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U.S. House of Representatives

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BRETT LOFER,
MINORITY STAFF DIRECTOR

Peru Represents "New Deal" for International Trade and Workers

Dear Democratic Colleague:

On May 10, House Democrats accomplished a historic breakthrough on trade by amending pending U.S. free trade agreements (FTAs) with Peru and Panama to incorporate a fully enforceable commitment that countries adopt and enforce the five basic international labor standards, subject to the same dispute settlement mechanism and remedies as other FTA obligations.

Since then, we have undertaken discussions with Peru regarding implementation of these obligations, including meeting with Peruvian President Alan Garcia in August. At that meeting, President Garcia heralded the amended FTA as a new "New Deal" that will ensure that workers benefit from expanded trade, and announced his firm commitment to change Peru's legal framework in a number of key areas to bring Peruvian law into alignment with the obligations under the FTA (Garcia statement enclosed).

In the subsequent weeks, we have continued to work with representatives of the Peruvian Government on implementation of the announced changes, and concluded discussions last week. Those changes, and the steps Peru has taken over the last year in preparation for the FTA, are outlined in the attached document. With the changes and the FTA, the United States now has a framework to bring about Peru's compliance with basic international labor standards.

House Democrats came together to oppose the U.S.-Central America FTA (CAFTA) precisely because that agreement did not incorporate basic workers' rights as a key instrument to spread the benefits of expanded trade. This is not the case with the Peru FTA, which includes the international workers rights standard for which we have been fighting. Knowing trade is an issue about which there are differing perspectives, we urge you to carefully consider what has been accomplished with this agreement, and the importance of broad support within our ranks.

We will continue to consult and update you as we move forward on other pending trade priorities this fall, including legislation to take action to stop China's unfair trade practices, to expand and reform Trade Adjustment Assistance, and to implement the U.S.-Panama Free Agreement.

Sincerely



Charles B. Rangel
Chairman
Committee on Ways and Means



Sander M. Levin
Chairman, Subcommittee on Trade
Committee on Ways and Means

Peru's Labor Reforms

EXECUTIVE SUMMARY

On May 10, House Democrats announced groundbreaking changes to pending U.S. free trade agreements (FTAs) with Peru and Panama. Central among the changes is the inclusion in the pending FTAs of a fully enforceable commitment that countries adopt and enforce the five basic international labor standards, subject to the same dispute settlement mechanism and remedies as other FTA obligations. The first articulation of the breakthrough will be the U.S.-Peru free trade agreement (FTA).

The Peru FTA breaks new ground in another respect. In August 2007, Peruvian President Alan Garcia announced his firm commitment to change Peru's legal framework in a number of key areas to bring Peruvian labor laws into alignment with the obligations under the FTA. In the subsequent weeks, President Garcia has followed through on his commitment by implementing the announced changes to the legal framework governing:

1. Temporary employment contracts
2. Subcontracting/outsourcing contracts
3. The right of workers to strike
4. Recourse against anti-union discrimination
5. Workers' right to organize

Those changes, and steps taken by prior President Alejandro Toledo and President Garcia over the last year in preparation for the FTA, are outlined below. With the changes and the FTA, Peru has put into place a framework to ensure compliance with basic international labor standards.

Peru's Labor Reforms

1. **Use of Temporary Employment Contracts to Undermine Union Activity.** The 2007 State Dept. Human Rights report states that many businesses use workers hired under short term employment contracts (“temporary contracts”). In reality, vast majority of these temporary workers are doing permanent jobs – the workers are kept under temporary contracts to thwart union organizing and to create economic insecurity.
 - ✓ Peru is shortly issuing a Supreme Decree tightening use of temporary contracts. The Supreme Decree will:
 - ▶ Prohibit the use of temporary contracts where the intent or effect is to harm or limit the exercise of the rights of association or collective bargaining, or to substitute for striking workers.
 - ▶ Reaffirm that workers hired under temporary contracts, including those hired through a subcontractor, have the right to organize, collectively bargain and strike.
 - ▶ Provide workers hired under temporary contracts with administrative and judicial causes of action for an employer’s failure to renew a contract because of anti-union discrimination, and provide for remedies including reinstatement, award of costs, attorneys fees, and compensatory and punitive damages. (Workers under temporary contracts already have the right to challenge *dismissals* for union activity.)
 - ✓ In August 2007, Peru issued a Supreme Decree significantly expanding the mandate and authority of Labor Inspectors to prevent abuse of temporary contracts. The Supreme Decree:
 - ▶ Requires Labor Inspectors to review temporary contracts to ensure they are not being used to harm or limit the exercise of the rights of association or collective bargaining.
 - ▶ Gives Labor Inspectors the authority and requires them to make workers employed under temporary contracts permanent hires when a temporary employment contract is used for fraudulent

