Labor Rights in the U.S.-Peru Agreement: One Step Forward, Two Steps Back?

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Introduction

The current ground rules for the global economy protect rights of commerce and investment, but not social rights. Embedding labor rights in the global trading system is an urgent goal.

Proponents of the U.S.-Peru Agreement argue that the Agreement marks a big advance in enforcing worker rights in the global economy. They argue that it is, in fact, a model for achieving equitable globalization – for realizing the gains from trade and distributing those gains fairly. Their case rests on two features of the Agreement: The Agreement purportedly requires both countries to comply with the core labor rights announced by the International Labor Organization; and the dispute resolution procedures that apply to the Agreement's commercial provisions apply equally to the labor provisions.

While these two features are a step in the right direction, they are a tiny step. In fact, the Agreement does not require the Parties to comply with core labor rights. It requires only that they comply with vague, undefined, and unenforceable labor "principles," and with their own domestic labor laws. Under existing trade statutes, by contrast, Congress has authorized the President to impose trade sanctions and withdraw trade benefits from Peru if it fails to enforce internationally recognized labor rights. An even more significant backward step is the Agreement's exceedingly weak mechanism and weak sanctions for ensuring that Peru actually complies with either the vague labor principles or its domestic labor law. Existing trade law, as weak and inadequate as it is, provides a stronger mechanism and stronger sanctions than the Agreement does.

Viewed as a whole, the U.S.-Peru Agreement cannot give sustained help to real workers in real workplaces. It is not a model that could transform our current form of globalization.

It is essential that global institutions do more than announce nice-sounding, highly abstract rights or "principles." International law has mouthed those rights and principles for nearly a century, and United States trade legislation has codified the same rights for a quarter century. But international law and domestic legislation have fallen woefully short in making those rights and principles a reality in actual workplaces around the world.

The statement and restatement of abstract worker rights can only make a difference on the ground, in the lives of real workers, if the abstract rights are defined by specific rules and indicators, and if those rules and indicators are enforced by well-designed institutions of the right sort. What sort is that? Certainly not the dispute resolution procedures of the U.S.-Peru Agreement. Rather, to make a real difference, the institutions must have the features enumerated in Section II below, none of which is found in either the U.S.-Peru Agreement or in existing trade law.

First, let's compare the Agreement's labor provisions with existing trade law.

I. How Does the U.S.-Peru Model Compare with Existing Law? How Does it Fall Short of What's Necessary to Genuinely Enforce Worker Rights in the Global Economy?

Existing law already authorizes the President to impose trade sanctions, withdraw trade benefits, and take other action against trading partners, including Peru, that fail to comply with internationally recognized labor rights. Three statutes grant that authority: The Andean Trade Promotion and Drug Eradication Act (ATPDEA),[1] Section 301 of the Trade Act,[2] and the Generalized System of Preferences (GSP).[3] In the points below, the summary of "Existing Law" refers to the authority granted the President under these three statutes.

- ***Existing Law:*** The President is authorized to impose sanctions against or withdraw benefits from Peru for failing to comply with internationally recognized labor *rights*.[4]

    - ***The U.S.-Peru Agreement:*** Peru need not comply with the core labor rights of the International Labor Organization. It must instead comply

[1] 19 U.S.C. § 3202(c)(7).
[2] 19 U.S.C. § 2411(d)(3)(B)(iii).
[3] 19 U.S.C. §§ 2461-2467. For the labor provisions of the GSP, see 19 U.S.C. § 2462(b)(2) and 19 U.S.C. § 2467(4).
[4] The five internationally recognized labor rights include: freedom of association, collective bargaining rights, rights against forced labor, rights against child labor, and rights to labor standards (including minimum wage, maximum hours, and occupational safety and health).

only with the "*principles*" underlying those rights.[5] As noted above, the core rights themselves are too abstract to give specific guidance about compliance, in the absence of specific indicators or performance measures. But the "principles" are even more vague than the already abstract rights. Indeed, they are entirely undefined in international law. They therefore provide minimal constraint on Peru's enforcement of actual labor rights. And it is therefore wrong for proponents of the Agreement to say that core labor rights are contained in the Agreement's labor provisions.

