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The 2007 US Trade Policy Template

Opportunities and Risks for Workers' Rights

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Introduction

On May 10, 2007, congressional leaders and the US Trade Representative (USTR) reached an historic agreement on a "new trade policy template" (template) that has the potential to be an important step towards ensuring that workers' rights are better protected in US trade accords.[1] The template applies to the US-Panama and US-Peru Free Trade Agreements and could also apply to other pending and future US free trade accords. Human Rights Watch is concerned, however, that ambiguities in the template could prevent it from reaching its full potential.

Human Rights Watch generally takes no position on the desirability of free trade per se,[2] but we believe that trade agreements can be valuable tools to protect workers' rights when meaningful, enforceable labor rights protections are built into the fabric of the accords. We believe that the template could lead to just such protections.

The final complete text of the template is not publicly available, however, and the two public summaries—one from USTR and the other from congressional leaders—contain important inconsistencies and ambiguities. To ensure that future free trade agreements comply with the spirit animating the creation of the template, we believe this lack of clarity needs to be remedied in the manner most respectful of workers' basic rights. We fear that, if it is not, the template could result in only minimal gains for workers.

In this paper, Human Rights Watch explains and identifies our concerns. We also propose free trade accord provisions on workers' rights that we believe are faithful to the template. The proposed language would make clear that parties to free trade agreements must adopt, maintain, and enforce in their labor laws and practice the fundamental workers' rights identified in the International Labour Organization

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[1] USTR, "Statement from Ambassador Susan C. Schwab on U.S. trade agenda," May 10, 2007, http://www.ustr.gov/Document_Library/Press_Releases/2007/May/Statement_from_Ambassador_Susan_C_Schwab_on_US_trade_agenda.html (accessed May 18, 2007).

[2] In a departure from this policy, Human Rights Watch opposes the US-Colombia Free Trade Agreement because of the serious human rights and, specifically, workers' rights concerns in that country. The proposals in the new trade policy template would do little, if anything, to address this egregious situation. See, e.g., Carol Pier, "A Pact with the Devil," opinion editorial, *The Baltimore Sun*, April 2, 2007.

Declaration on Fundamental Principles and Rights at Work (ILO Declaration) and defined in ILO conventions and jurisprudence.

The Trade Policy Template: A Summary

The trade policy template addresses the three core flaws that Human Rights Watch has identified in the labor chapters of all free trade agreements negotiated under the 2002 Bipartisan Trade Promotion Authority (TPA).[3] First, these recently negotiated free trade agreements only require that countries effectively enforce their own labor laws, no matter how weak and regardless of whether they adequately protect workers' rights. There is no requirement that those laws uphold fundamental international labor rights. Second, the accords negotiated under TPA fail to protect workers against employment discrimination in law or practice. Countries could, for example, ignore their own laws against racial bias or allow practices such as mandatory pregnancy testing and still be in full compliance with the trade agreements. Finally, there is no "enforcement parity" for workers' rights and commercial obligations under these trade agreements; the mechanisms for enforcing labor rights provisions are different from and inferior to those available to enforce commercial provisions. For example, the accords cap the fine amounts that can be imposed for labor-rights-related violations and reduce the punitive impact of those fines by channeling them back into, rather than out of, the violating country.

Both the USTR and congressional summaries of the template suggest that there is clear consensus around ensuring enforcement parity for labor and commercial requirements and incorporating provisions to prohibit workplace and employment discrimination in free trade accords. Both summaries state that if countries violate free trade agreements' labor obligations through a "sustained or recurring course of action or inaction" in a "manner affecting trade or investment between the parties," they will be subject to the same dispute settlement procedures and remedies

[3] TPA establishes trade agreement negotiating objectives and priorities and a procedural framework for the negotiation and congressional consideration of free trade accords, including by allowing the US Congress to vote for or against, but not amend, trade agreements.

available for enforcing commercial provisions.[4] Both summaries also agree that countries must be required to enforce their laws governing the "elimination of discrimination in respect of employment and obligation."[5]

