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Before the
Senate Finance Committee

"U.S.-Panama Trade Promotion Agreement"

May 21, 2009

Good morning, Mr. Chairman, Senator Grassley, Members of the Committee. Thank you for the opportunity to testify today on behalf of the 11 million working men and women of the AFL-CIO on this important issue.

We believe it is premature for Congress to consider passing the U.S.-Panama Trade Promotion Agreement (PTPA) at this time, and we will oppose passage if it is brought to a vote before outstanding and pressing concerns are adequately addressed. First, needed labor law and tax policy reforms in Panama must be fully adopted and implemented before the agreement is considered by Congress. Second, the Administration and Congress should address concerns that have been raised with respect to the investment, procurement, and services provisions in the Panama and other pending trade agreements. Finally, and most important, the Administration urgently needs to lay out a coherent and principled overall international trade strategy before proceeding in haste to implement a patchwork policy left over from the previous administration.

Current U.S. trade policy has failed to deliver good jobs at home; equitable, democratic, and sustainable development abroad; or a stable global economy. We need to review and reform our trade policy with respect to the overall framework of rules; our chronic and large trade imbalances; and the impact of our trade and investment policies on U.S. manufacturers, farmers, service providers, consumers, workers, and the environment. Nor should trade policy impinge on the ability of democratically elected governments at the federal, state, or local level to implement and enforce public policies designed to achieve legitimate social objectives.

This review is especially urgent in light of the current economic crisis, and the weakness of the U.S. labor market. As long as we continue to run trade deficits on the order of five percent of GDP, the arguments that we need more trade liberalization to succeed in the global economy ring hollow – especially to our members, who have seen too many jobs go offshore while their wages and benefits stagnate.

U.S. competitiveness should not be assessed based on the profitability of U.S. multinational corporations operating abroad, but rather on the ability of U.S.-based

producers to compete and thrive on American soil in a dynamic global economy. By this standard, our trade policy needs deep reform. Consideration of new trade agreements should happen only in the context of broad trade policy reform.

President Obama has taken some enormously important steps in the right direction with respect to investing in America's future: the American Recovery and Reinvestment Act and the president's budget devote significant resources toward rebuilding our crumbling infrastructure; investing in energy efficiency and renewable resources; creating a world-class education and training system for our children and our workers; and reforming health care to reduce costs and extend access. The president has also begun to end the tax breaks for companies that send jobs offshore or abuse tax havens.

All of these are essential to America's ability to compete in the 21st century – but they are not sufficient. We also need to enforce our existing trade laws effectively, consistently, and energetically. This includes, of course, safeguard provisions, including Section 421, and the worker rights provisions in trade agreements. We need to ensure that we are devoting adequate resources to enforcement, and that the different agencies in the government are coordinating with each other to make the best use of those resources. We need a strategic approach to our enormous and growing trade imbalance with China – addressing currency manipulation, worker rights violations, and illegal subsidies. We need to reexamine broader international tax issues to address inequities created by differential tax systems, especially with respect to value-added taxes. And we need to ensure that our trade agreements "provide clear and measurable benefits for American workers," as candidate Obama pledged in a letter to the United Steelworkers in March 2008.

Panama

With respect to Panama, significant labor law reforms are needed to bring Panama's labor laws into compliance with International Labor Organization minimum standards. The Panamanian government must also resolve tax haven issues that have been raised by the Organization for Economic Cooperation and Development (OECD), among others. Both the labor law reform and the tax haven issues should be definitively resolved by the Panamanian legislature and government before the U.S. Congress proceeds with a vote on the trade agreement. As we have seen repeatedly in the past, if legislative issues are not addressed before the Congressional vote, it is much more challenging to convince the government to act in a timely way.

On the tax haven issue, at a minimum, Panama should negotiate and implement a Tax Information Exchange Agreement (TIEA) before Congress votes on the trade agreement. Panama has marketed itself to foreign companies as a non-transparent tax haven, while the Obama administration has signaled its interest in closing egregious tax shelters. For these reasons, it is especially important that this issue be resolved before we enter into a trade agreement that gives new rights to investors and limits the ability of both governments to regulate international financial flows.

Needed Labor Law Reforms

Panama's labor laws fall short of international standards in numerous ways. Indeed, the ILO Committee of Experts has repeatedly criticized several provisions of the country's labor code. There are also serious problems with adequate enforcement of existing labor laws.

1. Freedom of Association in Private Sector

Restrictions on Union Leadership: Article 64 of Panama's Constitution violates ILO Convention No. 87 by requiring Panamanian nationality to serve on the executive board of a trade union.[1]

Burdensome Requirements for Union Recognition: Article 344 of the Labor Code establishes a minimum number of workers to form a union of 40. As the vast majority of employers in Panama are small and medium-sized enterprises with fewer than 40 workers, the law effectively prohibits the formation of enterprise level unions in most workplaces.[2]

2. Right to Organize and Bargain Collectively

Direct Bargaining with Non-Union Workers: Section 431 of the Labor Code permits collective bargaining with groups of non-unionized workers in the private sector, even where a union exists.[3] Groups of non-unionized workers in the private sector are being allowed to exclude unions from exercising collective bargaining by means of "agreements" prepared by the enterprise. As a consequence of these agreements, legitimate trade unions are unable to seek to engage in collective bargaining or to submit claims.[4] The ILO called on the parties to achieve compliance with the principal that collective bargaining with non-union workers should only be possible in the absence of a trade union.