purposes, including for the purpose of harming or limiting the rights of association or collective bargaining. Remedy is in addition to fines.

- ▶ Gives Labor Inspectors the authority to require renewal of temporary contracts where employers do not renew a contract because of anti-union discrimination.
- ✓ Peru's Ministry of Labor will shortly issue a Directive creating a national program to monitor use of temporary employment contracts in sectors where abuse has been most widespread. Under the program, the Peruvian Labor Department will review annually all temporary contracts in the following specified sectors to ensure compliance with the law: mining, textiles and apparel, agriculture, telecommunications, transportation, and construction. Reports will be made public.

2. Use of Subcontracting ("Outsourcing") to Undermine Union Activity.

The 2007 State Department Human Rights report states that there is frequent use of sub-contracted labor in Peru (known in Peru as "outsourcing"). Subcontracting/outsourcing is subject to few regulations or requirements, and many subcontracting/outsourcing entities are shells set up by the main employer to avoid a direct employment relationship with workers.¹

- ✓ Peru will shortly issue a Supreme Decree to tighten regulation of subcontracting/outsourcing. The Supreme Decree will:
 - ▶ Include requirements to ensure that subcontracting/outsourcing entities are legitimate, independent entities. The requirements are that subcontracting/outsourcing entities must: (a) assume responsibility for the work provided; (b) have and provide their own financial, technical and material resources; and (c) maintain control over the workers they provide to the main company (i.e., the user company). If a subcontracting/outsourcing entity does not meet these three requirements, and is providing workers to a main company, the workers become direct hires of the main

¹Peru has another form of subcontracting, known as "labor intermediation" that is not covered by the September 2007 Supreme Decree. Labor intermediation is subject to strict terms and conditions and does not appear to be abused. Therefore, additional requirements were not sought.

company.

- ▶ Prohibit a subcontracting/outsourcing entity from merely providing workers to a main company. If the subcontracting/outsourcing entity merely provides workers, the workers become direct hires of the main company.
- ▶ Prohibit the use of subcontracting/outsourcing where the intent or effect is to harm or limit the rights of association or collective bargaining or to substitute for striking workers.
- ▶ Reaffirm that workers provided through a subcontracting/outsourcing entity have the right to organize, collectively bargain and strike.
- ▶ Provide workers hired under subcontracting/outsourcing arrangements with administrative and judicial causes of action where subcontracting/outsourcing is used to harm or limit the rights of **association** or collective bargaining, and provides for remedies including becoming direct hires of the main company, and award of costs, attorneys fees, and compensatory and punitive damages.

[Note: The regulations described above will apply to all subcontracting/outsourcing, regardless of whether the subcontracting/outsourcing entity sends workers physically to the main company.]

