

A GOLD STANDARD FOR WORKERS?

The State of Labor Rights in Trans-Pacific Partnership Countries



AFL-CIO

Commonly Used Abbreviations:

Collective Bargaining Agreement (CBA)

Department of Labor (DOL)

Department of State (DOS)

Free Trade Agreement (FTA)

International Labor Organization (ILO)

Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC)

North American Agreement on Labor Cooperation (NAALC)

North American Free Trade Agreement (NAFTA)

Office of Trade and Labor Affairs (OTLA)

Organization for Economic Co-operation and Development (OECD)

Trans-Pacific Partnership (TPP)

United Nations (UN)

United States Trade Representative (USTR)

INTRODUCTION

This report seeks to shed light on the state of labor rights and commitments among the Trans-Pacific Partnership (TPP) partner countries. Respect for labor rights is at the core of increasing jobs, raising wages and creating broadly shared prosperity. The Obama administration had promised that the TPP would be a 21st century agreement, a “gold standard,” that would promote and respect labor rights, and raise wages for U.S. workers and workers across the Pacific Rim. Unfortunately, the grim conditions facing workers in TPP partner countries were not effectively addressed in the TPP text or consistency plans. Many commitments to improve labor rights remain vague, and the proposed enforcement scheme relies on the discretion of the next administration. The failure of the TPP to incorporate needed improvements to labor commitments that already have proved themselves inadequate in previous agreements belies the agreement’s stated commitment to workers. It is clear that, as currently drafted, the TPP would increase corporate profits and skew benefits to economic elites, while leaving workers to bear the brunt of the TPP’s shortcomings, including lost jobs, lower wages and continued repression of worker rights.

The majority of this analysis is based on the submission of the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC), a body consisting of U.S. trade union leaders with a statutory responsibility to provide advice to U.S. trade negotiators. The LAC had the statutory duty to respond to three questions concerning the TPP:

1. Is the Trans-Pacific Partnership in the economic interests of the United States?
2. Does the TPP achieve the applicable overall and principal negotiating objectives?
3. Does the TPP provide equity and reciprocity for labor interests?

On all three of these crucial questions, the LAC concluded that the TPP fell short. Overall, the LAC found the TPP is likely to harm U.S. manufacturing interests, cost good jobs, suppress wages, and threaten our democracy and economic security interests, while doing little to improve conditions for workers in the United States and overseas.

Before dealing with the question of labor conditions in the TPP countries, it is important to dispel some of the arguments that the supporters of the Trans-Pacific Partnership advance regarding the labor rights provisions in the text of the TPP.

“Enforceable” Labor Rights Provisions

The TPP’s supporters note that the TPP’s labor provisions are “enforceable.”

This is the wrong measuring stick. The correct measurement is whether there are sufficient provisions to provide confidence that they will be enforced. The United States has never imposed trade sanctions or even a fine as a response to labor violations by FTA partner countries. It has only attempted dispute settlement once, against Guatemala. The Guatemala case has been ongoing since 2008 and workers have yet to experience any measurable improvements as a result.¹ Despite receiving numerous specific recommendations, informed by experience, on how to turn theoretical enforceability into actual enforcement, the United States Trade Representative (USTR) failed to incorporate these recommendations. For example:

- The TPP fails to require parties to advance to the next stage in the dispute settlement process when an earlier stage proves ineffective (Article 19.15). This failure means that future labor submissions are likely to languish as the Guatemala case has.

- The TPP fails to include deadlines for its public submission process that would require parties to advance TPP submissions they receive in a timely manner (Article 19.9). This failure means that parties will be able to use “administrative delays” to indefinitely defer acting on such submissions, as happened with the Honduras case, in which the petitioners waited for an initial report for two and half years, and formal consultations have still not commenced.
- The TPP fails to clarify the obligations of the parties with respect to International Labor Organization (ILO) standards (Article 19.3). This vagueness as to what the obligation regarding freedom of association and other fundamental labor rights mean makes it less likely the labor obligations will be enforced effectively.
- The TPP fails to include measureable benchmarks or an independent evaluation to determine whether the consistency plans for Vietnam, Brunei and Malaysia are met. This failure means the determination that a consistency plan has been fulfilled and the TPP is ready for entry into force is wholly discretionary. The decision will be subject to immense commercial pressures to prematurely declare fulfillment. Such pressure was brought to bear regarding the Colombia Labor Action Plan (LAP), which also contained positive objectives, but lacked benchmarking criteria or an independent evaluation mechanism. As a result, success was declared prematurely, and Colombia has been out of compliance with its labor

obligations since Day One of the agreement. This premature certification of compliance with the LAP apparently has deterred the U.S. government from self-initiating labor consultations with Colombia even though workers continue to be subjected to threats and violence, up to and including murder, in order to discourage them from the free exercise of their fundamental labor rights. There is no reason to expect a different outcome from the TPP plans.

- The TPP contains different dispute settlement mechanisms for foreign investors and working people (Chapters 9 and 19). Foreign investors can bring cases against TPP parties on their own, without having to petition their own government to do so. Working people must petition their governments, and then engage in years-long campaigns to attempt to move the cases through the arduous process. The negotiators demonstrated they know how to create effective dispute settlement mechanisms when they want to (Article 9). Thus, we conclude the failure to equalize the dispute settlement procedures available to workers was purposeful.

The TPP’s supporters say the labor chapter responded to all of labor’s concerns.

This is a spurious claim—one that easily can be disproved.² As detailed in the section above, a number of important labor recommendations were wholly ignored. Those proposals that were not wholly ignored were included in a weakened form that would undermine their effectiveness.