Peru must comply with core labor rights only to the extent that Peru's domestic labor law happens to contain the core rights. If the U.S.-Peru Agreement becomes a model for future trade agreements, then those countries that have not adopted core labor rights in their domestic law will not be bound by those rights. Even when a country has formally ratified the core labor rights, as Peru has done, workers will benefit only if the country's domestic labor law gives adequate, detailed content to those highly abstract rights and only if the country establishes effective administrative agencies to enforce those laws. Peru has done neither.

- ***Existing Law:*** If Peru fails to comply with internationally recognized labor rights, then the United States can impose unlimited sanctions against Peru, can provide benefits to Peru in any area of foreign relations, or can withdraw special trade benefits in whole or in part, to ensure that Peru comes into compliance.[6] The U.S. can target specific sectors, products, or actors. The U.S. can impose sanctions or withhold benefits until those specified actors comply.

    - ***The U.S.-Peru Agreement:*** If Peru fails to comply with the vague labor "principles" or with Peru's domestic labor law, Peru can choose to pay the United States only half the monetary value of the trade benefits that accrue to Peru as a result of the violations[7] – creating a cost-benefit incentive for

[5] Although Article 17.2 requires each party to adopt "fundamental labor rights," that Article explicitly qualifies that obligation with the following sentence: "The obligations set out in Article 17.2, as they relate to the ILO, refer only to the ILO Declaration." This refers to the ILO Declaration on Fundamental Principles and Rights at Work of 1998. That Declaration does not require ILO Member States to adopt or adhere to the labor rights enumerated in the Declaration. That is, it does not require the Member States to adopt or adhere to the actual ILO Conventions setting out the rights enumerated in the Declaration. Instead, it requires the Member States only to adopt and adhere to the more general, undefined "principles" that underlie those rights. The United States would not have signed the Agreement with Peru if it had required the parties to adopt and adhere to the ILO core labor rights themselves, rather than just the principles underlying those rights – since the United States has not ratified the core ILO Conventions and has no intention to do so.

[6] Under Section 301, the President may take all "appropriate and feasible action within the power of the President," with respect to "trade in goods or services," or "with respect to any other area of pertinent relations with the foreign country." Trade measures can be imposed on "any goods or economic sector," even if the sector is not involved in the labor violations. See 19 U.S.C. § 2411(c)(3)(B); 19 U.S.C. § 2411(b)(2). Under the ATPDEA, the President can withdraw special trade benefits in whole or in part. 19 U.S.C. § 3202(e).

[7] Article 21.16(6).

Peru to commit violations. If Peru chooses this monetary penalty, then the sanction is not targeted on any sector or any actor. The Agreement establishes no system of positive benefits (carrots) to Peru for compliance.

- ***Existing Law:*** The United States can take action against Peru if it fails to comply with internationally recognized labor rights, but not if Peru fails to enforce its own domestic labor law.

    - ***The U.S.-Peru Agreement:*** Peru is obligated to comply with its own domestic labor law, as well as with the vague labor "principles." It is ironic that this is the primary point on which the Agreement exceeds existing trade law – ironic, because the Agreement's proponents have trumpeted that the Agreement "is a fundamental break with the ineffectual 'enforce your own laws' model."[8] In fact, if the Agreement established a mechanism to ensure that Peru effectively enforced its own domestic labor law, Peruvian workers might significantly benefit. Notwithstanding its many serious defects, Peruvian labor law at least contains many specific requirements that are more concrete than the wholly ineffectual, undefined labor "principles." The fundamental problem, however, is that the Agreement's dispute resolution mechanism and its Labor Affairs Council are – for the many reasons detailed below – grossly insufficient to ensure that Peru in fact "effectively enforces" either its own labor law or the vague labor principles.

- ***Existing Law:*** If Peru fails to comply with internationally recognized labor rights, then private parties in the United States, such as workers and labor unions, have the right to petition the President to impose sanctions or take other measures against Peru to ensure compliance.[9]

    - ***The U.S.-Peru Agreement:*** Section 301 of the Trade Act allows private parties to file petitions with the President, alleging that a trading partner has violated a trade agreement. Hence, a labor organization could file a petition alleging that Peru has violated the labor provisions of the U.S.-Peru Agreement. But the Agreement gives private parties no right to directly initiate complaints against Peru for violating its obligation to enforce the vague labor "principles" or domestic labor law.[10] Only the President may bring such complaints – *and, in fact, the President has* ***never*** *filed a complaint under the labor-rights provisions of* ***any*** *bilateral trade agreement.*

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[8] U.S. House of Rep., Ways and Means Committee, Opening Statement of Rep. Sander Levin, U.S.-Peru Free Trade Agreement Mark-Up (October 31, 2007).

