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## LABOR STANDARDS IN RECENT U.S. TRADE AGREEMENTS

*Remarks by:  
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(as prepared for delivery)*

Last year's electoral campaign and this year's debate, over the proposed United States trade agreement with six Central American countries, have brought out many myths, assertions, and arguments concerning the labor provisions in recent U.S. trade agreements. What this rhetoric reveals is that, even though there is an existing Congressional *compromise* about how we should address worker rights concerns in U.S. trade agreements, there really is no solid *consensus* that we are doing the right thing in this policy area.

This afternoon, after a quick review of the history of labor standards in United States trade policy, I will try to respond to the most common misunderstandings and questions concerning the current U.S. approach to ensuring that enforceable labor standards are included in U.S. free trade agreements. The U.S. is trying to ensure that American workers, as well as the workers of our trading partners, are both made better off by negotiating trade agreements that combine trade liberalization with the protection of worker rights.

### I. BRIEF HISTORY OF UNITED STATES TRADE & LABOR

The first U.S. trade legislation with a "linkage" between trade and labor standards is arguably the McKinley Tariff Act of 1890, which prohibited the import of goods made by convict labor. That provision, expanded in the Smoot-Hawley Tariff Act of 1930 to cover convict, forced, and/or indentured labor is still in effect. The National Industrial Recovery Act of 1933 (IRA), although found to be unconstitutional in 1935, went considerably further. The IRA restricted the import of any and all goods "that impair codes of fair competition, including the right to organize and bargain collectively, the right to join, organize or assist a labor organization, and compliance with maximum hours of work and minimum rates of pay." Note: both of these acts were completely unilateral U.S. restrictions on imports.

The Trade Act of 1974 instructed U.S. negotiators to seek "the adoption of international fair labor standards . . . in the GATT." This was the first time Congress asked U.S. trading partners – as opposed to enacting unilateral restrictions – to consider the relationship of trade liberalization with the protection of workers' rights. Finally, the

Omnibus Trade and Competitiveness Act of 1988 defined the denial of certain worker rights as “unreasonable” actions for the purposes of Section 301 of the Trade Act – a provision that went totally unused until March of this year when the AFL-CIO led a coalition in filing a section 301 petition against China. The U.S. government declined to accept this petition for formal review, although certainly not because it approves of China’s labor regime.

It is more realistic to say that the current U.S. trade policy regarding labor standards began its evolution just over twenty years ago. It did so with the country eligibility criteria of the “Caribbean Basin Initiative” (CBI) trade preference program, signed into law by President Reagan in 1983. The CBI worker rights language was copied and incorporated the next year into the “Generalized System of Preferences” (GSP). CBI and GSP are unilateral trade preference programs under which eligible less-developed countries can ship certain specified goods to the U.S. duty-free. The CBI and GSP statutes require the president to determine if a developing country “has taken or is taking steps” to provide its workers with “internationally recognized worker rights,” and sets forth a definition of that term. Very similar, although not identical, worker rights eligibility criteria have been included in subsequent U.S. trade preference programs, the Andean Trade Promotion Act (ATPA) in 1991, the African Growth and Opportunity Act (AGOA) in 2000, and very similar worker rights have been in the eligibility criteria for OPIC since 1985.

The 1993 North American Agreement on Labor Cooperation (NAALC), generally known as the NAFTA labor side-agreement, had the objective of improving working conditions and living standards in the U.S., Mexico, and Canada. As the title implies, the preferred approach is through cooperation, including information exchanges, technical assistance, and consultations. NAALC obligates each Party to promote compliance with and “effectively enforce” its labor laws, and provides for consultations and a dispute settlement mechanism (which has never been invoked) in cases of non-enforcement of some specific labor laws. (Note: the Canada-Chile and the Canada-Costa Rica labor side-agreements copied this model).

The United States–Jordan Free Trade Agreement negotiated by the Clinton Administration, but submitted to Congress by the current Bush Administration, is the first U.S. bilateral trade agreement to incorporate labor provisions within the main body of the trade agreement. The primary labor clauses of the U.S.–Jordan FTA require that each Party will:

- “strive to ensure” that its laws incorporate the 1998 ILO Declaration on Fundamental Principles and Rights at Work;

- “strive to ensure” it does not waive or derogate from domestic labor laws as an encouragement for trade; and,
- not fail to effectively enforce its labor laws in a manner affecting trade between the Parties.

