

TTIP: TIME FOR A NEW APPROACH TO LABOR RIGHTS AND STANDARDS

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SUMARIO: 1. INTRODUCTION. 1.1. Potential Magnitude of TTIP. 1.2. U.S. Labor Law and International Labor Standards. 1.3. Past U.S. Labor Chapters Preserve Current U.S. Labor Law. 1.4. TTIP: Time for a new template. 2. CONCLUSION.

RESUMEN: La Asociación Transatlántica para el Comercio y la Inversión (*Transatlantic Trade and Investment Partnership en inglés*) representa una oportunidad para reivindicar el liderazgo de Estados Unidos y Europa en la definición, mediante la adopción de los tratados de la OIT, de estándares laborales internacionales homogéneos y rigurosos en los acuerdos comerciales y de inversión. En el actual modelo comercial de EE. UU., los apartados dedicados a cuestiones laborales se limitan a reproducir los principios a los que hace referencia la Declaración Fundamental de Principios y Derechos del Trabajo de la OIT de 1998. Este hecho permite que EE. UU. salvaguarde sus discrepancias legales y normativas con respecto a los tratados de la OIT, que contienen derechos propiamente dichos. Puesto que muchos países europeos son consecuentes con estos derechos, limitar la ATCI a los términos de la Declaración podría proporcionar a EE. UU. una ventaja injusta con respecto a los mercados de trabajo, siempre y cuando, lógicamente, los países europeos no degraden los estándares laborales a los niveles existentes en EE. UU.

ABSTRACT: The Transatlantic Trade and Investment Partnership represents an opportunity to assert U.S. and EU leadership in defining uniform and unambiguous international labor standards in trade and investment agreements by adopting ILO Conventions. Under the current U.S. trade model, labor chapters are limited to the

principles referenced in the ILO's 1998 Declaration of Fundamental Principles and Rights at Work. Limiting labor chapters to the Declaration permits the U.S. to preserve its statutory and regulatory inconsistencies with ILO Conventions, which express actual rights. Since many European countries are consistent with these rights, limiting the TTIP to the Declaration could give the U.S. unfair advantage with respect to labor markets, providing of course, that European countries do not lower their labor standards to those of the U.S.

PALABRAS CLAVE: Estándares Internacionales del Trabajo, acuerdos de comercio, Acuerdos de la OIT.

KEYWORDS: International labor standards, trade agreements, ILO Conventions.

1. INTRODUCTION

The Transatlantic Trade and Investment Partnership (TTIP) presents the United States and the EU with a unique opportunity to negotiate a trade agreement that creates a new trade model based on uniform, clear and enforceable internationally recognized labor standards. In order to take advantage of this opportunity, negotiators must be willing to embrace their leadership role in crafting a world trade agenda that places as much importance on fundamental human rights, as it does on reducing tariffs and technical barriers to trade, or protecting intellectual property rights and investment. In order to achieve this objective, negotiators should begin by throwing out old models, reflected by the U.S.-Peru Free Trade Agreement ("Peru FTA or template"), the current U.S. trade template. Among other things, this model is at best ambiguous and at worst, falls short of meeting internationally recognized labor standards, like those adopted by the International Labor Organization, a tri-partite arm of the United Nations.¹

¹ This paper only addresses labor rights and standards in the TTIP. It does not address other very critical provisions, including those related to enforcement, dispute resolution, investor to state provisions, government procurement, rules of origin, environment, investment,

1.1. Potential Magnitude of TTIP

The Final Report of the High Level Working Group on Jobs and Growth notes that “the European Union (EU) and the United States account for nearly half of world GDP and 30 percent of world trade.”² In a letter to the Speaker of the U.S. House of representatives notifying Congress of its intention to enter into negotiations with the EU for the TTIP, the office of the United States Trade Representative (USTR) wrote: “Last year the United States exported \$458 billion in goods and services to the EU, estimated to support more than 2.2 million U.S. jobs.”³ According to the European Commission, a significant number of EU jobs were supported by trade to countries like the U.S. The European Commission states that trade supports “jobs for 31 million Europeans.”⁴ In its letter, the USTR stressed:

The stock of U.S. and EU investment in each other’s economy totaled nearly \$3.7 trillion in 2011, and EU affiliates in the United States employed an estimated 3 million Americans in 2010. The EU and the United States together account for nearly half of global output of goods and services and 30 percent of global trade.”⁵

Given the economic magnitude of the U.S. and EU, a TTIP labor chapter could have far-reaching implications for improving the lives of millions of workers. If TTIP includes a labor chapter that actually incorporates labor standards defined by ILO Conventions and its jurisprudence, it would harmonize labor standards upwards towards meeting uniform internationally recognized standards. It would also provide a new template for future FTA’s. Additionally, it would eliminate ambiguities in current labor chapters, like those in the U.S.-Peru FTA, while at the same time provide future signatories with a clear understanding of what will be expected of them.

On the other hand, if current language from U.S. trade agreements is maintained, the opposite will occur: instead of leading to an upward harmonization of labor standards between the U.S. and EU, the EU will be forced to engage in a downward spiral. It is not hard to predict that EU labor and employment law protections will erode as EU companies seek to meet U.S. competition made more

consumer rights or any of the other provisions that directly or indirectly have an impact on workers in the U.S. and the EU.

² http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf

³ [https://ustr.gov/sites/default/files/03202013 TTIP Notification Letter.PDF](https://ustr.gov/sites/default/files/03202013%20TTIP%20Notification%20Letter.PDF)

⁴ <http://ec.europa.eu/trade/policy/in-focus/trade-and-jobs/>

⁵ [https://ustr.gov/sites/default/files/03202013 TTIP Notification Letter.PDF](https://ustr.gov/sites/default/files/03202013%20TTIP%20Notification%20Letter.PDF)

favorable by U.S. labor laws that fall short of meeting the international standards that most European countries have implemented.

The difference between EU and U.S. labor laws in meeting workers fundamental human rights as expressed by ILO Conventions is significant. While both regions acknowledge and respect the principle of these rights, unlike the EU, the U.S. has failed to ratify most of the core ILO Conventions.⁶ And, according to the United States Council for International Business, “no ILO convention will be forwarded to the U.S. Senate for ratification if ratification would require any change in U.S. federal or state laws.”⁷

1.2. U.S. Labor Law and International Labor Standards

The basis of employment and labor law in the U.S. is that employees are “at-will”. This means that they can be fired or terminated for any reason, good reason, bad reason or no reason at all, if they do not have a contract or specified duration of employment.⁸ Over time, some statutory exceptions to the rule were created, although employment at will remains very much a foundation of U.S. law. These exceptions limit, in some cases, the right of an employer to terminate the employment relationship.⁹

One statutory exception is the National Labor Relations Act (NLRA).¹⁰ The NLRA is the primary law governing freedom of association and collective bargaining

⁶ ILO, Ratifications for the United States, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102871

⁷ U.S. Ratification of ILO Core Labor Standards, United States Council for International Business, April 2007; http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/105.authcheckdam.pdf

⁸ See discussion, Owen Herrnstadt, “Strengthening the collective rights of precarious workers under US labour and employment law”, in Meeting the challenge of precarious work: A workers’ agenda, *International Journal of Labour Research*, Vol. 15, Issue 1, 2013, pp. 100-102, citing Jay Fineman, “The development of the employment at will rule”, *American Journal of Legal History*, Vol. 20, pp. 118-123, 1976.

⁹ see discussion, Owen Herrnstadt, “Strengthening the collective rights of precarious workers under US labour and employment law”, in Meeting the challenge of precarious work: A workers’ agenda, *International Journal of Labour Research*, Vol. 15, Issue 1, 2013, pp. 100-102.