The ambiguity arises around the obligations that the template envisions with respect to countries' national labor laws. The USTR's summary of the template states that parties shall be required to "adopt and maintain in their [federal] laws and practice" the "five basic internationally-recognized labor *principles*, as stated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work," while the congressional leadership's summary refers to the "five basic internationally-recognized labor *standards*, as stated in the ILO Declaration."[6] Both template summaries also add a clarifying note stating that the obligation "refers only to the 1998 ILO Declaration on Fundamental Principles and Rights at Work."[7]

Although on its face the use of vague and slightly different terms (like "standards" versus "principles") may seem inconsequential and the clarifying note relatively benign, both are important. They generate confusion that, if not resolved with an eye to protecting workers' basic rights, could significantly reduce the positive labor rights impact of the template.

Understanding the ILO Declaration

The ILO Declaration lists five fundamental rights: freedom of association; the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.[8] It explains

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[4] USTR, "Bipartisan Agreement on Trade Policy: Labor," May 11, 2007, http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file627_11284.pdf (accessed May 18, 2007); US House of Representatives Committee on Ways and Means, "Peru and Panama FTA Changes," May 10, 2007, http://waysandmeans.house.gov/Media/pdf/110/05%2014%2007/05%2014%2007.pdf (accessed May 18, 2007), sec. I, "Provisions on Basic Labor Standards."

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] International Labour Conference, ILO Declaration, 86th Session, Geneva, June 18, 1998.

that these rights "have been expressed and developed in the form of specific rights and obligations in [eight] Conventions recognized as fundamental both inside and outside the Organization."[9] As such, "all [ILO] Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, *the principles concerning the fundamental rights* which are the subject of those Conventions."[10] 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.

In the report of the tripartite ILO Committee on the Declaration of Principles, which developed the ILO Declaration, the ILO Legal Adviser explained that "the Declaration and its follow-up does not and cannot impose on any member State any obligation pursuant to any Convention which the State has not ratified."[11] He added that, as a result, "the Declaration contemplated the implementation, not of specific provisions of Conventions, but rather of the principles of those Conventions."[12]

Employer representatives similarly summarized their approach to the ILO Declaration in the tripartite committee report, stating that "the Declaration should not impose on member States detailed obligations arising from Conventions they had not freely ratified."[13] A wide range of government members also expressed their objections to any declaration that imposed new responsibilities or obligations on states,[14] and government members of the United States, Chile, Sweden, France, and Brazil

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[9] Ibid.

[10] Ibid. (emphasis added).

[11] International Labour Conference, "Report of the Committee on the Declaration of Principles," 86th Session, Geneva, June 17, 1998, para. 352. The International Labour Conference is the annual meeting, held at ILO headquarters, of all member states, each of which is represented by a delegation of two government delegates, an employer delegate, a worker delegate, and their advisers. ILO, "International Labour Conference," May 11, 2007, http://www.ilo.org/public/english/standards/relm/ilc/ (accessed May 31, 2007).

[12] International Labour Conference, "Report of the Committee on the Declaration of Principles," para. 72.

[13] Ibid., para. 10(iii).

[14] Ibid., paras. 27, 29, 36, 46, 42, 186.

explicitly reminded the committee that the "Declaration referred to adherence to principles and values and not to specific Conventions."[15]

It is therefore clear from the committee report that 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.[16] But what obligations does the ILO Declaration impose on members?[17] 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.

In the committee report, the ILO Legal Adviser tried to answer this question by stating that "the reference to the fundamental Conventions allows the clear identification of the principles which the Members have committed themselves to 'respect, to promote and to realize, in good faith' by their adherence to the [ILO] Constitution and its values."[18] The employer members of the committee attempted to clarify the concept of "principles concerning fundamental rights" by explaining that the phrase "acknowledged that the rights were inherent, while the principles addressed the policy environment relating to the goals and objectives pertinent to those rights."[19] Neither explanation is clear, however, and none of the other 381 paragraphs of the report of the ILO Committee on the Declaration of Principles, in which worker, employer, and country representatives expressed their opinions, sheds any more light on the situation.