- ✓ The new Supreme Decree also will include additional requirements that must be **met** where a subcontracting/outsourcing arrangement involves provision of workers “on-site” at a main company. The Supreme Decree will:
 - ▶ Require such subcontracting/outsourcing arrangements to be in writing, and subject to verification by the Ministry of Labor.
 - ▶ Require the outsourcing/subcontracting entity to have sufficient financial resources to guarantee compliance with wage and social security obligations for all workers covered by a

subcontracting/outsourcing arrangement.²

- ✓ The Ministry of Labor will shortly issue a Directive creating a national program to **monitor** subcontracting/outsourcing entities, including creating a registry of the companies, the contracts, and **verifying** whether the companies meet the requirements of law, including having sufficient resources to meet wage and social security obligations.
 - ✓ In August 2007, Peru issued a Supreme Decree significantly expanding the mandate and authority of Labor Inspectors to prevent abuse of subcontracting/outsourcing.³ The Supreme Decree:
 - ▶ Provides Labor Inspectors with the authority to review subcontracting/outsourcing arrangements to ensure that they meet the requirements of law, including that they are not being used to harm or limit the exercise of the rights of association or collective bargaining.
 - ▶ Gives Labor Inspectors the authority to make subcontracted/outsourced workers direct hires of the **main** company where the subcontracting/outsourcing arrangement does not meet the requirements of law, including where it is used to violate the rights of association or collective bargaining. This remedy is in addition to fines.
3. **Onerous Strike Requirements.** Peru's labor law requires that a majority of the workers in a workplace vote in favor of a strike before a strike can be held. The ILO recommends that if a vote is required for a union-called strike, that the support of a simple majority of votes cast should suffice. (ILO CEACR Report, C. 87, 2005)
- ✓ In July 2006, Peru issued a Supreme Decree changing the strike

²The August 2007 Supreme Decree gives Labor Inspectors the authority to require the main company to guarantee the subcontracted/outsourced workers' wages and social security payments if the subcontracting/outsourcing entity does not have the requisite financial resources.

³The August 2007 Supreme Decree also gives Labor Inspectors additional authority to regulate labor **intermediation**. Those provisions are not discussed here for the reasons identified in footnote 1.

requirement to require a simple majority of votes cast.

- ✓ Peru will shortly issue a Supreme Decree to eliminate a 2/3rds quorum requirement. Under the new Decree, only a majority of union workers will be needed to hold a strike vote.

4. Determination of Legality of a Strike Made By the Government.

Peru's Ministry of Labor determines the legality of a strike. The ILO recommends that an independent entity other than a government determine legality of a strike (e.g., the courts). (ILO CEACR Report, C.87, 2007)

- ✓ In August 2007, Peru requested its National Labor Council (a tripartite advisory body that includes Peru's major unions) to provide a recommendation on what body should determine the legality of a strike within the next six months. Peru has committed to act on that recommendation immediately.

5. Effective Remedies to Remedy Anti-Union Discrimination. The ILO has criticized judicial procedures established by Peru's law for dealing with complaints of anti-union discrimination or interference as too slow to be effective. (ILO CEACR Report, C. 98, 2005)

- ✓ In July 2006, Peru passed a new law providing for expedited administrative action to sanction anti-union discrimination. That law was supplemented by Supreme Decrees issued in October 2006 and August 2007. Inspectors now have authority to:
 - ▶ Impose fines against employers for anti-union conduct.
 - ▶ Reinstate workers that have been fired or whose employment contracts were not renewed because of anti-union discrimination.
 - ▶ Require companies to directly hire any worker employed through a subcontracting/outsourcing relationship that does not meet the requirements of law.
- ✓ Peru's Supreme Court will shortly issue a mandatory Directive to all Peruvian judges to give expedited consideration to all pending and future judicial cases involving dismissals or non-renewal of employment contracts due to anti-union discrimination. Peru's Ministry of Justice will issue periodic reports on compliance with the directive.