¹⁰ National Labor Relations Act (29 U.S.C., Secs 151 et seq.). Other statutes creating additional exceptions include; Fair Labor Standards Act (29 U.S.C. Secs. 201-219);

in the U.S. One of its primary objectives is to protect employees from being fired or otherwise discriminated against for their union activities, including engaging in collective bargaining. However, as Lance Compa explains, the NLRA fails to uphold international freedom of association standards in a number of respects.¹¹ He provides the following examples¹²:

- Allowing employers to mount one-sided, aggressive workplace pressure campaigns against workers' organizing efforts, marked by mandatory "captive-audience" meetings filled with predictions of dire consequences if workers organize, without providing workers similar access to information supporting union organizing¹³;

Occupational Safety and Health Act (29 U.S.C. Secs. 553, 651-678; OSHA—(workplace safety and health); Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.)

¹¹ The following summary is taken directly from Lance Compa, *A Strange Case—Violations of Workers' Freedom of Association in the United States by European Multinational Corporations*, Human Rights Watch, 2010; https://www.hrw.org/sites/default/files/reports/bhr0910web_0.pdf; see also, United States Council for International Business, *U.S. Ratification of ILO Core Labor Standards*, April 2007, "Five of the ILO core conventions (87, 98, 29, 138 and 100) have been found to directly conflict with U.S. law and practice and would require significant and widespread changes to U.S. state and federal law if they were ratified. U.S. ratification of Conventions 87 and 98 would require particularly extensive revisions of longstanding principles of U.S. labor law to conform to their standards."

http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/105.authcheckdam.pdf

¹² The following summary is taken directly from Lance Compa, *A Strange Case—Violations of Workers' Freedom of Association in the United States by European Multinational Corporations*, Human Rights Watch, 2010; https://www.hrw.org/sites/default/files/reports/bhr0910web_0.pdf

¹³ Compa, *A Strange Case*, pp. 11-12; citing at fn. 22, "The only limitation on captive-audience meetings is that they may not be held within 24 hours of an NLRB representation election. See *Peerless Plywood Co.*, 107 NLRB 427 (1953) Management can require employees to attend these meetings, and can further require employees not to leave the meeting, not to ask questions, and not to espouse pro-union views, under pain of discharge for insubordination. See *NLRB v. Prescott Industrial Products Co.*, 500 F.2d 6 (8th Cir. 1974); *Litton Systems, Inc.*, 173 NLRB 1024 (1968). Employers can also exclude employees known to be union supporters from captive-audience meetings. See *F.W. Woolworth Co.*, 251 NLRB 1111 (1980). In 1951, the NLRB adopted an "equal opportunity" doctrine by which employers who held captive-audience meetings should allow union representatives to present their views at the employer's facility, noting that this placed no limit on what the employer could lawfully say. See *Bonwit-Teller, Inc.*, 96 NLRB 608 (1951). However, the Board (with new appointees) repudiated this doctrine just two years later, citing employers' property rights to exclude unwanted persons from the

- Allowing employers to deny workers the right to meet union representatives at the workplace to discuss forming a union;¹⁴
- Denying a legal remedy to undocumented immigrant workers fired for trying to form a union;¹⁵
- Enabling employers to rely on delay-ridden, ineffectual administrative and judicial procedures and remedies in cases of labor law violations;¹⁶
- Allowing employers to permanently replace workers who exercise the right to strike over wages and working conditions (workers who strike over employers' unfair labor practices may not be permanently replaced);¹⁷; and,
- Mandating the NLRB to seek court injunctions when "secondary boycott" allegations are lodged against unions, but leaving to NLRB discretion—which it rarely exercises—whether to seek injunctions against employers' unfair labor practices.¹⁸

premises. See *Livingston Shirt Co.*, 107 NLRB 400 (1953). The *Livingston Shirt* "unequal opportunity" rule has prevailed since then."