The FTA “dispute settlement” provisions, such as they are, apply to the labor provisions, meaning that if the Joint Committee established by the agreement does not resolve a dispute, the affected Party is entitled to take “any appropriate and commensurate measure.” Congress voted to approve the U.S.-Jordan FTA only after the two Parties exchanged letters pledging never to use trade sanctions as one of those measures for any dispute under the FTA.

## II. UNITED STATES TRADE PROMOTION AUTHORITY

The United States Constitution empowers Congress, not the Executive Branch, “to regulate commerce with foreign nations,” and “to lay and collect taxes, duties, imposts, and excises.” These are powers that Congress jealously guards, and yet occasionally delegates to the president. For the past several years the President has further delegated these powers to the U.S. Trade Representative. The most recent delegation of such authority, after an eight-year hiatus, came in the Trade Act of 2002; particularly part B of the Act, known as the “Bipartisan Trade Promotion Authority Act (TPA).”

Whether, and if so how, to incorporate worker rights in the TPA was vigorously and fully debated in Congress. Some Members, fearing that labor provisions would only be used for protectionist purposes, clearly favored the NAFTA/NAALC “side agreement” model. At the other extreme, amendments were proposed that would have required both the adoption of ILO-consistent labor laws and the imposition of trade sanctions if/when any such laws were not fully enforced. In the end, Congress reached a bipartisan compromise, based significantly on the Senate version, on how to incorporate worker rights in U.S. trade agreements. (Remember that in 2002 the House of Representatives had a working Republican majority, while the Senate was narrowly controlled by the Democrats).

That bipartisan compromise included the “Jordan language” - to not fail to effectively enforce domestic labor laws - as a binding obligation, subject to dispute settlement, as well as numerous other labor-related clauses. Not least among those other labor-related provisions are instructions to consult with the U.S. trading partners regarding their labor laws and provide technical assistance when necessary; to establish consultative procedures to strengthen the capacity of our trading partners to promote respect for core labor standards; and, when the U.S. sends proposed FTAs to Congress to send a “meaningful

labor rights report” on the countries with which the U.S. has been negotiating along with.

What is significant, but not really self-evident, is that Congress divided its instructions to the executive branch into three areas: “overall” and “principal” trade negotiating objectives, and the “promotion of certain priorities.” While there are labor-related clauses in all three of these TPA sections, the significance of this division is that only “principal” negotiating objectives are required to have access to dispute settlement procedures and remedies for non-compliance.

Even though Congress voted in favor of Trade Promotion Authority with these labor provisions, neither side in the trade-and-labor debate is really happy with them. Congressional Democrats continue to believe that having only one “enforceable” labor obligation is insufficient to protect the worker rights of our trading partners, nor to protect American workers from “unfair” competition. On the other side of the aisle, there is a lingering concern that labor clauses in trade agreements are there only for “protectionist” purposes, and are inherently a barrier to trade liberalization.

Now I claim to be the “best-ever” Assistant United States Trade Representative for Labor. This is a pretty safe claim, because I am the first and only AUSTR for Labor to date. Ambassador Zoellick appointed me because he knew - and fully supported - that Congress simply would not grant the Bush Administration trade negotiating authority unless it included binding and enforceable worker rights provisions. It has therefore been a large part of my job to ensure that these TPA labor provisions - our instructions from Congress - are fully incorporated into all U.S. free trade agreements.

We think we have done so. And we think we have gone further. While negotiating the trade agreement with Central America, we were actively involved in a “three-track” approach to improving protections for worker rights:

1. Negotiating the text of the labor chapter, and its capacity-building Annex, that fully meets TPA objectives.
2. Working with our trading partners to improve the application and enforcement of labor laws during the course of the negotiations. A base-line review of the labor laws of the six countries conducted by the ILO provided an important starting point for this exercise.
3. Setting in place longer-term technical assistance programs and projects to help ensure there will be continued improvements in the protection of core labor standards in these countries.