After providing high levels of engagement at the initial stages of the TPP negotiations, USTR moved in the opposite direction. Between Feb. 21, 2012, and July 2015, the USTR and the Department of Labor (DOL) provided no updated texts of the labor chapter (and the same was true for many chapters of interest to working people). Furthermore, the LAC was never allowed to review the text or substance of the draft labor consistency plans for Vietnam, Malaysia and Brunei, despite numerous requests. Given that these arrangements are focused on these countries' labor and employment laws, the unwillingness of U.S. negotiators to share draft text of these arrangements with its labor advisers (who have security clearances) is indicative of the indifference USTR generally displayed toward its consultation process with the LAC throughout TPP negotiations. The gaps in labor rights coverage and lack of accountability mechanisms in the TPP exemplify the outcome of such an approach. The LAC could have offered advice that would have plugged holes and strengthened weak spots, but we were not provided an opportunity to do so, despite our role pursuant to the Trade Act of 1974.

The TPP's supporters say it is much stronger than the May 10th labor chapter.

USTR argues the TPP labor chapter greatly improves on language developed in 2007 known as the "May 10th" agreement on labor, which included "enforceable" language requiring countries to adopt and maintain in their laws, and to practice five basic internationally recognized labor principles as stated in the ILO Declaration on Fundamental Principles and Rights at Work. Yet the changes are minor and provide little value to workers (for example, TPP parties must set a minimum wage, but there is no level below which that wage cannot go). As the AFL-CIO noted at the time, the May 10th agreement, though an important step forward from previous FTAs, was "by no means a complete fix appropriate for any country or any situation."³

Because both the May 10th agreement and earlier labor provisions have been weakly enforced,⁴ the labor movement worked hard to develop proposals, provide recommendations and engage positively with USTR to reform labor texts that had proved ineffective, even when dealing with countries with less severe labor

and human rights issues than Vietnam and Malaysia. Rather than trying a new model, the TPP incorporates without improvement numerous provisions, including the discretion to indefinitely delay acting on labor rights violations, already known to be ineffective. Because employers in our trading partner countries will continue to abuse workplace rights, workers throughout the TPP region will continue to make lower wages and will have fewer benefits and more dangerous workplaces than they otherwise might. An injury to a worker in Vietnam will indeed affect his or her American counterpart by driving down wages and working conditions.

TPP supporters say the TPP would, for the first time, require parties to have laws concerning "acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health."

Unfortunately, because the TPP sets no minimum standards for these laws, this provision is not as valuable as it might first appear. The TPP explicitly provides that these obligations will be satisfied "as determined by" each country (Article 19.3.2). As a result, a TPP country can set a minimum wage of a penny an hour, or allow shifts of 20 hours per day with no overtime pay, or require workers to provide their own safety gear—and yet be fully compliant with the TPP. Thus, this provision adds little in terms of meaningful new protections for workers in TPP countries.

TPP supporters say it requires TPP countries to combat trade in goods made with forced labor.

Rather than requiring countries to prohibit or even combat trade in goods made with forced labor, the TPP requires parties only to "discourage" trade in such goods "through initiatives it considers appropriate" (Article 19.6). This language ensures a TPP party can judge for itself whether it is "discouraging" such trade. A TPP country not inclined to do much might, for example, put up a poster alerting customs employees that trade in goods made with forced labor should be discouraged. The provision allows parties to judge for themselves whether their initiatives are adequate, and even contains a footnote noting the provision provides no authorization to discourage trade in goods made with forced labor if such activities would violate obligations made in other trade deals. Thus, this provision provides no assurances that workers

would be protected from forced or compulsory labor, including forced or compulsory child labor—and explicitly prioritizes trade obligations over obligations to protect human rights.

TPP supporters say the TPP obligates parties not to waive or derogate from statutes or regulations implementing minimum wages, hours of work, and occupational safety and health in a special trade zone or customs area.

This is yet another provision that adds little for workers. As explained above, a TPP party's laws need not set meaningful standards regarding minimum wages, hours of work, and occupational safety and health. While preventing TPP parties from reducing these standards through waiver or derogation is a laudable goal, this particular obligation only applies "in a special trade or customs area, such as an export processing zone or foreign trade zone, in the Party's territory." Thus, it leaves the vast majority of TPP workers without this protection. The AFL-CIO had requested that parties not be allowed to waive or derogate from laws regarding acceptable conditions of work *for any worker*—as such a commitment would have been useful. Limiting the reach of this provision to special zones only limits its usefulness.

The TPP's supporters say it requires countries to eliminate discrimination in employment.

Unfortunately, the text of the TPP itself is vague regarding what types of discrimination are prohibited, even though a number of TPP countries have entrenched in practice (and in some cases in law) discrimination against disfavored groups. For example, Vietnam's consistency plan only requires Vietnam to prohibit discrimination on the basis of color, race and national extraction. It fails to mention religion, political opinion, LGBT status or immigration status.⁵ These glaring omissions leave open the strong possibility that these other bases of discrimination will be used as a pretext to discourage unions and deter workers from exercising their rights. Similarly, the Malaysia consistency plan fails to address discrimination on the basis of LGBT or immigration status, even though discrimination on these grounds is pervasive throughout Malaysia. Likewise, the Brunei consistency plan fails to address LGBT or immigration status even though it enacted a Sharia legal code during the TPP

negotiations that includes the death penalty for illicit sexual relations.⁶ Moreover, neither the TPP text nor the consistency plans address basic human rights, including freedom of expression. Without even basic protections for such freedoms, it seems insincere to argue that governments that have engaged in years of repression against free and independent labor unions will not resort to other legal means at their disposal to continue to undermine workplace rights. These glaring omissions mean that workers who should be protected likely will continue to face major threats and discrimination that the TPP, on its face, will be unable to address.