¹⁴ *Id.* at 12, citing at fn. 23, "*Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)".

¹⁵ *Id.*, citing at fn. 24, "*Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002)".

¹⁶ *Id.*, citing at fn. 25, "Cynthia L. Estlund, 'The Ossification of American Labor Law,' 102 *Columbia Law Review* 1527 (2002)".

¹⁷ *Id.*, citing at fn. 26, "The permanent replacement doctrine is not found in labor law statutes. It was created by the Supreme Court in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). The problem in practice is that whether a strike is an "economic strike" or an "unfair labor practice strike" it is subject to litigation, and it often takes years of administrative and judicial hearings and appeals before a final decision is reached and workers learn whether they are entitled to reinstatement. By then, even with a decision in favor of the workers, it is often the case that the strike is long broken and the workers scattered to other jobs. As the ILO Committee on Freedom of Association noted in considering the US permanent replacement doctrine, "that distinction [between economic strikes and unfair labor practice strikes] obfuscates the real issue ... whether United States labor law and jurisprudence (the so-called Mackay doctrine) are in conformity with the freedom of association principles." See ILO CFA, United States, Case No. 1543, Report No. 278, para. 89 (1991)".

¹⁸ *Id.*, citing at fn. 27, "Section 10(j) of the NLRA is the discretionary injunction clause in cases involving employers' unfair labor practices. Section 10(l) is the mandatory injunction clause in cases involving secondary union action. For more discussion, see George Schatzki, "Some Observations About the Standards Applied to Labor Injunction Litigation Under Sections 10(j) and 10(l) of the National Labor Relations Act," 59 *Indiana Law Journal* 565 (Fall 1983), noting "As for section 10(l), which is aimed almost entirely at unions, federal courts are inclined virtually to rubber-stamp National Labor Relations Board requests for injunctions. However, in considering applications for section 10(j)

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Compa concludes, “the ILO has found these and other features of U.S. labor law in violation of international standards.”¹⁹

These failings have a direct impact on the ability of workers to form their own unions and to engage in collective bargaining. One scenario, describing how workers can legally be prevented from forming a union in the U.S. is provided below:

Workers begin to actively form a union. The Company responds by hiring anti-union consultants who distribute literature about how unions only want workers dues money and how they can force workers to go out on strike, even if they do not want to. The union has no access to the company’s property and can be prevented from distributing literature, let alone visiting with workers on company property. In many cases, there is limited public property where the union can stand outside the plant gates to distribute literature. ~~The company, however, can order all of the employees~~ together to explain to them how they would prefer not to have a union. They can also distribute literature about union staff salaries and benefits which, in the U.S., are publically posted on the federal government’s website for all to see.

If the company fires the union activists, charges that the company has violated the law can be filed with the National Labor Relations Board, a government agency. If a petition for an election has already been filed by the workers for the union, the election is either blocked or held in the wake of the discharges. If the election is held, it is not hard to imagine the effects on employees the illegal conduct may have. In areas where skilled jobs are hard to come by, threats of discharge and closings are taken very seriously. If the election is not held, it will take a long time for the unfair labor practices to be fully litigated. When the charges are finally resolved, the union has to start its organizing drive all over again. Either way, the employer has the upper hand.

injunctions, which are primarily aimed at employers, the courts are inclined— especially when employers are the respondents—to be more critical of the Board's petition and, as a result, often deny or significantly qualify the requested relief.”

¹⁹ Id., citing at fn. 28, “For ILO decisions on these topics, see ILO Committee on Freedom of Association, Complaint against the United States, Case No. 2524, Report No. 349 (March 2008) (exclusion of low-level supervisors); ILO Committee on Freedom of Association, Complaint against the United States, Case No. 2227, Report No. 332 (2003) (denial of remedies to immigrant workers); ILO Committee on Freedom of Association, Complaint against the United States, Case No. 1543, Report No. 278 (1991) (permanent striker replacement); ILO Committee on Freedom of Association, Complaint against the United States, Case No. 1523, Report No. 284 (1992) (union representatives’ access to the workplace); ILO Committee on Freedom of Association, Complaint against the United States, Case No. 1523, Report No. 284 (1992) (secondary boycott strictures)”.