To date, Congress has voted to approve four FTAs incorporating TPA-consistent labor clauses: Chile, Singapore, Morocco, and Australia. The U.S. has completed negotiations for additional FTAs with the Arabian Gulf State of Bahrain, and with six Central American countries (Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua), an agreement known as CAFTA. The President, however, has not yet formally submitted these agreements to Congress for approval. The U.S. is also engaged in FTA negotiations with Oman and the United Arab Emirates (two more pieces, along with American FTAs with Israel, Jordan, Morocco and Bahrain, towards President Bush's announced goal of a Middle East Free Trade Area (MEFTA)), Panama, the five countries comprising the Southern African Customs Union (SACU) three Andean Countries, and Thailand.

The U. S. is also, of course, continuing to pursue the Free Trade Area of the Americas (FTAA), linking all thirty-four democracies in the Western Hemisphere. The United States has tabled TPA-consistent labor text for the FTAA, but there is not a consensus on labor provisions at this time. Finally, the United States' trade negotiating agenda contains a full and firm commitment to the successful conclusion of the Doha Development Agenda in the World Trade Organization. Deadlines have been missed, but we believe that the economic opportunities that will be opened for all workers via the WTO will not be foregone.

### III. COMMON MISUNDERSTANDINGS ABOUT CURRENT TRADE/LABOR LINKAGES

Despite the bipartisan nature of the Congressional compromise on how to include worker rights in U.S. trade agreements, and a significant legislative and negotiating history concerning the wording of labor provisions in American trade agreements, there continue to be numerous questions and criticisms of the labor clauses in the FTAs that have been negotiated under TPA. Critics of the administration's labor provisions have been increasingly vocal as Congress nears a vote on CAFTA. So please let me now pose some of those questions/allegations, and give you brief answers to them:

1. *Why don't recently concluded U.S. free trade agreements (FTAs), especially CAFTA, include "strong and enforceable" labor provisions?*
- The recently concluded FTA with five Central American Republics and the Dominican Republic (CAFTA), like our FTAs with Chile, Singapore, Australia, Morocco, and Bahrain, include – within the text of the FTA, not as the NAFTA "side-agreement" - strong and enforceable labor provisions.

- The CAFTA Labor Chapter is more “robust” than the U.S.-Jordan FTA, or even the U.S.-Chile FTA approved by Congress last year, in its enumeration of procedural guarantees, including access to fair, equitable, and transparent proceedings for the enforcement of labor laws, as well as the institutional arrangements for consultations, dispute settlement provisions, and of course remedies (“penalties”) for non-compliance.
  - The Labor Chapter includes an Annex on labor cooperation and capacity building that reflects a carefully considered approach to the long-term protection of worker rights in our Central American partners.
2. *Why aren't countries required to have labor laws that fully incorporate ILO standards?*
- Our analysis, supported by an impartial review/study by the ILO, shows that the labor laws of America's CAFTA partners are generally compliant with ILO standards. These ILO labor law reviews, requested by the Central American Countries, are available on the ILO's web site.
  - Congress debated and rejected a version of TPA that would have “required” full incorporation of ILO Conventions into the labor laws of our trading partners.
  - Congress has, on several occasions, indicated its approval of the formulation that the United States and its trading partners should “strive to ensure” that domestic labor laws incorporated the *principles* of the ILO Declaration, without reference to the actual ILO conventions.
  - And, of course, since the U.S. has ratified only two of the eight “core” ILO conventions, it is a standard the U.S. itself could not meet. (El Salvador has ratified six of the eight conventions, while the other countries have ratified all eight).
3. *Even if their labor laws are adequate now, is there anything in CAFTA to prevent one of the Central American countries from later amending its labor laws to reduce worker rights?*
- This is extremely unlikely, since the evidence is clear that all of these countries are taking significant strides towards democracy and openness, in some cases after years of bitter civil wars and “class struggles.”