6. **Inadequate Penalties to Deter Employer Interference in Union Activity.** The ILO has criticized Peru's labor law for not providing adequate sanctions against acts of interference by employers in trade unions. (ILO CEACR Report, C. 98, 2005)
- ✓ In July 2006, Peru passed a new law defining prohibited acts of employer interference in union activity.
 - ✓ In October 2006, Peru issued a Supreme Decree establishing significant fines for acts of employer interference in union activity.
 - ✓ In August 2007, Peru issued a Supreme Decree expanding the prohibited acts of employer interference, including prohibiting use of temporary contracts and subcontracting/outsourcing to undermine union activity (*i.e.*, exercise of the rights of association and collective bargaining).
7. **Employers Unilaterally Changing Collective Bargaining Agreements.** The ILO has criticized a provision in Peru's labor law that had been interpreted to allow employers to “introduce changes unilaterally in the content of previously concluded collective agreements or require them to be renegotiated.” (ILO CEACR Report, C. 98, 2005)
- ✓ In July 2006, Peru issued a Supreme Decree clarifying that the ambiguous provision does not allow employers to change unilaterally collective bargaining agreements or require renegotiation of such agreements.
8. **High Arbitration Costs.** According to the 2005 U.S. Department of State Country Report on Human Rights Practices in Peru, “union officials complained that their proportionate share of the costs of arbitration often exceeded their resources.”
- ✓ In July 2006, Peru issued a Supreme Decree significantly reducing arbitration costs.
 - ✓ Arbitration is not mandatory.

President Garcia and the FTA:

A translated copy of Garcia's remarks follows:

President Alan Garcia
Lima, Peru
12:30 PM Monday, August 6

Today we have the satisfaction of receiving in the House of Government the chairman of the Ways and Means Committee, Mr. Charles B. Rangel, Cong. Sandy Levin and Cong. Allyson Schwartz. All who have arrived to continue the conversations about the approval of the FTA between Peru and the U.S.

In the months after the shift in political parties in the majority of the U.S. Congress, and because of the change, we have maintained permanent negotiations and dialogue with the Congresspersons to perfect and improve the trade agreement which had been originally agreed to, although not yet, approved by the North American Congress.

I think that in spite of our impatience to have the FTA approved rapidly, we have found in the new majority people who defend their principals, people who defend their social and political convictions. From this dialogue, it could be said that a new concept has been born that enriches the standing agreement and I am sure, that this is the initial step of a world wide new trade policy that takes into account the human face.

This new majority in the U.S. Congress has coincided with the timing that Peru has negotiated the agreement. I think that it has been to our advantage because they have incorporated social concepts like those referring to workers rights, the rights of the protection of the environment and the right to access to medicines.

These issues improve the standing of the agreement. Let it be said that, this could be the beginning of a grand transformation of world

trade, a "New Deal". A transformation of the requirements for global trade to discourage competition from lowering wages for introducing their products but instead that the competition be driven by technological and human capital that respect the basic rights of workers.

It is my understanding that some of the observations and requests of the new majority coincide clearly with the objectives of the government that I lead. Our delegates are committed to incorporate the changes to strengthen the agreement to benefit world trade and workers worldwide.

I use the expression New Deal because it was a phrase used about 70 years ago by FDR to change the foundation of capitalism which ended with monopolist practices to incorporate workers rights, minimum wage and the capacity to limit the interests on money. That was a grand transformation which allowed for the development of the U.S.

We see here for the first time that we incorporate workers rights in a trade agreement so that all benefit from trade and not only a small interest group and here we also see that we establish requirements with respect to the environment, the protection of the Amazon, of the mahogany and other items that are of interest to all humanity and also the rights of the villages to have access to medicines without restrictions.

This is a positive step that we are taking and we are certain this will allow our friends in the U.S. Congress to proceed with the ratification of this FTA. This FTA will be beneficial to both countries and will affirmation our commitment to democracy, workers rights and human rights. This will also stimulate the economic and social development especially in Peru which needs new markets and needs to broaden its production capacity to participate with the U.S. in global development.

We have advanced with much velocity thanks to a healthy political

economy, but if we had open doors to the U.S. market, the velocity would increase; this would bring financial security which would assist in securing a higher investment rate. This would also assist us in obtaining credit at a lower rate and to develop our infrastructure and industry. This is why the FTA is fundamental for our country to combat poverty. We have coincided in the timing and the moment with the new majority in the Congress on how to interpret the trade agreement. A new deal for International trade. And just like there is a clause of the most favored Nation for goods or products, there should also be a clause pertaining to the most favored worker in recognition of their labor rights.

We are very satisfied to have received you and we are firmly confident, just like we believe in the sincerity of your points of view and convictions.

Thank you.