Even if the union wins an election and unfair labor practices are not at issue, the employer can bargain to impasse and unilaterally implement its last offer. If the workers cannot live with the unilaterally implemented contract, they can strike and watch permanent replacements march through their picket lines. After one year, their permanent replacements can vote to decertify their union while they are not even permitted to participate in the election.²⁰

As if the weakness in U.S. labor law did not already pose a high hurdle for workers wanting to form a union, some state and federally elected officials have made it clear that unions are not welcome in their states. For example, in South Carolina, Governor, Niki Haley, the highest official in the state, said in her annual State of the State address:

I love that we are one of the least unionized states in the country. It is an economic development tool unlike any other...We don't have unions in South Carolina because we don't need unions in South Carolina...And we'll make the unions understand full well that they are not needed, not wanted, and not welcome in the State of South Carolina.²¹

In Wisconsin, Gov. Scott Walker, who lead the effort to curtail public sector collective bargaining, compared unions to terrorist groups.²² And in Tennessee, U.S. Senator Bob Corker of Tennessee entered the fray in a union election at Volkswagen in Chattanooga saying, "I've had conversations today and based on those am assured that should the workers vote against the UAW, Volkswagen will announce in the coming weeks that it will manufacture its new mid-size SUV here in Chattanooga."²³

European Companies have at times only appeared too eager to adopt these anti-union tactics, indicating their willingness to participate in the downward spiral of international labor standards. A few years ago, Bosch attempted to use permanent

²⁰ A version of this description first appeared in Owen Herrstadt, *Time Once Again to Climb to the Industrial Mountain Top: A Call for Labor Law Reform*, *Labor Law Journal*, Vol. 39, No. 3, March, 1988, pp. 188-189.

²¹ Governor Niki Haley's 2012 State of the State Address, <http://www.governing.com/news/state/south-carolina-2012-state-of-the-state-address.html>

²² "in an attempt to show just what a tough guy he is, really did say that his strength in taking on protesting union members qualified him for confronting radical Islamic terrorist groups, such as the Islamic State."

<https://www.washingtonpost.com/blogs/answer-sheet/wp/2015/02/27/yes-scott-walker-really-did-link-terrorists-with-protesting-teachers-and-other-unionists/>

²³ U.S. senator drops bombshell during VW plant union vote
<http://www.reuters.com/article/2014/02/13/us-volkswagen-corker-idUSBREA1C04H20140213>

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striker replacements to break a strike in Wisconsin.²⁴ Other reports describe the conduct of Deutsch Telekom, Deutsch Post, Sodexco, Tesco, Kongsberg Automotive, and Siemens.²⁵

The newest European convert to anti-union methods in the U.S. may be Airbus. One recent story was headlined, "Like Boeing, Airbus doesn't want unions at its new plant in the South."²⁶ Another story reported that, "Airbus already has developed a strategy to counter an internally expected move by labor unions to organize the A320 final assembly line that opens later this year in Alabama."²⁷

1.3. Past U.S. Labor Chapters Preserve Current U.S. Labor Law

TTIP poses two questions with respect to a labor chapter: First, will TTIP provide a clear, unambiguous labor standard; second, will TTIP require the U.S. to improve its labor laws so that they are consistent with international labor standards? If TTIP simply adopts the current U.S. model reflected by the U.S. - Peru FTA, the answer to these questions are straightforward: "No".

Under the Peru-U.S. FTA²⁸:

1. Each Party shall adopt and maintain in its statutes and regulations, and practices there under, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration):

(a) freedom of association; (b) the effective recognition of the right to collective bargaining; (c) the elimination of all forms of compulsory or forced labor; (d) the effective abolition of child labor and, for purposes of this Agreement, a prohibition on the worst forms of child labor; and (e) the elimination of discrimination in respect of employment and occupation.