TPP supporters argue that the TPP is "one of the best tools we have to fight forced labor and human trafficking" in Malaysia.⁷

Similar promises were made about the Colombia trade deal. The "strong labor provisions" of that trade deal were supposed to provide leverage to raise standards for a country with notoriously abusive labor practices, which had reduced labor density to 1% through a campaign of terror against labor leaders and activists. Unfortunately, because the Colombia trade deal went into effect before it had complied in both law and practice with its labor obligations, the promised leverage was lost. Now, even though threats and violence against trade unionists have increased since the deal's entry into force, the United States has failed to respond. The commercial pressure to keep trade flowing freely has superseded efforts to protect workers so they can act collectively to raise their wages and conditions of work. Likewise, the TPP includes Malaysia, a country with a notoriously bad record on human trafficking and forced labor. To deal with this, labor unions suggested new protections for migrant workers that would have obligated all TPP countries to prohibit certain practices by employers and labor recruiters that are linked to forced labor and human trafficking. We also recommended a clause making clear that migrant workers are entitled to the same rights and remedies as all other workers. Both of these recommendations were soundly rejected. Since the trafficking provisions in the Malaysia consistency plan apply only to Malaysia and have no independent evaluation mechanism, it is unlikely the TPP will prove effective at addressing trafficking and forced labor.

ANALYSIS OF LABOR CONDITIONS IN TPP PARTNER COUNTRIES

The TPP includes countries with entrenched labor and human rights abuses that are unlikely to be solved during a short implementation period.⁸

The following summary of the labor and human rights practices of other TPP countries is broken down into three categories: countries with critical labor rights violations, countries with serious concerns and selected labor rights violations in partner countries. Holistically, each partner country is assessed on the basis of its adherence to the ILO's five fundamental labor rights: the right to freedom of association, the right to collectively bargain, the abolition of forced or compulsory labor, the abolition of child labor and nondiscrimination. This report also will consider how the TPP and, in some cases, U.S.-negotiated labor consistency plans (side agreements for Vietnam, Malaysia and Brunei) would impact the situation for workers in the future. It will conclude with recommendations for a worker-centered trade policy.



I. Countries with Critical Labor Rights Violations (Out of Compliance)

Mexico

The human and labor rights situation in Mexico is rapidly deteriorating. Mexico currently fails to adopt and implement laws that protect the ILO's core labor standards. Indeed, the Department of State (DOS) Mexico 2014 Human Rights Report concludes that:

The government did not consistently protect worker rights in practice. Its general failure to enforce labor and other laws left workers without much recourse with regard to violations of freedom of association, working conditions, or other problems.⁹

The use of “protection contracts” (agreements masquerading as collective bargaining agreements (CBAs) signed between an employer and an employer-dominated union, often without the knowledge of the workers) is the most serious threat to freedom of association and collective bargaining in Mexico. Today, there are estimated to be tens of thousands of protection contracts and tens of thousands of workplaces in Mexico covering millions of workers. In thousands of workplaces, workers are governed by contracts they have never ratified, were never consulted on, and in many cases have never seen.

When workers attempt to bring complaints about protection contracts, these complaints are heard by Mexico's Conciliation and Arbitration Boards (CABs), which are politically biased and corrupt.¹⁰ Instead of ensuring workers can exercise their rights under Mexican and international law, the CABs, the

labor authorities and sometimes privately hired or public police forces have interfered with workers' freedom of association. This situation presents itself at the worksites of many multinational companies, including Atento, Excellon, Honda, PKC and Teksid.¹¹ In the agricultural sector, child labor, forced labor and inhumane working conditions exist on farms that export fresh produce into the United States, which then is sold at major retailers, including Walmart and Safeway.¹² The recent mobilizations in Baja California for better wages in the agricultural sector and the right to form independent unions were met with police repression.¹³

The union certification process is designed to limit worker representation. For example, a requirement known as *toma de nota* has been used by the labor authorities as a tool to deny union office to leaders who are politically disfavored under the guise of an elections certification process. Labor authorities also have denied legal registration to independent unions on seemingly arbitrary or technical grounds. They continue to assert that unions may represent only workers in specific industries, and that the state may restrict a union to a specific "radius of action" (*radio de acción*).¹⁴

The magnitude of these problems has been well documented in public reports, submissions under the North American Agreement on Labor Cooperation (NAALC),¹⁵ reports of the ILO Committee on Freedom of Association,¹⁶ academic investigations¹⁷ and recent case studies.¹⁸ Although Mexico and the United States have had more than 20 years to work on bringing Mexican labor law and practice up to minimum international standards through the NAALC process, labor abuses in many cases are worse now than before the North American Free Trade Agreement (NAFTA), and these abuses appear to be concentrated in supply chains that feed U.S. markets.

In short, NAFTA has contributed to labor abuses, not improvements. NAFTA also contributed to massive displacement of Mexican *campesinos*.¹⁹ Some of these workers searched for promised new jobs in the *maquiladoras*. Many others migrated north to the United States, either through irregular channels or by utilizing often-exploitative labor recruitment firms and guestworker visa programs. As documented in

a 2011 NAALC petition, migrant workers in the United States are subject to a range of labor rights violations.²⁰ Meanwhile, companies have shifted manufacturing work to Mexico for decades to take advantage of displaced *campesinos* and other impoverished workers who lack the most basic workplace protections.

There is currently a crisis of violence and impunity taking place in Mexico that raises doubts about whether the Mexican government can and will fulfill its obligations under the TPP. The disappearance last year of 43 students, now declared dead, from the teachers' college in Ayotzinapa, Guerrero, by local police and criminal gangs widely believed to be responsible, is a horrific example of violence, corruption and dissolution of the rule of law. More than 22,000 persons have been disappeared since 2007, including more than 5,000 in 2014 alone.²¹ These crimes rarely are investigated and almost never prosecuted, allowing public security forces—the same that have sporadically engaged in violent worker repression over the years—to operate with impunity.

There is nothing in the TPP's labor chapter that would ensure Mexico's history of worker abuse and exploitation will be remedied. No provisions were added to the enforcement section to ensure monitoring and enforcement of the labor obligations will be deliberate, consistent, timely, vigilant, effective or automatic. There is not even a "consistency plan" for Mexico despite the U.S. government's extensive knowledge of the problems—problems that not only impoverish Mexico's workers, but also act as an inducement to transfer production out of the United States. The TPP fails to even include any specific protections for equal rights and remedies for migrant workers, or specific prohibitions against exploitive or fraudulent international labor recruitment, which labor union presidents had recommended strongly.