- In most of these countries basic worker rights are constitutional guarantees, not civil code provisions.
  - The U.S. has defensive concerns regarding any “don’t amend your labor laws” clause, e.g. fearing complaints/disputes regarding changes to American safety and health laws or wage and hour regulations.
4. *Because only the “effective enforcement” clause is subject to dispute settlement and possible remedies, isn’t CAFTA (“the Chile model”) weaker than the Jordan FTA, where all labor clauses were covered?*
- The effective labor law enforcement clause of the CAFTA labor text is exactly the same as the labor article of the Jordan FTA.
  - All other labor clauses in the Jordan FTA (which are much fewer and less specific than in CAFTA) are formulated as “strive to” commitments, not binding obligations, and hence they would not be fully subject to dispute settlement or any trade remedies at all.
  - A comparison of the Jordan and CAFTA labor provisions makes it very clear that CAFTA’s labor clauses are very much “Jordan plus.” FYI: We have posted a line-by-line comparison of the Jordan, Morocco (approved by Congress last year), and CAFTA-D.R. labor texts on the U.S. Trade Representative web site.
5. *Under CAFTA, the United States will give up the leverage it has under GSP/CBTPA, particularly the petition process asking for removing benefits from a country that is not “taking steps” to provide internationally recognized worker rights.*
- The labor laws a country is obligated to effectively enforce under CAFTA cover all internationally recognized worker rights used as eligibility criteria for GSP and CBTPA.
  - Suspension or removal of GSP/CBTPA benefits is a very blunt instrument, which could harm the very workers whose rights we are trying to protect. Under CAFTA, if a country does not adequately protecting worker rights, the government would pay a significant fine *until the situation is remedied*.
  - By signing onto CAFTA, our partner countries very publicly accept the obligation to have laws that incorporate ILO standards and to effectively enforce those labor laws. The GSP/CBTPA labor provisions were unilaterally imposed upon them by the U.S.



- Procedures for public submissions (from trade unions, human rights NGOs or others) alleging non-compliance with the labor provisions are included in the Labor Chapter text. These procedures are modeled after the NAALC submissions process.
- 6. *CAFTA provides a very weak enforcement mechanism because a country can “continue to fail to enforce its labor laws in order to gain a trade advantage as long as it pays a small fine to itself to support vaguely defined labor activities.” (Quote from the AFL-CIO).*
  - Relative to the size, level of income, and labor ministry budgets of our CAFTA partners, a fine of up to \$15 million a year is certainly not “small.”
  - As the complaining party in a dispute involving labor law enforcement, the United States would always retain a veto over the use of any and all fines collected. These fines are paid into a special fund and are not returned to the other party.
  - The funds would be targeted to improve and protect the specific worker rights that had been violated by a party’s failure to enforce its labor laws. The design of any such programs will be done on a case-by-case basis.
- 7. *Why do we even need labor provisions in U.S. trade agreements? Shouldn’t the promotion of worker rights be left to the ILO?*
  - Congress, in the Trade Act of 2002, and consistent with prior trade/labor legislative history, made it abundantly clear that our trade agreements should contain enforceable worker rights provisions. Such provisions:
    - Assure that the benefits of trade liberalization are shared equitably by the workers of America’s trading partners; and
    - Help protect American workers from unfair competition by workers who are denied fundamental labor rights.
  - While ILO Conventions set internationally recognized labor standards, the ILO’s supervisory mechanisms are not designed to be part of trade agreements. The ILO has asked its members to take trade-related actions only in the most egregious cases (ex. when Poland outlawed Solidarity, in response to

apartheid in South Africa, and most recently because of slave labor in Burma/Myanmar).

I hope my remarks today have helped you understand the background, legislative history, and intent of the labor provisions in recent United States trade agreements. For those of you interested in the debate over the labor provisions in CAFTA, I strongly suggest that you look at the U.S.T.R.'s web page that was set up for this purpose: [www.ustr.gov/trade\\_agreements/bilateral/CAFTA-DR/briefing\\_book/section\\_index.html](http://www.ustr.gov/trade_agreements/bilateral/CAFTA-DR/briefing_book/section_index.html).

Now I hope we have time remaining for me to respond to any questions that you may have.