²⁴Owen Herrstadt, *Are International Framework Agreements A Path to Corporate Social Responsibility?*, U.Pa. Journal of Business and Employment Law [Vol 10:1] at p.205.

<http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1296&context=jbl>

²⁵ Lance Compa, *A Strange Case—Violations of Workers' Freedom of Association in the United States by European Multinational Corporations*, Human Rights Watch, 2010;

https://www.hrw.org/sites/default/files/reports/bhr0910web_0.pdf

²⁶ <http://www.bizjournals.com/seattle/news/2015/05/26/like-boeing-airbus-doesnt-wants-unions-at-its-new.html>

²⁷ <https://www.flightglobal.com/news/articles/airbus-expects-unions-to-target-a320-fal-in-alabama-410269/>

²⁸ <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>

2. Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations implementing paragraph 1 in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph.

Two footnotes qualify the obligations that are required under Chapter 17. The first footnote states that the “rights” referenced are limited to violations “in a manner affecting trade or investment between the Parties”. The second footnote states that, “The obligations set out in Article 17.2, as they relate to the ILO, refer only to the ILO Declaration.”²⁹ Confining the Peru agreement to the Declaration as opposed to the ILO core conventions and accompanying jurisprudence makes it much easier for countries to satisfy their obligations. After all, the Declaration is a “principles” document and as such enables countries like the U.S. to sign onto it without committing them to honor the actual rights and standards found in the Conventions.

As a principles document, the Declaration was never intended to require a country to respect the actual standards reflected by ILO Conventions. The ILO Legal Advisor described the Declaration in the following manner:

the Declaration requires nothing more of ILO Members than to be consistent and to comply with the commitment that they have already undertaken, and serves to encourage them in their endeavors; it certainly does not seek to impose further commitments on them. Contrary to what may have been said, there is definitely no question of subjecting Members to specific provisions of Conventions that they have not ratified.³⁰

What is the difference between a commitment to honoring principles of rights and honoring the actual rights and standards as laid out by ILO Conventions? In its report on the U.S. - Peru FTA template, Human Rights Watch explains: “What this obligation means in practice and, specifically, what level of adherence to the fundamental ILO Conventions the ILO Declaration requires, is the subject of much debate and has not yet been resolved.”³¹ As further explained in the Report:

²⁹ Id.

³⁰ “Consideration of a possible Declaration of principles of the International Labor Organization concerning fundamental rights and its appropriate follow-up mechanism”; ILO 86th Session, June 1988, Report VII, p. 3; <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/rep-vii.htm>

³¹ The 2007 US Trade Policy Template, Human Rights Watch, June 2007, p. 4.; <http://www.hrw.org/legacy/backgrounders/usa/trade0607/trade0607web.pdf>

...under the ILO Declaration, ILO members do not assume precisely the same obligations they would have if they had ratified the fundamental conventions. Legal scholars subsequently analyzing the ILO Declaration have largely reached the same conclusion. But what obligations does the ILO Declaration impose on members? Specifically, what are “the principles concerning the fundamental rights” set out in the eight fundamental ILO conventions and what does it mean to uphold them? There is much unhelpful rhetoric and little agreement on this issue.³²

Employer representatives explain that the Declaration does not place new obligations on parties; rather it is about the core labor standards promoting the principles:

the Declaration represents a political commitment by governments to respect, promote and realize the Declaration’s principles...whereas ILO Conventions, if ratified, require governments to respect their strict legal detail, the Declaration is intended to focus on the steps taken by governments to promote the four fundamental principles...These principles inspired the creation of the eight core Conventions which, when ratified, transform those “promotional” principles into specific legal obligations. Therefore, the political obligations required to promote, achieve and realize the principles under the Constitution – and, by extension, the Declaration – must remain distinct from the specific legal obligations that are undertaken through the ratification of the core Conventions. ...the Declaration is intended to focus on the steps taken by governments to promote the four fundamental principles.³³