In December 2015 in Cancun, Mexico, President Peña Nieto announced he would send new labor law reform proposals to Congress early this year, but to date there is no clear process to include independent unions and civil society in developing these proposals.

The president of Mexico also sent ILO Convention 98 on the right to organize and collective bargaining to

the Senate for ratification, and the labor secretary has announced a new inspection protocol that supposedly would verify whether workers understand their contracts, but workers still would lack the right to get a copy of their contract, which reinforces the current protection contract model.

On Jan. 20, 2016, the Mexican Supreme Court ruled the government can cap back pay at one year in lawsuits over unjust firings, although on average these cases take more than three years to resolve. This ruling creates a perverse incentive to fire workers who attempt to organize democratic unions.

Despite public statements promising to address worker rights issues, the Mexican government has failed to address systemic worker rights violations. The government continues to fail to eliminate the CABs and replace them with independent labor judges, create transparency in the union contracts and certification, or ensure that union democracy is protected through improved election and certification processes. Labor rights must be enforced, not be just potentially enforceable, to have an impact on the ground. As currently written, the TPP fails to meet this benchmark, and would reward Mexico with more trade benefits before the government makes fundamental and structural changes to its labor system to bring it into compliance with international labor law.

Vietnam

Vietnam has an authoritarian government that limits political rights, civil liberties and freedom of association. The government maintains a prohibition on independent human rights organizations and other civil society groups. Without the freedom to exercise fundamental labor rights, labor abuses in Vietnam are pervasive, artificially suppressing wages, stifling the ability of Vietnamese workers to escape poverty, and putting U.S. and other workers at a disadvantage in the global market. Labor provisions in the TPP and the labor consistency plan do not appear to be carefully crafted to effectively mitigate this urgent problem or empower workers to improve conditions.

The Vietnamese government currently restricts union activity outside the official unions affiliated with the Communist Party's Vietnam General Confederation of Labor (VGCL), which actually controls the union registration process.²² Workplace-level VGCL unions generally have management serving in leadership positions, and when that is not the case, workers cannot meet as the union without management present.²³ This effectively bars the possibility of establishing independent trade unions in Vietnam. Further, there is no right to strike in Vietnam. Wildcat strikes and industrial actions outside VGCL unions have led to government retaliation, including prosecution and imprisonment.



Government repression of civil liberties further undermines industrial relations in Vietnam. Corruption in the judicial system and widespread law enforcement abuse, including arbitrary killings, stifles whistleblowers and labor activists, as well as human rights defenders.²⁴ The government blocks access to politically sensitive websites and monitors the Internet for the organization of unauthorized demonstrations.²⁵

Vietnam has significant problems with forced labor and child labor. The U.S. DOL finds that child labor is prevalent in the production of bricks and garments. Forced labor and human trafficking also is prevalent in the garment sector and in the informal economy.²⁶ Vietnam is the second-largest source of apparel and textile imports to the United States, totaling just under \$10 billion in value²⁷ and employing more than 2 million workers.²⁸ Many of the clothes contain textiles produced in small workshops subcontracted to larger factories. These workshops frequently use child labor, including forced labor involving the trafficking of children from rural areas into cities.²⁹

The government of Vietnam also actively imposes compulsory labor on drug offenders. In these work centers styled as drug treatment centers, detainees are harassed and physically abused when they do not meet their daily factory quotas in so-called “labor therapy.” An estimated 309,000 people were detained in Vietnam’s drug detention centers from 2000 to 2010. The detainees receive little or no pay for their work.³⁰

The labor consistency plan with Vietnam offers many improvements on paper, but few of them are likely to be actualized given that full TPP membership and market access will be granted after ratification and before changes are made. The plan contains a number of other shortcomings. It allows Vietnam to give “independent” unions “mandatory political obligations and responsibilities” so long as they are not “inconsistent with labor rights as stated in the ILO Declaration.” It is inconsistent with the concept of free and independent unions to allow the government to saddle them with “political obligations” of any kind. The plan calls for a prohibition on discrimination, but does not include religion, political opinion, immigration status and sexual orientation/gender expression as protected categories. Despite important language clarifying the

right to strike, the right of unions to independently manage their own affairs and elect their own leadership, and to create independent federations, it is not clear that penalties for employer violation of these rights will be established.

Further, the plan provides a free pass to Vietnam to deny the right to freedom of association above the enterprise level for *at least the first five years* after the TPP’s entry into force. The potential penalty is only a delay of future tariff reductions. However, by Year Six of the agreement, Vietnam already will enjoy the bulk of the tariff reductions required by the TPP, including significant market access in the all-important garment sector. By providing a grace period, the agreement gives away important leverage that could improve the situation *now*.

The market opening benefits of the TPP should not apply to Vietnam unless and until Vietnam comes into full compliance with fundamental labor rights. Anything less essentially will create a permanent ceiling on labor and human rights in Vietnam, stunting Vietnamese wage growth, suppressing Vietnamese demand and continuing to allow social dumping on world markets.

Malaysia

Malaysia has grave problems with every one of the five fundamental labor rights. Particularly troubling is its profound failures to protect workers from forced labor and human trafficking. The DOL reports that forced labor is prominent in the electronics and garment industries, and the palm oil sector, which also uses child labor.³¹ The majority of the victims of forced labor in Malaysia are among the country’s 4 million migrant workers—40% of the overall workforce.³² The government of Malaysia’s failure to uphold labor rights, or even basic human dignity, puts the products of forced labor into the hands of U.S. consumers, and forces U.S. workers to compete with a workforce with few rights and protections.³³ Under current conditions, it is difficult, if not impossible, to imagine these workers moving into the middle class and becoming a significant market for U.S. exports.

