after NAFTA's entry into force and wages for Mexico's auto workers are today depressed at a small fraction of comparable U.S. auto workers' wages.²⁰ In addition, despite the fact that sexual harassment in the workplace is prohibited under Mexican law, the State Department reports that it remains a "significant problem" with victims reluctant to report incidents of abuse or to enforce their rights.²¹ Even when harassment is so open and egregious that co-workers are willing to step forward to protest the abuse on behalf of the victim, the overall lack of rights and protections in the workplace has resulted in the co-workers being fired as a group.²²

1. Labor Standards in Mexico Today

Working conditions and worker rights in Mexico fall far short of internationally recognized labor standards, as reflected in the May 10th Agreement. Freedom of association and the right to collective bargaining are severely compromised in Mexico, as a result of a collusive and corrupt relationship between labor, management, and the government in Mexico that dates back as far as the founding of the modern Mexican state in 1917.

"Protection unions" (*sindicatos de protección*) – i.e., unions that are subordinated to (and "protect") employer and state interests – prevail in Mexico as do "protection contracts" (*contratos de protección*) which set out terms and conditions for work that workers are usually unaware of, did not have input in, and often do not provide benefits beyond the legal minimum.²³ In 2012, Mexico considered adopting legal provisions, as part of its labor reform effort, that would require workers to ratify collective bargaining agreements before those agreements could

²⁰ Harley Shaiken, "Annals of free trade: will TPP learn from our NAFTA past, or are we condemned to repeat it?" *The Conversation* (May 28, 2015) (<http://theconversation.com/annals-of-free-trade-will-tpp-learn-from-our-nafta-past-or-are-we-condemned-to-repeat-it-42005>).

²¹ 2014 Human Rights Country Reports (June 2015) (U.S. Department of State), Mexico, sec. 6.

²² See "Mexican Auto Workers Fired for Protesting Sexual Harassment," Wendy Thompson, Labor Notes (May 12, 2016) (<http://labornotes.org/2015/05/mexican-auto-workers-fired-protesting-sexual-harassment>).

²³ See U.S. National Administrative Office NAALC Public Report of Review of Submission No. 940003 (Sony); 9702 (Han Young); 9703 (Itapsa); Workers Rights Consortium, Violations of International Labor Standards at Arneses Y Accesorios de Mexico, S.A. de C.V. (PKC Group): Findings and Recommendations and Status (June 18, 2013); and ILO, CFA, Report in which the committee requests to be kept informed of development - Report No 370, October 2013, Case No. 2973 (Mexico), para. 567.

take effect.²⁴ This would have in part addressed the protection contracts problem by making workers aware of the existence and terms of agreements being negotiated on their behalf and giving them the opportunity to endorse or reject those agreements. However, the provisions in question were ultimately not included in Mexico's labor law revisions.

The Conciliation and Arbitration Boards (CABs) (*Juntas de Conciliación y Arbitraje*) that hear and address complaints and violations comprise representatives of the employer, government, and protection union who work in collusion as part of a corrupt system.²⁵ This entrenched system ensures that Mexico falls far short of meeting basic ILO standards. The CABs play a critical role as arbiter in labor disputes, gatekeeper to official recognition for the representation of workers, and have the authority to intervene in negotiations and strikes in the workplace. The control of the CABs by the government and employers' interests is therefore particularly pernicious to the establishment of workers' access to justice, their freedom to associate and bargain collectively on their own behalf, and the terms of their right to strike. Furthermore, given the role that CABs would play in enforcing any new rules policing against protection contracts, reform of the CABs is also an indispensable part of addressing the protection contract problem.

As a remedy to the structural bias of Mexico's CABs, experts have proposed reforms that include removing the CABs from the executive branch of government and incorporating them instead in the judiciary; replacing the existing CAB structure with an impartial body housed in an independent executive agency with both administrative and judicial functions; or transferring some of the functions of the CABs functions to a new, independent government agency while transferring other functions to the judiciary.²⁶ Most, if not all, of these proposals would likely require a constitutional amendment. (Mexico's constitution has been amended approximately 500 times since its adoption in 1917.)

The process for union elections (*recuento*) has also been widely criticized for being subject to long delays – of months or even years – and very short notices once an election date is finally decided. Recent reports have also documented the persistence of forced and child labor in Mexico, especially in the agricultural, industrial, and informal sectors.²⁷

²⁴ See <http://www.aflcio.org/Issues/Trade/Trans-Pacific-Partnership-Free-Trade-Agreement-TPP/Labor-Rights/Mexico-Labor-Rights-Concerns>; and <http://lapress.org/articles.asp?art=6740>.