Denial of the Right to Bargain Collectively in Enterprises in Existence for Less Than Two Years: Under Section 12 of Act No. 8 of 1981, no employer shall be compelled to conclude collective agreements during the first two years of an enterprise's operation.[5] The ILO has found this law inconsistent with the requirements of Convention 98.

3. Right to Strike in Private Sector

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[1] CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organize, Panama – 2008 (*hereinafter* "ILO Individual Observation - Convention No. 87").
[2] Id.
[3] CEACR: Individual Observation concerning Right to Organize and Collective Bargaining Convention (No. 98) Panama – 2007 (hereinafter "ILO Individual Observation - Convention No. 98").
[4] Id.
[5] "ILO Individual Observation - Convention No. 98.

Federations and Confederations: The law is silent on the right of federations and confederations to call a strike, though it is widely considered that federations and confederations of unions are prohibited from calling strikes.[6] The ILO has called on the government to provide for the right of federations and confederations to strike.

Limitation on Purposes of a Strike: Article 480 of the Labor Code permits strikes under a list of circumstances which have been criticized as too restrictive. The ILO recognizes, for example, the legitimacy of protest strikes to challenge a government's economic and social policies. Article 480 does not permit such strikes.

Limitation of the Right to Strike in Enterprises in Existence for Less Than Two Years: Because no employer is obligated to bargain a collective agreement during the first two years of an enterprise's operation and because the labor code limits the right to strike in substantial part to strikes in pursuance of a collective bargaining agreement or to enforce a collective bargaining agreement, the bases for a legal strike are thus further limited in enterprises in existence for less than two years.[7]

4. Workers' Rights in the Canal Zone

Prohibition of the Right to Strike. Article 109 of the Organic Law of the Panama Canal Authority, Law No. 19, prohibits workers covered by the law to strike.[8]

5. Maritime Workers

Law 8 governs, among other things, labor relations between employers and maritime workers. However, the law is ambiguous, for example, with regard to the right to bargain collectively and to strike. Further, it is not clear how the provisions of the labor code are to be reconciled with ambiguous or contradictory provisions of the maritime law. Law 8 must be revised and updated to incorporate recent jurisprudence and to clarify several articles so as to bring them into conformity with actual practice.

6. *EPZ Workers*

Although the law provides that workers may form unions and negotiate agreements, in practice, there are no collective bargaining agreements in the zones. Further, the law places restrictions on the rights of these workers.

Collective Bargaining: Law 3 of 1997 permits the negotiation of "agreements regarding the conditions of work or on other labor benefits." However, these "agreements" do not have the status of full-fledged collective bargaining agreements and thus do not fall under the norms of the labor code, which guarantee, for example, that the violation of the terms of a collective agreement could form the basis for a legal strike.

[6] ILO Individual Observation - Convention No. 87.
[7] ILO Individual Observation - Convention No. 87.
[8] Id.

Strikes: Strikes in the EPZs are possible only after a long and burdensome process. The State Department's 2008 Country Report on Human Rights Practices for Panama states, "A strike is considered legal after 36 work days of conciliation; otherwise, striking workers could be fined or fired. These procedures are somewhat more prescriptive than those that generally apply."[9]

Acceptable Conditions of Work: Special workplace norms for this sector were imposed under Law 25 of 1992, as amended by Decree Law 3 of 1997. For example, workers in EPZs are eligible to receive only an additional 25% for overtime instead of the 50-75% found outside the EPZs. See Law 3, Sec. B(4). Also, the law gives the employer wide latitude over when and for how long workers can take vacations. Sec. B(5).

7. Short Term Contracts and Subcontracting

Employers in Panama escape many legal obligations by hiring people repeatedly under temporary arrangements rather than as full-time, indefinite employees. The U.S. State Department reports:

> Employers in the retail industry frequently hired temporary workers to circumvent labor code requirements for permanent workers. In lower-skilled service jobs, employers often hired employees under three-month contracts for several years, sometimes sending such employees home for a month and later rehiring them. Employers also circumvented the law requiring a two-week notice for discharges by dismissing some workers one week before a holiday. Due to labor laws that make it difficult to fire employees who have worked two years or more, employers frequently hired workers for one year and 11 months and subsequently laid them off.[10]

Similarly, the proliferation of subcontracts is a major and growing problem. In numerous economic sectors, subcontracting companies provide workers to perform the core functions of the primary employer but without paying the same wages, benefits and other conditions of work. The widespread failure of employers to obey the law with regard to short-term contracts or subcontracting and the similar failure government to enforce these laws has had a substantial impact on the exercise of union rights. Workers who labor for years under these contracts are especially vulnerable to dismissal and thus are unlikely to organize. Employers are rarely punished for firing workers who attempt to exercise their rights.