Freedom of association is strictly limited, as there are many legal restrictions on industrial action and police permission is required for public gatherings

of more than five people.³⁴ Collective bargaining also is restricted, especially for migrants and public-sector workers. Employers use provisions that allow for multiple unions at the enterprise level to set up company-dominated unions and erode the bargaining power of representative unions. Trade union leaders and workers report that employers regularly terminate or penalize workers for expressing their political opinions or highlighting alleged wrongdoings by employers. These practices contribute to the overall level of exploitation, suppressing wages and driving demand down.

Migrants to Malaysia face a range of abuses related to their recruitment and placement, and often are threatened with deportation for speaking out. Migrant workers in agriculture, construction, textiles and electronics, and domestic workers throughout Malaysia, are subjected to restrictions on movement, deceit and fraud in wages, document confiscation, and debts by recruitment agents or employers. Migrants also are limited in their ability to improve these conditions. While the Malaysian Employment Act of 1955 guarantees all workers, including migrant workers, the right to join a trade union, employers and government authorities discourage union activity among migrants, and work contracts and subcontracting procedures often undermine worker agency.³⁵

Some of the most recognizable electronics brands operate or source components from Malaysia,



including Intel, Advanced Micro Devices, Dell and Flextronics.³⁶ Verité interviewed more than 500 workers and found that approximately 28% of electronics workers toiled in conditions of forced labor. Additionally, 73% of workers reported violations that put them at risk for forced labor, such as outsourcing, debt from recruitment fees, constrained movement, isolation and document retention.³⁷

In May 2015, Malaysian police uncovered 139 makeshift graves in the jungle alongside abandoned cages used to detain migrant workers—an operation so massive many believe local officials were complicit.³⁸ Not long after, the U.S. State Department made the disastrous and apparently political decision to upgrade Malaysia in its annual Trafficking in Persons Report from Tier 3 to the Tier 2 watch list—removing the country from the threat of trade restrictions under the TPP or other sanctions tied to Tier 3 status.³⁹ The situation in Malaysia has not improved: forced labor, human trafficking and exploitation remain pervasive.

Fundamental reforms must be taken in terms of Malaysia's labor, immigration and industrial policies before workers will be able to escape the cycle of exploitation and vulnerability that often leads to labor abuses and trafficking. Despite Malaysia's notorious failure to combat human trafficking and protect the rights of migrant workers, the TPP fails to even include any specific protections for equal treatment for migrant workers or against exploitive or fraudulent international labor recruitment.

The TPP labor provisions and the Malaysia consistency plan have some helpful provisions. For example, the consistency plan calls on Malaysia to amend its laws to limit the ability of labor officials to deny trade union registration and affiliation; make it illegal to retain a worker's passport; expand the right to strike; and allow migrant workers improved trade union rights. However, despite these provisions, they do not appear sufficient to ensure working people in Malaysia will be able to exercise their fundamental labor rights.

The plan does not clearly call for an expansion of the right to bargain collectively in all sectors, nor does it appear to hold employers fully accountable for abuses

in subcontracting and recruitment processes—major factors in the perpetuation of forced labor. Improved rules regarding access to justice, recruitment fees, targeted labor enforcement in industries known to be problematic and victim services still could be lacking even under the agreement. Nor does the agreement address basic human rights, including the right to free assembly and lack of civil rights for LGBT persons. As such, employers and government officials still may attack workers for their advocacy, while claiming to be using a different section of Malaysia’s legal code to do so.

All workers in Malaysia must be broadly empowered to improve wages and working conditions. The consistency plan fails to meet this benchmark and lacks any specific measurements or criteria to evaluate the implementation and enforcement of the required reforms. Given that Malaysia could be rewarded with greater market access under the Trans-Pacific Partnership without having to first enforce the changes it promises to make on paper, there will be little incentive for the government to end exploitative working conditions or the brutality of forced labor after entry into force.

Brunei

The human and labor rights situation in Brunei is dire. Under the Sultan of Brunei, whose family has ruled for more than six centuries, the country adheres to a strict penal code based on Sharia law, which mandates flogging, dismemberment and death by stoning for crimes such as adultery, alcohol consumption and homosexuality. Despite widespread calls from U.S. labor, LGBT and human rights groups to exclude Brunei from the TPP, it appears the agreement and the consistency plan situate the U.S. and Brunei governments to enter into a permanent trading relationship without ensuring that working families can exercise their fundamental human and labor rights in Brunei.

Freedom of speech in Brunei is severely limited, and the legislature has a limited role.⁴⁰ It is difficult, if not impossible, to imagine freedom of association will exist where the right to free speech does not accompany it. Under the Internal Security Act, activists deemed to be anti-government can be detained without trial indefinitely, renewable for two-year periods.⁴¹ Harsh

punishment stifles worker activism, and there is a nationwide prohibition on collective bargaining.

Workers, and migrant workers in particular, have few protections for their basic rights. The government prohibits strikes. The law does not provide for reinstatement for dismissal related to union activity. The government can refuse to register trade unions.⁴² Government permission is required for holding a public meeting involving more than 10 people, and the police can break up any unofficial meeting of more than five people if they regard it as liable to disturb the peace.⁴³

Many of the 85,000 migrant workers in Brunei face labor exploitation and trafficking related to debt bondage from labor recruitment fees, wage theft, passport confiscation, abuse and confinement. Immigration law allows for prison sentences and caning for workers who overstay their visas, fall into irregular status, or work or change employers without a permit.⁴⁴ This traps migrant workers in abusive employment and impedes access to justice and compensation if a migrant worker chooses to leave an exploitative employment relationship.

The labor consistency plan with Brunei is wholly inadequate to deal with the serious problems indicated above. For example, it calls for an end to document confiscation and “an outreach program to inform and educate stakeholders,” but does not address excessive recruitment fees or the criminalization of migrant workers. While it requires that employment discrimination be made unlawful, it fails to include LGBT workers within this new protection. Moreover, it fails to provide for labor courts or other structures free from the political influence of the sultan.