²⁵ According to the U.S. Department of Labor, "[t]he labor representative on the CAB generally represents the incumbent or majority union, usually a CTM affiliate. Therefore, at least one member of the CAB has a competing interest with any independent union seeking registration." See, U.S. National Administrative Office (NAO), Bureau of International Labor Affairs, U.S. Department of Labor, NAALC Public Report of Review of NAO Submission No. 9702 (Han Young) at 19, citing findings from U.S. Department of Labor, Bureau of International Labor Affairs, U.S. NAO, Report on Ministerial Consultations on NAO Submission No. 940003 (1996).

²⁶ See <http://www.aflcio.org/Issues/Trade/Trans-Pacific-Partnership-Free-Trade-Agreement-TPP/Labor-Rights/Mexico-Labor-Rights-Concerns>; and Informe de Resultados de los Foros de Justicia Cotidiana, Centro de Investigación y Docencia Económicas, CIDE, April 2015 at 150-151 (https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi245rc9YvKAhVMWh4KHWCVCuYQFggdMAA&url=http%3A%2F%2Fjusticiacotidiana.mx%2Fwork%2Fmodels%2FJusticiaCotidiana%2FResource%2F101%2F1%2Fimages%2FDocumento_JusticiaCotidiana_VoBo_270415.pdf&u sg=AFQjCNHhyx6saliZlXGgn5sKNRdDxFwgPg&sig2=QGUbfGGBwtvywqpeZvSV3w).

²⁷ http://www.dol.gov/ilab/reports/pdf/TVPRA_Report2014.pdf

The combination of protection unions that are often formed before a company has hired a single employee; protection contracts that workers often do not even know exist; structurally biased CABs that are responsible for registering unions, deciding labor disputes, and overseeing union elections; and a *recuento* election process that is easily manipulated to serve management's interests – together create a pervasive environment for the suppression of worker rights in Mexico. Resulting situations like the one reported by the State Department in its 2014 Human Rights Report for Mexico are common: workers at several plants in the state of Coahuila reached out to the National Union of Mine, Metal, Steel and Allied Workers of the Mexican Republic (a.k.a. *Los Mineros* – one of the few independent unions in Mexico) and declared their desire to become members. However, all of the companies employing those workers already had in place collective agreements with the Confederacion de Trabajadores de Mexico (CTM) – the largest confederation of labor unions in Mexico, which is also closely aligned with the dominant political party, the PRI. Those agreements had been negotiated without the workers' knowledge or consent. And although a majority of workers in each plant signed affiliation cards with *Los Mineros*, the Coahuila CAB refused to set a date for a bargaining rights election or provide copies of the existing collective bargaining agreements between the companies and the CTM.²⁸

2. *The Impact of Mexico's Poor Labor Standards on U.S. Workers*

Deficiencies in labor conditions in Mexico, which shares a border of 2,000 miles with the United States, have a particularly profound effect on U.S. jobs and workers. Low labor standards and lack of worker protections exert a downward pressure on wages in the United States. The lower costs resulting from the lack of worker rights and protections create a powerful incentive for corporate decision-makers to relocate manufacturing plants and factories across that border.

Production has increased in the manufacturing sector in Mexico over the past 20 years. Mexico is today the seventh largest producer of automotive vehicles in the world²⁹ and poised to overtake both Japan and Canada as the leading automotive exporter to the United States.³⁰ Productivity has also increased in Mexico in the past two decades. Nevertheless, real wages in Mexico's manufacturing sector have decreased despite this increase in productivity.³¹ Today, wages for manufacturing workers in Mexico average around 20 percent of wages for similar workers in the United States.³²

3. *No TPP Implementation Plan*

TPP provides an important opportunity to, in essence, renegotiate NAFTA – which did not include any meaningful labor obligations – and ensure that Mexico fully implements its TPP labor commitments by making the necessary changes to its law and practices.

²⁸ 2014 Human Rights Country Reports (June 2015) (U.S. Department of State), Mexico, sec. 7.a.

²⁹ See <http://www.oica.net/category/production-statistics/>.

³⁰ U.S. International Trade Commission data (see: https://dataweb.usitc.gov/scripts/user_set.asp).

³¹ Harley Shaiken, "Annals of free trade: will TPP learn from our NAFTA past, or are we condemned to repeat it?" *The Conversation* (May 28, 2015) (<http://theconversation.com/annals-of-free-trade-will-tpp-learn-from-our-nafta-past-or-are-we-condemned-to-repeat-it-42005>).

³² *Id.*

However, there is no labor consistency plan to ensure that Mexico implement its obligations.