Furthermore, the same legal scholars who agree that the ILO Declaration does not constitute *de facto* ratification of the eight fundamental ILO conventions for all ILO members disagree on what exactly the declaration does require because they cannot

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[15] Ibid., para. 217.

[16] 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.

[17] See, e.g., Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime," pp. 476-483.

[18] International Labour Conference, "Report of the Committee on the Declaration of Principles," para. 325.

[19] Ibid., para 182.

agree on the content of "the principles concerning the fundamental rights" in the conventions. Without a clear understanding of these principles, a clear understanding of the specific obligations imposed by the ILO Declaration is also impossible.

One scholar has cited evidence of detachment of these principles "from the various international sources which give [them] content," pointing to "unequivocal statements by one of the Declaration's principal architects and proponents and a tendency on the part of the ILO in its various reports to play down the linkage between the 'principles' and the normative *acquis*."[20] Concluding just the opposite, another scholar, has written, "There is no danger that the principles and their content be liberated from the "anchor" of the relevant conventions and "painstakingly constructed jurisprudence" in relation to these rights *for the simple reason that they are the anchors*.[21]

The question remains open: what do the "principles concerning the fundamental rights" listed in the ILO Declaration really mean and to what international instruments, guidance, jurisprudence, and other relevant materials should ILO members turn to understand them? If the answer is not to the eight relevant ILO conventions and the related reports of the ILO Committee on Freedom of Association and the ILO Committee of Experts on the Application of Conventions and Recommendations (ILO Committee of Experts), then the alternative may be the one feared by one scholar, who wrote that if definitions such as these are "left to every national context to be given content, . . . we would have very little reason to think that [they] would restrain the vast majority of governments from doing as they wish."[22]

The meaning of the "principles concerning the fundamental rights" included in the ILO Declaration likely falls somewhere between the strict meaning of the rights as set out in the fundamental conventions and ILO jurisprudence, on the one hand, and

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[20] Philip Alston, "Facing Up to the Complexities of the ILO's Core Labour Standards Agenda," 16 *European Journal of International Law* 467, 2005, p. 476.

[21] Francis Maupain, "Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights," 16 *European Journal of International Law* 439, 2005, p. 446 (emphasis in original).

[22] Alston, "Facing Up to the Complexities of the ILO's Core Labour Standards Agenda," p. 476.

whatever meaning each ILO member might want to attribute, on the other. Where on that vast spectrum the meaning falls, however, is not clear.

Understanding the Trade Policy Template's Ambiguities

The USTR's summary of the template proclaims in a bold headline "Internationally-recognized labor principles incorporated into trade agreements." This leaves open the possibility that the same uncertainty that currently plagues the ILO Declaration's reference to "principles concerning the fundamental rights" could soon become part of US free trade accords and that a free trade agreement dispute panel could ultimately be forced to address the issue.

Equally concerning is the statement in the congressional leadership's summary of the template, appearing in only a slightly different form in USTR's version, that "[t]he obligations of this agreement, as they relate to the ILO, refer only to the *1998 ILO Declaration on the Fundamental Principles and Rights at Work*."[23] This language could be construed as preventing a free trade accord dispute panel from interpreting an agreement's labor rights obligations with reference to the relevant ILO conventions and jurisprudence, increasing the likelihood that their definition would be left to the whims of the different parties to the accords, rendering them largely meaningless and unjusticiable.

It is clear, however, that such ambiguity and such potential restrictions on the understanding of fundamental workers' rights were not the intention of the congressional leadership who agreed to the template. The leadership's use of the term "internationally-recognized labor *standards*," rather than "principles," understood in the context of the many speeches and public declarations made on this issue, support this conclusion.