The labor side letter fails to include any specific benchmarks to evaluate the implementation and enforcement of the required legal and regulatory changes. The letter includes no independent evaluation mechanism, which means that partial and ineffective fulfillment of the plan’s elements or changes on paper could be substituted for actual changes in workers’ lives. In short, the Brunei side letter seems likely to be partially implemented on paper, but likely will continue to leave workers without the ability to freely exercise their fundamental rights.⁴⁵

II. Countries of Serious Concern

Chile⁴⁶

Today, 25 years after the end of the Pinochet regime, workers confront a profound lack of legal guarantees and effective protection by the state. The current labor legislation remains largely the same and thus perpetuates the destructive legacy of the past. As a result, there has been a steep decline in the rate of unionization—from 30% in 1973 to only 8% today. Today, Chile has among the lowest unionization rates among all OECD members. While the current government has formulated amendments to address some of the issues described below, the legislation has yet to pass.

Freedom of association is restricted, particularly in the public sector. Police, military personnel and civil servants of the judiciary are prohibited from joining a union. Temporary workers also have no right to organize. The constitution also provides that the holding of a trade union office is incompatible with active membership in a political party, and that the law shall lay down related sanctions (Political Constitution, Art. 23). In addition, broad powers are granted to the Directorate of Labor for supervision of union accounts, and financial and property transactions.

Collective bargaining also is restricted in a number of ways. Industrywide agreements that set minimum standards for wages and working conditions for all workers once were common, but since largely have disappeared as the law does not require bargaining above the enterprise level. In addition, workers without permanent contracts and other temporary workers are excluded from collective negotiations, a serious problem as employers are shifting to short-term contracts even for work that in reality is full time. The law also permits groups of workers to submit draft collective agreements, even when there are unions present, undermining the role of unions as a bargaining representative.

Finally, Chile also circumscribes the right to strike. According to the Labor Code, a strike must be agreed to by an absolute majority of the company's employees (Sections 372 and 373) and must be carried out within three days of the decision to call the strike (374). No

strike action may be taken by workers if they are deemed to provide services of a public utility, or it would present a serious threat to health, the country's economy or national security. This goes beyond the "essential services" strike restrictions acceptable under ILO guidance. Section 254 of the Penal Code provides for criminal penalties in the event of the interruption of public services or public utilities or dereliction of duty by public employees, and Act No. 12927 authorizes the imprisonment of anyone involved in the interruption or collective suspension, stoppage, or strike in public services or public utilities. Section 381 provides for the possibility of hiring replacement workers during a strike. Agricultural workers are not guaranteed the right to strike.

Peru

Since the U.S.-Peru free trade agreement (FTA) came into force, Peru has reduced protections for workers and weakened mechanisms to enforce labor legislation. Peruvian unions report there are low levels of public investment to eliminate child labor and forced labor, promote equality and nondiscrimination in employment, and to ensure the right to organize and collectively bargain. Labor rights, generally, and rights in export sectors, in particular, have been eroded by a disproportionate increase in temporary employment.

According to the DOS, Peru does not fully comply with the minimum standards for the elimination of trafficking. Peruvian workers are exploited in conditions of forced labor, primarily in informal gold mining, logging, agriculture, brick making and domestic service. Many of these victims are indigenous, rural or migrant workers who face deceptive recruitment, debt bondage, restricted freedom of movement or inability to leave, withholding or nonpayment of wages, and threats and use of physical violence. Forced child labor occurs in begging, street vending and criminal activities.⁴⁷ The DOL also has found significant instances of child labor in the production of bricks, coca, fireworks, fish, gold and timber.⁴⁸

Last year, the Peruvian government passed a series of laws to roll back health, safety and environmental regulations—purportedly "to create a more friendly environment, to reduce the impediments to investment." Despite the fact that regressive laws likely

violated trade commitments, the government turned back 2011 improvements to occupational health and safety and inspections processes. It also weakened enforcement mechanisms, fines and mandated action plans.⁴⁹

Further, it has been well documented by national and international organizations, including the ILO and the UN Office of the High Commissioner for Human Rights (OHCHR), that the Peruvian government is not enforcing its own labor laws in the sectors of garments, textiles and agricultural product exports, which together employ hundreds of thousands of workers who produce billions of dollars of goods for the U.S. market.⁵⁰ In the textile and garment



industry, the Law for the Promotion of Non-Traditional Exports (Law No. 22342)—designed to encourage investment by allowing workers to be hired under an indefinite number of short-term contracts—has been a major obstacle to the promotion of labor rights. The largest textile and garment companies are the major beneficiaries of the law, and the 30 largest companies account for more than 70% of the contracts covered by these regulations. Employers can issue contracts as short as 15 days and renew the contract every two weeks for as long as 15 years. The law allows employers to discriminate against trade unionists by firing them under the pretext of not renewing their contract because of “economic circumstances.”

As documented in a recent submission to the Office of Trade and Labor Affairs (OTLA) on the failure of the government of Peru to comply with labor standards under the FTA, employers routinely have abused their power to renew short-term contracts of their workers when they are trying to constitute or become members of a union, making them permanent victims of firings for this purpose.⁵¹ This is the second submission regarding Peru’s labor practices in less than a decade, while many also have requested U.S. action on Peru’s violation of its environmental obligations as well.⁵² The lack of robust action by the USTR to enforce the first “May 10th” agreement sends the wrong message to TPP parties: that despite the “historic” nature of the obligations, these obligations are unlikely to be enforced.

The TPP Labor Chapter does not make significant and meaningful improvements to substantive labor provisions of the U.S.-Peru FTA and offers no improvements to the enforcement mechanisms. This, combined with 20 years of lackluster labor enforcement by the U.S. government, makes it clear that TPP will do little to improve working conditions or raise wages in Peru. Because Peru is currently in violation of the U.S.-Peru FTA, Peru will be in clear violation from the moment the TPP enters into force unless both governments take immediate actions to secure Peru’s compliance.