[9] See 15 C.F.R. § 2006.0(b).

[10] Article 17.5(5)(c) of the Agreement provides that each party shall receive communications from "persons" of the party on matters related to the Chapter. However, Article 17.5(6) says that each party shall review the communications "in accordance with domestic procedures." The Agreement sets out no requirements for those domestic procedures, nor any requirement that the party respond to the communications.

- ***Existing Law:*** The President has unbridled discretion to impose or not impose sanctions against Peru, or to grant or withdraw special trade benefits, for noncompliance with internationally recognized labor rights.[11] The President's decision is not reviewed by a court or other body.

    - ***The U.S.-Peru Agreement:*** The President has unbridled discretion to bring a complaint or not bring a complaint against Peru for non-compliance with the vague labor "principles" or domestic labor law. The President's decision is not reviewed by a court or other body.

- ***Existing Law:*** If the President decides that Peru is failing to comply with internationally recognized labor rights, he can impose sanctions. He need not gain the approval of another decision-maker.

    - ***The U.S.-Peru Agreement:*** If the President decides that Peru is failing to comply with vague labor "principles" or domestic labor law, he cannot impose sanctions. He can only file a complaint that may lead to international arbitration to determine whether Peru stands in violation. Hence, the decision to impose sanctions must be taken by two decision-makers, rather than one – the President and a panel of international arbitrators. And international arbitrators will apply international law, which holds that an obligation to adhere to the vague labor principles does not entail an obligation to adhere to actual labor rights, let alone adhere to any concrete performance measures or indicators.

- ***Existing Law:*** If Peru is failing to enforce an internationally recognized labor right, Peru cannot avoid sanctions by showing it has allocated resources to enforcing a different labor right.

    - ***The U.S.-Peru Agreement:*** If Peru is failing to enforce a vague labor "principle" or domestic labor law, Peru can avoid sanctions by asserting that it has allocated resources to enforcing some other, equally vague labor principle or to enforcing any other domestic labor law.[12]

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[11] Under the ATPDEA, the President can grant special trade benefits to a country that violates labor rights if he deems it in the national economic interest or the national security interest, 19 U.S.C. § 3702(c), or if he finds that the country is "taking steps" to afford labor rights. 19 U.S.C. § 3702(c)(7). Under Section 301 and the GSP, as well, the President need not impose trade measures if he finds that a trading partner is "taking steps" to come into compliance even if no actual compliance is achieved. See 19 U.S.C. § 2462(b)(2)(G); 19 U.S.C. § 2411(d)(3)(C)(i)(I). Under Section 301, the President may decline to take action if he finds that it is "[in]appropriate" or inconsistent with a country's level of development. See 19 U.S.C. § 2411(b)(2); 19 U.S.C. § 2411(d)(3)(C)(i)(II). In practice, the President has invoked these provisions to serve his geopolitical purposes or ideological predispositions.

[12] Article 17.3(1)(b).

- ***Existing Law:*** The United States has no governmental mechanism for ongoing investigation of labor rights compliance in Peru, ongoing oversight of remedies for noncompliance, and ongoing verification of remediation.

    - ***The U.S.-Peru Agreement:*** The Agreement establishes no mechanism for ongoing investigation of compliance with the vague labor "principles" or domestic labor law in Peru, ongoing oversight of remedies for noncompliance, and ongoing verification of remediation. The Labor Affairs Council created by the Agreement, which is modeled on NAFTA's Labor Council, has neither the mandate nor resources to conduct these ongoing administrative functions.[13]

- ***Existing Law:*** The United States has no governmental mechanism for creating performance measures or indicators of compliance with labor rights in Peru. As a corollary, the United States has no mechanism for demanding continuous improvement in Peru's labor rights record.