8. ***Unenforced Minimum Age for the Employment of Children***

According to the State Department Human Rights Report for 2008, Panama's child labor laws are generally in compliance with ILO norms. However, those laws are not adequately enforced: "Nonetheless, child labor in agriculture and in the informal sector of

[9] State Dept., *Country Report 2008.*
[10] U.S. Department of State, *Country Report on Human Rights Practices 2006 – Panama*, Mar. 6, 2007 *(hereinafter* "State Dept., Country Report 2006").

the economy remained a problem, and the ombudsman reported that 55,919 children were working instead of attending school."

Needed Changes to the Trade Template

In addition to the on-the-ground changes needed in Panama with respect to labor law and tax issues, it is also important to revisit the trade agreement "template" at this time. In particular, the AFL-CIO has consistently over many years raised concerns with respect to the investment, procurement, and services provisions in trade agreements.

Investment: Even after improvements negotiated in the May 2007 agreement, the investment provisions of the Panama trade agreement still allow foreign investors to claim rights above and beyond those that domestic investors enjoy. The agreement's rules on expropriation, its broad definition of what constitutes investment, and its definition of "fair and equitable treatment" are not based directly on U.S. law, and annexes to the agreement clarifying these provisions fail to provide adequate guidance to dispute panels. As a result, arbitrators could interpret the agreement's rules to grant foreign investors greater rights than they would enjoy under our domestic law. In addition, the agreement's investor-to-state dispute resolution mechanism contains none of the controls (such as a standing appellate mechanism, exhaustion requirements, or a diplomatic screen) that could limit abuse of this private right of action.

Government Procurement: The FTA's rules on procurement restrict the public policy aims that may be met through procurement policies at the federal level. These rules could be used to challenge important procurement provisions, especially new domestic sourcing preferences. We believe that governments must retain their ability to invest tax dollars in domestic job creation and to pursue other legitimate social objectives, and that procurement rules which restrict this authority are inappropriate.

Services: NAFTA and WTO rules restrict the ability of governments to regulate services – even public services. Increased pressure to deregulate and privatize could raise the cost and reduce the quality of basic services. Yet the Panama agreement does not contain a broad, explicit carve-out for important public services. Public services provided on a commercial basis or in competition with private providers are generally subject to the rules on trade in services in the Panama FTA, unless specifically exempted.

Other Pending Trade Agreements

We remain strongly opposed to consideration of the Colombia and South Korea trade agreements at this time.

Colombia continues to lead the world in murders of trade unionists—a shameful record. More than 2,700 trade unionists have been murdered in Colombia since 1986, including more than 500 since President Uribe took office in 2002. Forty-nine trade unionists were killed in 2008 – a 25 percent increase over the previous year. As of May 15th, 17 trade unionists have been murdered in 2009.

Fewer than 5 percent of the perpetrators of these murders have been brought to justice. The majority of these murders have been committed by paramilitary groups, some of which have been shown to have connections to high-ranking members of the Uribe government. We stand in solidarity with Colombian workers and will continue to oppose this trade agreement until concrete progress is made in Colombia to ensure that Colombian workers can exercise their rights to organize and bargain, free of threats and intimidation, and free of the current legal obstacles.

The Korea-U.S. Free Trade Agreement, as negotiated, would decimate our auto sector and increase pressure on other key industrial sectors, potentially costing tens of thousands of good U.S. jobs—jobs we can ill afford to jeopardize. The FTA fails to adequately address the numerous non-tariff barriers to U.S. goods in the Korean market, while opening our market quickly. This could dramatically exacerbate our already-lopsided trade relationship with Korea. Our brothers and sisters in South Korean labor unions also have concerns about the FTA, as their government and employers have recently cracked down on union activities and exploited irregular worker loopholes in Korean labor law. We stand with them in demanding that both of our governments respect all the International Labor Organization's core labor standards, in both law and practice. In addition, in the proposed FTA, our negotiators agreed to consider granting trade preferences to products made in the Kaesong Industrial Zone, an industrial park located in North Korea. The North Korean workers in this zone cannot exercise any of their fundamental workers' rights—including the freedom of association and the right to strike. In fact, these workers are not even paid directly by their employers, in a situation close to indentured servitude. We strongly oppose the Korea-U.S. FTA in its current form and call on both governments to renegotiate this flawed deal.

Trade Reform and National Economic Strategy

During the 2008 presidential campaign, candidate Obama (in the Democratic Party Platform) emphasized the need for trade policy to "be an integral part of an overall national economic strategy that delivers on the promise of good jobs at home and shared prosperity abroad." We strongly agree that our country needs a new trade policy. The Panama Trade Promotion Agreement does not represent the needed change in direction, and has not been accompanied by the broader reforms needed.

Thank you for the opportunity to express the views of the AFL-CIO. I look forward to your questions.