Singapore⁵³

Substantial legal limitations on freedom of association, collective bargaining and the right to strike exist in Singapore. The Registrar of Trade Unions has wide-ranging powers to refuse to register a union or cancel registration. The parliament may impose restrictions on the formation of a union on the grounds of security, public order or morality. The registrar has the right to refuse the rule change if she or he deems it either unlawful or “oppressive or unreasonable.”

The Trade Unions Act limits what unions can spend their funds on and prohibits payments to political parties or the use of funds for political purposes. Although the Trade Unions Act prohibits government employees from joining trade unions, the law gives the president of Singapore the right to make exceptions to this provision. The Amalgamated Union of Public Employees (AUPE) was granted such an exemption, and its scope of representation now covers all public-sector employees except the most senior civil servants.

Migrant workers particularly are limited in exercising their rights. The Trade Unions Act bars any person “who is not a citizen of Singapore” from serving as a national or branch officer of a trade union unless prior written approval is received from the minister. The act also stipulates that a foreign national cannot be hired as an employee of a trade union without prior written agreement from the minister. Similarly, a foreign national is forbidden to serve as a trustee of a trade union without the minister’s written permission.

As in other countries with existing serious rights violations, the United States failed to secure a labor consistency plan with Singapore. The TPP, as in other countries, will come into force, offering Singapore enhanced benefits, before any changes are required.

III. Selected Labor Rights Concerns in Other TPP Countries

Freedom of Association and the Right to Collective Bargaining

In **Japan**, all national and local public employees and some employees of private companies or state-run companies that provide essential services such as electricity are banned from striking. Dismissal and fines or imprisonment for up to three years can be imposed if a trade union leader is convicted of inciting a strike action in the public sector—this limitation for public-sector workers is a serious violation of the ILO forced labor convention (C. 105), which remains unratified by Japan.⁵⁴

New Zealand’s employment law allowing employers in the film and video game production industry to classify workers as contractors, denying them rights to collective bargaining and minimum labor standards, was introduced specifically to attract investment to that industry at the demand of Warner Brothers.⁵⁵

In March 2015, changes to New Zealand’s Employment Relations 2000 came into force. Key changes to collective bargaining allow employers to end negotiation more easily, weaken good faith negotiations, remove protections for new workers and make collective bargaining more difficult. The changes specifically allow employers to opt out of multiemployer negotiations without providing reasons or being subject to industrial action.⁵⁶

In **Australia**, there are a number of legal obstacles with regard to freedom of association and the right to collectively bargain. The Fair Work Act of 2009 imposes a number of restrictions related to trade union rights to elect representatives and to draw up their constitution and rules. Any person who has been convicted of a prescribed offense at any time is prohibited from holding trade union office, and individuals in vocational placement cannot join a registered union in connection with their work on that vocational placement. A 2015 amendment to the act further restricts freedom of association and the right to collectively bargain, in particular by setting an expiry date for negotiations in greenfield workplaces,

after which an employer's "draft agreement" will be treated as a collective bargaining agreement when, in truth, the workers never agreed to it. Due to the act, a representative trade union also may be just one of a number of bargaining representatives taking part in the negotiations, which reduces the power of collective bargaining.⁵⁷

In **Canada**, federal labor law applies only to approximately 10% of workers; in workplaces and occupations that are not federally regulated, provincial and territorial governments are responsible for labor laws. This translates into a number of categories of workers being prohibited or limited from forming or joining a union or holding a union office, due to their professional designation or sector (such as in the medical professions or in agriculture). In the public sector, the government of Canada gave itself the exclusive right to define what constitutes an essential service, and to unilaterally designate its employees as essential. If 80% or more of the bargaining unit is designated as essential, strikes are prohibited.⁵⁸

Forced Labor and Child Labor

New Zealand has no minimum age of employment.

In **Australia**, forced and compulsory labor are explicitly prohibited by law; however, there have been a few reports of temporary workers in such sectors as agriculture, cleaning, construction, hospitality, manufacturing and domestic service being subject to forced labor. There also are numerous instances of foreign workers on temporary work visas being underpaid, exploited and denied their rights under Australian law.

Canada prohibits all forms of forced labor, and the government enforces the law. Some reports indicated that child labor occurred, especially in the agricultural sector. In British Columbia, children as young as 12 years old can work legally in any industry; a letter from the parent is all that is required, and the province places no legislative or regulatory restrictions on the occupations, tasks or time of day a child can work. There is some evidence of forced labor trafficking of workers from Eastern Europe, Asia, Latin America and Africa who are subjected to forced labor in agriculture, construction, restaurants, hospitality, food processing plants and as domestic workers.

Discrimination

Japan mandates equal pay for men and women. However, the Japanese Trade Union Confederation (JTUC-RENGO) reports many cases of discrimination against union members or activists as well as gender discrimination in wages and working conditions.

Canada prohibits discrimination with respect to employment or occupation on the basis of race, gender, etc. However, the Public Service Equitable Compensation Act makes it a criminal offense for a union to encourage or assist any employee in filing or proceeding with a pay equity complaint. Unions are subject to summary conviction and fined up to \$50,000 if they assist their members in any way in advancing pay equity complaints.

CONCLUSIONS AND RECOMMENDATIONS

The TPP, as currently written, is troubling in numerous ways. Of course, the agreement covers not just traditional trade issues, such as tariffs and quotas, but sets rules that will limit our democracy and how our government can regulate in the public interest. The TPP creates new and expansive legal rights for foreign investors—including their very own private legal system that is outside the reach of U.S. courts. The current labor chapter, even with improved language, does not represent a counterbalance to the protections and privileges gained by corporations. In the TPP, the interests of workers and the promotion of their rights are embedded in a failed model.