    - ***The U.S.-Peru Agreement:*** The Agreement establishes no mechanism for creating performance measures or indicators of compliance with the vague labor "principles" or domestic labor law in Peru. As a corollary, there is no mechanism for demanding continuous improvement in Peru's record on enforcing labor principles or domestic labor law. The Labor Affairs Council created by the Agreement, which is modeled on NAFTA's Labor Council, has neither the mandate nor resources to conduct these ongoing administrative functions.[14]

- ***Existing Law:*** Apart from their right to file petitions, workers and their organizations are given no ongoing role in defining and enforcing labor rights in Peru.

    - ***The U.S.-Peru Agreement:*** Workers and their organizations are given no ongoing role in defining and enforcing the vague labor "principles" or domestic labor law in Peru.[15]

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[13] The Agreement creates a Labor Affairs Council made up of executive officials of each country. The Council is modeled roughly on the Council created by the NAFTA's labor side agreement. Article 17.5. The Agreement also creates a Labor Cooperation and Capacity Building Mechanism. Article 17.6. Neither of these bodies is charged with, or provided the capacity to undertake, ongoing investigation and verification of compliance, nor with creating performance measures or demanding continuous improvement in Peru's enforcement record.

[14] See id.

[15] Annex 17.6 provides only that the Labor Cooperation and Capacity Building Mechanism shall consider the views of employers, the public, and worker representatives when the Mechanism undertakes cooperative activities. Article 17.6(6) provides that each Party "may consult" an advisory council that includes employer, public, and worker representatives on matters related to the Chapter. These *ad hoc* consultations do not constitute the kind of ongoing participation, referred to in the text, in formulating indicators and performance measures for compliance with labor principles and domestic labor law, and in enforcing those indicators and measures. Indeed, as discussed above, the Agreement creates no process for carrying out these functions, let alone ensuring worker participation in the functions.

- ***Existing Law:*** United States trade legislation imposes no requirements for transparency by Peru's agencies for enforcing labor rights, nor for transparency in the actual conditions in Peru's workplaces. It is therefore difficult for the United States government and private parties, such as worker organizations, to document the Peruvian government's noncompliance or compliance with labor rights. It is equally difficult to document deterioration or improvement in actual working conditions for real workers. As a result, the United States cannot effectively determine when sanctions should be imposed or withdrawn or when benefits should be given or denied. Nor can the United States implement a calibrated system of incentives. That is, it is impossible for the United States to incrementally relax sanctions or increase benefits in response to Peru's satisfaction of precise benchmarks of improved, actual compliance – since the United States cannot know where to set the benchmarks and whether they are met.

    - ***The U.S.-Peru Agreement:*** The Agreement imposes no requirements for transparency by Peru's agencies that ostensibly enforce the vague labor "principles" or domestic labor law nor for transparency in the actual conditions in Peru's workplaces.[16] It is therefore difficult for the United States government and private parties, such as labor organizations, to document the Peruvian government's noncompliance or compliance with labor principles or domestic labor law. It is equally difficult to document deterioration or improvement in actual working conditions for real workers. As a result, the United States and international arbitrators cannot effectively determine when sanctions should be imposed or withdrawn or when benefits should be given or denied. Nor can a calibrated system of incentives be implemented. That is, it is impossible for the United States and international arbitrators to incrementally relax sanctions or increase benefits in response to Peru's satisfaction of precise benchmarks of improved, actual compliance – since the United States and the arbitrators cannot know where to set the benchmarks and whether they are met.

- ***Existing Law:*** Under ATPDEA and GSP, the President may withdraw benefits from a trading partner even if the latter's failure to enforce labor rights is not trade-related. Under Section 301, however, sanctions or benefits can be imposed

[16]Article 17.4(2) provides that each Party shall ensure that judicial or administrative proceedings are transparent. However, each Party may close its proceedings "where the administration of justice otherwise requires," and may refuse to tell the public the outcome of proceedings if domestic law so stipulates. See Article 17.4(2)(b) and Article 17.4(3)(b). Even more important, even this limited transparency requirement applies only to individual proceedings of dispute resolution – that is, judicial or quasi-judicial litigation. It does not apply to disclosure of information about the resources, staffing, and systemic enforcement efforts of administrative agencies. The latter information is the critical evidence necessary to prove whether a Party is complying or not complying with the Agreement's central obligation that the Party "effectively enforce" its domestic labor laws. Article 17.3(1)(a). Nor does the limited transparency requirement require disclosure of information about the actual conditions in workplaces – that is, information that could show whether government enforcement is achieving actual compliance.

only when noncompliance with labor rights has an effect on trade.[17] It is extremely difficult to show that labor violations affect trade, especially when the violations are by small countries whose exports do not comprise a substantial share of the U.S. market. Moreover, this rule protects the rights of only those workers who are producing for export or for import-sensitive industries. It leaves unprotected the fundamental rights of the vast majority of our trading partners' workers.