Given the above, the precise obligations countries are required to meet under the Declaration are ambiguous. Adding to this ambiguity is the U.S. - Peru FTA’s reference to “rights”: “Each Party shall adopt and maintain in its statutes and regulations, and practices there under, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up

³² *Id.*, at 5;

<http://www.hrw.org/legacy/backgrounders/usa/trade0607/trade0607web.pdf>; citing, See, e.g., Philip Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime,” 15 *European Journal of International Law* 457, 2004, pp. 409-495; Brian A. Langille, “Core Labour Rights—The True Story (Reply to Alston),” 16 *European Journal of International Law* 409, 2005, p. 423. See, e.g., Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime,” pp. 476-483.

³³ https://www.wilsoncenter.org/sites/default/files/pos_2006_ilodeclaration.pdf

(1998)". Does this mean that the parties are required to satisfy the rights listed in the Declaration. If so, how are these rights defined? Are they defined by ILO Standards?

The U.S. - Peru template says that the obligations are limited to "only the Declaration."³⁴ Does this mean that the ILO Conventions cannot even be relied on to give these rights meaning? What about cases determined by one of the ILO's Supervisory mechanisms, like the Committee on Freedom of Association (COFA)? The COFA reviews complaints filed against countries that may not have ratified the freedom of association conventions, but still must adhere to the principles of freedom of association because they are ILO members. (The ILO Constitution itself obligates them to honoring these principles.) This raises further questions since many of the cases reviewed by the COFA conclude that U.S. law is not consistent with the ILO's principles and standards.³⁵ As such, if the jurisprudence developed by the COFA could be relied on to define the obligations reflected in the Declaration, the U.S., and other countries, would be in violation of the FTA on the first day the agreement is implemented. Observers could easily conclude if that were the case, the U.S. would not have entered into the Peru agreement.

Other questions remain. Without references to the Conventions or the COFA digest of cases, what definitions will be applied to freedom of association under the Peru FTA? Is it whatever each signatory understands the definition to be? Is the definition to be determined under Peru's dispute resolution process? If so, does this mean that parties will have to wait until jurisprudence is created under the FTA over a long—very long—time as each case works its way through the tortuous dispute resolutions process?³⁶

Even if a party could demonstrate that the principles or rights under the Peru template are violated, these violations still might not be eligible for a complaint because these infractions must meet additional conditions, which raise further questions. The Peru FTA contains requirements that labor violations must be "in a manner affecting trade or investment" and constitute a sustained or reoccurring action or inaction. The mere fact that labor obligations are included in a trade agreement should indicate a direct relationship to trade without placing further burden of proof on an agreed party. Nonetheless, this condition furthers narrows the nature of a

³⁴https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file73_9496.pdf

³⁵ See, Lance Compa, A Strange Case—Violations of Workers' Freedom of Association in the United States by European Multinational Corporations, Human Rights Watch, 2010; https://www.hrw.org/sites/default/files/reports/bhr0910web_0.pdf

³⁶ Note: The proposed Canadian-European Trade Agreement does not even contain a dispute resolution process for these types of matters.

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complaint that can be submitted because only violations that impact trade or investment are eligible. Consequently, large groups of public sector workers, like teachers, are completely excluded from Peru's labor chapter. It is not hard to imagine a scenario where a complaint filed on behalf of school teachers who have been jailed or even murdered for exercising their right to freedom of association, is immediately rejected because these violations "are not in a manner affecting trade or investment."