The labor movement has now had years of experience with labor rights language in trade agreements. As documented by the Government Accountability Office, the U.S. government does little to actively monitor or enforce commitments made in the labor chapter.⁵⁹ Unlike corporations that are able to unilaterally access dispute settlement mechanisms, workers do not have the power to initiate complaints and must petition

their governments to advocate on their behalf. For workers denied their rights, trying to convince another government to initiate a complaint focused on the rights of foreign workers has resulted in an unworkable process. The fact is no worker in the global economy has won the right to form an independent union and to bargain collectively as a result of the enforcement of a worker rights provision in a trade agreement. There has never been a single monetary fine or tariff penalty imposed for labor violations in any U.S. trade agreement.

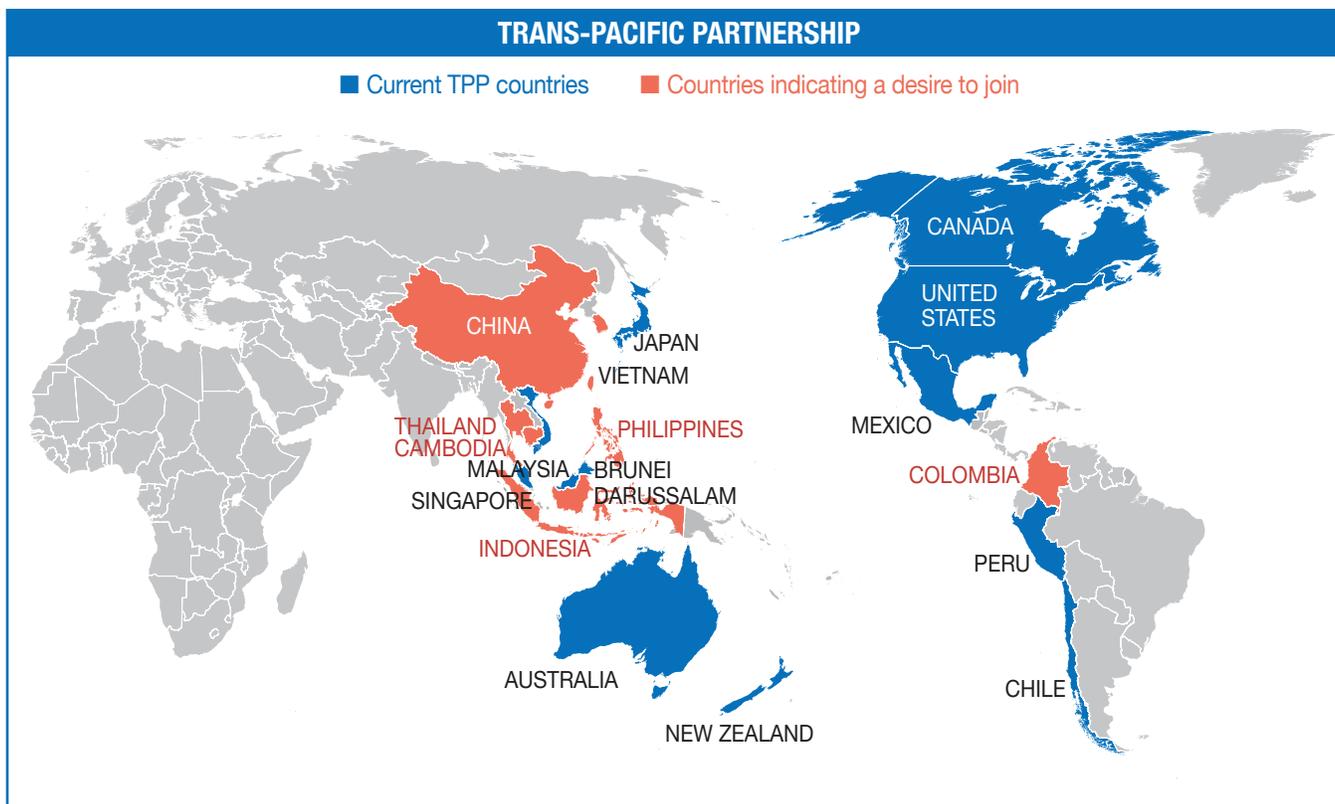
To make matters worse, as outlined above, the United States seeks to enter into the TPP with a number of Pacific Rim nations with troubling anti-worker practices. USTR gave away crucial negotiating leverage by not insisting that trade benefits be contingent on adherence and promotion of the core labor standards. To let the TPP enter into force without full compliance with all labor commitments from all 12 countries undermines the entire agreement. It sends the message that promises to comply—in any area—are



sufficient. If the TPP is going to have beneficial effects, promises and changes on paper are not enough.

Nor does the TPP rebalance the playing field in ways beneficial for workers in the United States or globally. The chapters setting out rules for services, financial services, food safety and other regulations put some economic decision making a step further from democratic control, encircling domestic decision making within the neoliberal, deregulatory, Washington consensus indefinitely. This means that when political winds blow in the opposite direction, seeking more activist policies regarding Wall Street or food safety or government purchasing, foreign countries and foreign companies will be empowered to challenge those policies. Even if the labor promises of the TPP's authors were to come to fruition, the labor chapter alone would not create an equity of benefits for workers. The rules included in the other chapters enshrine an inequitable "you're on your own" economic model that places all of the downside risk of trade on working people without setting up adequate countermeasures that ensure future economic growth will be sustainable and inclusive.

As it currently stands, the TPP fails workers. The AFL-CIO and global labor movement stand in opposition to the agreement. To be effective at creating shared prosperity and inclusive growth, the TPP must be renegotiated to include protections for workers, as well as the environment and other public interest issues, that are as strong as all other protections in the agreement—including those for investors. Moreover, the other chapters must be renegotiated to include rules that *promote rather than inhibit* progressive economic policies that correct market failures, ensure adequate government investment in infrastructure and human development, and provide certainty for workers, not just global businesses. The AFL-CIO urges Congress to only support a people-centered trade approach that will guarantee the benefits of trade can improve the working and living lives of millions of workers and their families in the United States and throughout TPP countries. Further, we stand ready to work with Congress and the administration to renegotiate the TPP so that it works for people who work.



Endnotes

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