- ***The U.S.-Peru Agreement:*** Sanctions or benefits can be imposed only when noncompliance with labor rights has an effect on trade between the United States and Peru.[18] This provision has the two defects just noted: First, as a practical matter, it may be extremely difficult to demonstrate that labor violations in Peru affect trade with the United States. Second, as a matter of principle, the fundamental rights of the vast majority of Peruvian workers fall outside the Agreement, since it reaches only those workers producing for export or for import-sensitive industries. If the U.S.-Peru Agreement becomes a model for future agreements, then global ground rules will not enforce the fundamental rights of the vast majority of the world's workers.

II. What Would It Take to Genuinely Enforce Labor Rights in the Global Economy?

As shown in the points set out above, the labor provisions of the U.S.-Peru Agreement are, in many important respects, as weak or weaker than existing law. To repeat: Abstract worker rights or even vaguer "principles" can only make a difference in the lives of real workers, if the abstract rights and principles are defined by specific rules and indicators, and if those rules and indicators are enforced by well-designed institutions. To do the job, the institutions must have the following features, none of which is found in existing law or in the Agreement:

- provide high-powered incentives (carrots or sticks, benefits or sanctions) for governments and employers to comply with the rights,
- target those incentives at the specific actors (governmental and managerial) who can actually improve conditions for real workers in real workplaces,
- incrementally reduce sanctions or increase benefits when precise benchmarks of compliance are actually achieved (but not when steps are merely "being taken toward" actual compliance),
- establish an ongoing agency to formulate and continuously strengthen specific performance measures and indicators of compliance with the otherwise abstractly worded labor rights,
- enforce labor rights through mandatory, continuous application of the specific performance measures and indicators, not through discretionary, sporadic application of vague principles,

[17] 19 U.S.C. § 2411(b)(1);
[18] Article 17.2 n.1.

- establish machinery, with ample resources, to continuously investigate compliance across a broad range of actual workplaces, to demand specific remedies for noncompliance, and to ensure that those remedies are implemented,
- demand comprehensive transparency by government agencies and private employers, making it possible to document noncompliance, to identify feasible and necessary remedies for noncompliance, and to verify improvements in compliance, and
- include workers and worker organizations in every aspect of the institutions' work, from identifying enforcement priorities, to formulating indicators of compliance, finding violations of those indicators, specifying remedies for noncompliance, and verifying that those remedies are implemented.

This is an ambitious program, to be sure. But we must be honest about what it will take to make worker rights a reality in actual workplaces around the world. We must be clear-sighted about how far existing laws and proposed agreements fall short.

Conclusion

In advance of the House vote on the U.S.-Peru Agreement, Representatives Charles Rangel and Sander Levin won the Peruvian government's agreement to revise Peru's labor law. These revisions should be applauded, assuming they are actually implemented. They cannot, however, overcome the Agreement's fatal defects. For the question is: Will the terms that are *in* the Agreement and the institutions that are *in* the Agreement *continuously secure* the rights of Peruvian and American workers? That is, the key question is not the baseline of existing labor law in Peru, with or without the recently announced revisions on paper. Rather, the question is whether the Agreement embodies international rules and institutions to ensure, going forward, that domestic labor laws and international labor rights are well-enforced. That question could be answered in the affirmative only if the Agreement created well-designed institutions with several critical features that are necessary to make a difference in the lives of real workers. The Agreement does not create such institutions.

Existing trade law and existing procedures for protecting the rights of our trading partners' workers are weak, unreliable, and inadequate to the task. The labor provisions of the U.S.-Peru Agreement are, in several important respects enumerated above, even worse than existing law. In no respect do the Agreement's labor provisions mark a significant improvement.

Rights of contract and property are kept safe by a thicket of global rules. The labor provisions of the U.S.-Peru Agreement are not a model for meaningful advancement of the rights and interests of workers. Those provisions cannot justify yet another free trade agreement that provides still further protection to commerce and investment.