Instead, there has been reliance on efforts that Mexico is taking outside of the TPP to address these problems. These include regulatory reforms aimed at preventing the formation of new protection contracts as well as vetting existing contracts to distinguish legitimate contracts from protection contracts. On November 23, Mexico's Labor Minister Alfonso Navarrete Prida announced a new labor inspection protocol to verify that workers understand their collective bargaining agreements and the negotiations that have taken place on their behalf, and are given the opportunity to report any violations. Mexico's President Enrique Peña Nieto also requested on November 30 that Mexico's Senate ratify ILO Convention 98 on the right to organize and collective bargaining, which prohibits the use of protection contracts

Reforms aimed at preventing the formation of new protection contracts as well as vetting existing contracts to distinguish legitimate contracts from protection contracts would be a positive first step. As would the ratification by Mexico of ILO Convention 98. However, some have estimated that up to 90 percent of collective bargaining agreements in Mexico are in actuality sham protection contracts.³³ In order to effectuate a meaningful re-hauling of this problem in Mexico, reforms will need to address not only ways to distinguish between legitimate and protection contracts among existing contracts, but will need to invalidate the protection contracts and replace them with legitimate ones.

The Administration has also pointed to the fact that President Peña Nieto recently commissioned a report proposing changes, including legal and constitutional changes, to reform the accessibility of Mexico's civil justice system, including the CABs.³⁴ In early September, President Peña Nieto identified as one of the 10 priorities for the second half of his term in office, achieving a "National Accord for Everyday Justice" that reforms Mexico's civil, labor, commercial, and administrative justice system³⁵ and on December 5, President Peña Nieto explicitly announced that his Everyday Justice reform initiative will include a revision of the system of labor justice, including the transformation and modernization of the CABs.

However, as Napoleon Gomez Urrutia, the leader of Mexico's *Los Mineros*, has pointed out, even as Mexico takes steps forward on meaningful labor reforms, it also appears to be taking steps backward. Gomez Urrutia, who lives in exile in Canada because Mexico's government has told him that his personal safety cannot be guaranteed in Mexico, has noted that the roundtables created to review the labor justice system and solicit comments from the public do not include representatives of the workers – ensuring that any reforms from this process will reflect this fatal deficiency.³⁶ In the meantime, while Mexico's government makes announcements about eventual

³³ "Justice for All: The Struggle for Worker Rights in Mexico," Solidarity Center (2003), at 14 (<http://www.solidaritycenter.org/publication/the-struggle-for-worker-rights-in-mexico-2003/>).

³⁴ Informe de Resultados de los Foros de Justicia Cotidiana, Centro de Investigación y Docencia Económicas, CIDE, April 2015.

³⁵ <http://eleconomista.com.mx/sociedad/2015/09/03/anuncia-decalogo-acciones-ultimos-tres-anos>

³⁶ "Justicia Cotidiana," Napoleón Gómez Urrutia, *La Jornada* (January 14, 2016), available at <http://www.jornada.unam.mx/2016/01/14/opinion/016a1pol>.

CAB reforms, the existing CABs continue to exercise their biased influence, delaying votes demanded by workers for years, and allowing protection unions to intimidate, threaten, and terminate workers seeking to organize independent rights.³⁷

Furthermore, the first real step in the process of CAB reform – the President’s submission of proposals to the Mexican Congress – has yet to even take place. Many steps remain to be taken before constitutional reform is enacted and it remains unclear when, if ever, the CABs will be reformed to meet international labor standards.

In the case of Mexico, the worker rights provisions of TPP – and the lack of a specific plan that spells out much-needed labor reforms and their effectuation – present a clear case of a profoundly important opportunity missed to date.

E. Peru

There are also continuing concerns regarding **Peru’s** performance of the labor obligations in the U.S.-Peru trade agreement, which are essentially the same May 10 standard obligations included in the TPP Agreement. In September, the U.S. Department of Labor accepted a submission from labor rights groups alleging that, by permitting the unlimited consecutive renewal of short-term contracts (which can prevent workers from receiving the benefits due to full-time employees and can make it difficult for workers to become union members and organize), Peru has failed to meet its U.S.-Peru trade agreement commitment to adopt and maintain in its statutes and regulations, and practices thereunder, the right of freedom of association and the effective recognition of the right to collective bargaining.³⁸

There is no consistency plan for Peru’s implementation of its labor obligations in the TPP Agreement.

³⁷ Id.

³⁸ http://www.dol.gov/ilab/media/pdf/PTPA%20submission_July%2023%202015_English%20translation.pdf