Second, even if the violations do affect trade or investment, they still must be sustained or reoccurring. This additional hurdle raises yet more questions: If one violation of the Declaration is horrific, such as the murder of a prominent trade unionist, would this qualify? Probably not, since it is not sustained or reoccurring. How about if ten trade unionists were murdered at the same time. Would that qualify? ~~How many violations must occur, in order for a violation to stand under this requirement?~~

As this paper is being written, the U.S. has just announced that it reached agreement with 11 other countries to form the Trans-Pacific Partnership Agreement (TPP). If TPP goes into effect, its labor chapter will presumably become the new template for labor agreements involving the U.S. While the agreement itself has not yet been made public, reports indicate that its labor chapter may be based on the U.S.-Peru FTA text. Although the Peru FTA contains weak and ambiguous labor standards, the TPP will reportedly be even a step backward from that template.

The USTR has indicated that the TPP will include other arrangements with Viet Nam, Malaysia, and Brunei. These are three countries where freedom of association and collective bargaining as provided under the ILO do not exist and where prohibitions against discrimination, child labor and forced labor are not effective. In addition, it will also include Mexico, a country where despite the labor side agreements of the 1993 North American Free Trade Agreement, freedom of association, collective bargaining, and prohibitions against discrimination and child labor have yet to be realized.

1.4. TTIP: Time for a new template

As mentioned in the introduction of this paper, TTIP offers the U.S. and EU the opportunity to create a new template that is clear, unambiguous and based on labor standards reflected in ILO Conventions and ILO jurisprudence. This can simply be accomplished if the labor chapter in the agreement explicitly states that parties honor and effectively enforce the rights and standards expressed in ILO Conventions and interpretations issued under the ILO's supervisory mechanisms, like the COFA.

Footnotes that raise uncertainty over the definition of labor rights and standards, like the one in the Peru FTA limiting the terms of the chapter to the Declaration, must be abandoned.

In order to be certain that parties satisfy these requirements, they must demonstrate that they are in compliance prior to the agreement going into effect. This is especially critical in view of the long, frustrating dispute resolution path contained in the Peru template. Of course this presumes that TTIP will have an effective dispute resolution provision that covers labor violations. Failure to adopt such a provision would be a fatal flaw to the effectiveness of any labor chapter.

Vague limitations on the nature of violations that are covered by TTIP must also be avoided. Specifically, the Peru FTA requirements that labor violations must be “in a manner affecting trade or investment” and constitute a “sustained or reoccurring action or inaction” should be rejected by TTIP negotiators. As mentioned, the mere fact that labor standards are included in a trade agreement should indicate a direct relationship to trade without placing a further burden of proof on an agreed party. Furthermore, also as mentioned, particularly outrageous violations of labor rights should by themselves be eligible for a complaint, regardless of whether the violation was part of a sustained or reoccurring violation.

Fundamental human rights like the labor standards defined by the ILO Conventions apply to all workers throughout the world with equal intensity. For this reason, side agreements or alternative arrangements like those used in conjunction with NAFTA or the U.S.-Colombia Labor Action Plan are no substitute for the kind of strong labor chapter described above. As previously mentioned, these side arrangements have not been effective. After more than 20 years the NAALC has not stopped Mexico from continually violating workers’ rights and the Labor Action Plan with Colombia has not stopped the murder and death threats for trade unionists and human rights activists.

2. CONCLUSION

TTIP represents an opportunity for the U.S. and EU to demonstrate to the world that a real and meaningful labor rights and standards can be part of any trade agreement. It is up to negotiators to seriously undertake efforts to accomplish this task. If they are successful, then at least one part of the TTIP will represent a step forward.³⁷

³⁷ Of course, TTIP would require significant improvements in many other chapters, including the elimination of the investor to state dispute provision, improvements to

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If they are not successful, then they will fail to bring us one step closer to the kind of agreement that can make a difference in the lives of working men and women in the U.S., the EU and throughout the world.

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government procurement, adoption of an effective and timely dispute resolution process for violations of the labor chapter as well as much work on transparency, consumer rights and the environment—to name a few.