For example, Representative Sander Levin (D-MI), chair of the US House of Representatives House Ways and Means Trade Subcommittee and instrumental in

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[23] US House of Representatives Committee on Ways and Means, "Peru and Panama FTA Changes," May 10, 2007, sec. I, "Provisions on Basic Labor Standards" (emphasis in original).

the negotiation of the template, has repeatedly decried that, in some countries that are potential parties to free trade accords with the United States, "workers do not have in law or practice their *basic international rights*." To address this problem, he has urged that free trade accords "directly incorporate the ILO core labor standards with enforcement" and has advocated for a "clear obligation with a nation with whom we have an FTA to bring one's own laws and conditions into compliance with basic international standards." Importantly, he has noted that "[t]he ILO has a body of experience in applying these standards that give them meaning."[24]

A Way Forward

To ensure that the intent of Rep. Levin and other congressional leaders is reflected in pending and future free trade accords, it is important that the uncertainties and ambiguities in the template be resolved with clear trade agreement language that captures the template's full potential for protecting workers' rights. Human Rights Watch, therefore, recommends that:

1) Countries be required to adopt, maintain, and enforce in their own laws and in practice the five basic internationally-recognized labor *rights*, listed in the ILO Declaration, and "expressed and developed . . . in Conventions recognized as fundamental both inside and outside the [International Labour] Organization";[25] and
2) No limiting language be included regarding the interpretation of these basic *rights* and, to the contrary, additional language be considered clarifying that these rights are defined by the eight ILO fundamental conventions and related ILO jurisprudence.[26]

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[24] Rep. Sander Levin, "Using Trade as a Tool to Shape Globalization," speech, Center for American Progress, March 5, 2007 (emphasis added); see also, Rep. Sander Levin, "Remarks of Representative Levin for Discussion on FTAs between the US and Latin America," speech, Carnegie Endowment for International Peace, March 14, 2006.

[25] International Labour Conference, ILO Declaration.

[26] Congressional leaders' summary of the trade policy template similarly indicates that dispute panels convened under US free trade accords to apply countries' obligations related to Multilateral Environmental Agreements (MEA) shall "follow (*i.e*, defer to) all interpretive guidance under the relevant MEA." US House of Representatives Committee on Ways and Means, "Peru and Panama FTA Changes," May 10, 2007, sec. II, "Provisions on Environment and Global Warming" (emphasis in original).

This language would use the ILO Declaration as a reference point for identifying a list of internationally-recognized fundamental rights with clear, well-articulated substance. This approach would also avoid importing into US trade accords the ambiguity of the ILO Declaration as a legal instrument, discussed above.

One potential criticism of the approach Human Rights Watch recommends might be that it would impose on all parties to US free trade accords the same obligations they would assume if they ratified all eight fundamental ILO conventions.[27] This is not the case.

When countries ratify conventions, they are duty-bound to amend their national laws to comply and to ensure that those laws are effectively enforced, regardless of the labor sector, regardless of the circumstances. In the case of the ILO fundamental conventions, parties also commit to submit to the jurisdiction and annual reporting mechanism of the ILO Committee of Experts.

In stark contrast, the proposed free trade agreement language would provide only that, if a country's labor laws or practice failed to protect the fundamental rights listed in the ILO Declaration through a "sustained or recurring course of action or inaction" in a "manner affecting trade or investment between the parties," another party to the accord could lodge a complaint. This complaint, if not resolved amicably, could be heard by an arbitral panel of independent experts, which could rule that an agreement violation had occurred, at which point the violating country would be free to determine how to respond. The country could remedy the problem, through legislative or other means, or could choose to remain in noncompliance, deciding instead to pay an annual fine or enjoy fewer trade accord benefits rather than fix the violation.

The proposed language would serve as a lever to induce greater respect for workers' basic rights but would not impose on countries the same panoply of legal obligations they would face if they were parties to the ILO conventions.

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[27] See, e.g., US Council of International Business, "U.S. Ratification of ILO Core Labor Standards," April 18, 2007.

Conclusion

Human Rights Watch believes that the template could lead to major improvements in the workers' rights protections contained in US free trade accords and commends those who have worked diligently on its provisions towards this goal. Nonetheless, we fear that failure to resolve the template's troubling ambiguities with strong, clarifying labor rights language could leave labor provisions in pending and future free trade agreements vulnerable to narrow interpretation, to the detriment of workers' human rights and contrary to the spirit of the template.