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Hearing on the
Implementation of the United States-Peru Free Trade Agreement

Mr. Chairman, members of the Committee, thank you for the opportunity to testify today on behalf of the nine million working men and women of the AFL-CIO on this very important topic.

The trade debate in the United States continues to be contentious, bitter, and partisan. But it doesn't have to be this way. We in the labor movement, along with our allies in the environmental, family farm, small business, development, and faith communities, have repeatedly communicated our substantive and concrete concerns about the direction of U.S. trade policy to the Administration -- through testimony, advisory committee reports, and meetings. Yet our concerns have been completely ignored, and the Administration continues to barrel ahead with ill-advised bilateral trade deals that will only further exacerbate our current trade imbalance, and erode the living standards of American workers and our counterparts in our trading partners.

Mr. Chairman, members of the Committee, we ask you to reject the Peru FTA and urge the administration to renegotiate this deeply flawed deal.

In our view, the Peru FTA provides precisely the wrong answers to the challenges faced in Peru and the United States. The agreement is based on a failed model that neither addresses the problems confronted by workers in Peru, nor contributes to the creation of good jobs and decent wages at home. Once again, the workers' rights provisions are entirely inadequate to ensure that workers' fundamental human rights are respected, and the dispute settlement mechanism for workers' rights and environmental protections is far weaker than that available for commercial provisions. At the same time, flawed provisions on services, investment, government procurement, and intellectual property rights will undermine the ability of both governments to protect public health, strong communities, and the environment.

In addition to the problems outlined above, which are common to all of the trade agreements negotiated by this Administration, we continue to have very serious concerns about the labor laws of Peru. As the International Labor Organization (ILO) recently observed, many of Peru's labor laws still do not comply with ILO core labor standards.

Moreover, existing laws are not respected in practice. Despite improvements made to Peru's legal framework in 2003, labor laws today do not provide for the full exercise of the most important and fundamental workers' rights: freedom of association and the right to organize and bargain collectively.

Workers in Peru suffer from a labor relations system that makes the entire employment relationship precarious and unfair. Employers can and often do avoid unions by employing workers on short, fixed-term contracts, commercial contracts, or by hiring workers through a management-dominated service cooperative. Should a worker with a fixed-term contract attempt to organize or join a union, the contract is generally not renewed upon expiration. Those workers hired through a cooperative are not considered employees but members of the cooperative; thus, they are completely denied the ability to exercise their basic labor rights.

Workers fortunate enough to be in a union are largely unprotected from employer interference or from anti-union discrimination, further limiting the ability of workers to organize and bargain for better, dignified working conditions. Even if a worker does have a collective bargaining agreement, employers may unilaterally modify its terms as a condition for negotiating a new contract. Most troubling, the law gives the employer the power to fire any worker *without cause, and without the right to legally challenge the action*. This effectively eliminates the rights for workers hired under direct, permanent contracts to organize, bargain collectively, and strike.

Labor law reform is currently stalled in the Peruvian Congress. But even if these reforms were fully implemented, the labor provisions included in the Peru FTA do *not* include any enforceable provisions preventing the weakening of or derogation from domestic labor laws. This means that even if Peru's labor laws are brought fully into compliance with ILO standards, the U.S. government would have absolutely no recourse to dispute settlement or enforcement if a future government were to reverse those gains and weaken or gut Peru's labor laws after Congressional passage of the FTA.

In addition to our concerns on Peru's labor situation, any vote on the Peru FTA must take into account the broader economic reality that we are facing today. Our trade deficit hit a record-shattering $726 billion last year; we have lost more than three million manufacturing jobs since 1998; and average wages have not kept pace with inflation this year – despite healthy productivity growth. The number of people in poverty continues to grow, and real median family income continues to fall. Offshore outsourcing of white-collar jobs is increasingly impacting highly educated, highly skilled workers – leading to rising unemployment rates for engineers and college graduates. Together, record trade and budget deficits, unsustainable levels of consumer debt, and stagnant wages paint a picture of an economy living beyond its means, dangerously unstable in a volatile global environment.
The AFL-CIO Executive Council adopted a statement in March calling for a moratorium on all new free trade agreements, including with Peru, until we can rewrite them to protect and advance workers' interests.

Labor Provisions of the Peru FTA

Like CAFTA, the Peru FTA's labor provisions constitute a significant step backwards from existing labor rights provisions in the U.S. – Jordan FTA and in our Generalized System of Preferences (GSP) program. In the Peru agreement, only one labor rights obligation – the obligation for a government to enforce its own labor laws – is actually enforceable through dispute settlement. All of the other obligations contained in the labor chapter, many of which are drawn from Congressional negotiating objectives, are explicitly excluded from the dispute settlement system and are thus completely unenforceable.

The USTR has no legitimate excuse for continuing to negotiate these weak and inadequate labor provisions. During a visit to Washington, D.C., in 2005, President Alejandro Toledo expressed support for including an enforceable commitment to comply with ILO core labor standards in the trade agreement. Our government has consciously chosen not to include this provision in the final text, despite the willingness of the Peruvian government to do so. It is no longer credible for USTR to claim that other governments are not willing to include meaningful worker rights provisions in FTAs.

The labor provisions of the Peru FTA, like those in all the FTAs negotiated by this Administration, are simply inadequate to ensure that workers' fundamental human rights will be protected. These weak labor provisions:

- do not contain any enforceable requirements that domestic labor laws comply with the international standards established by the International Labor Organization (ILO). While the labor chapter includes a commitment to respect the ILO core labor standards, this commitment is not subject to the enforcement mechanisms of the trade agreement.

- do not prevent a government from "weakening or reducing the protections afforded in domestic labor laws" to "encourage trade or investment." A government could roll back its labor laws without threat of sanction or fine. This is a very real problem. In 2005, for example, the Mexican government drafted and attempted to pass legislation that would have substantially weakened its labor code. Unfortunately, this is an all-too-common occurrence.

- do not include any requirement that countries effectively enforce non-discrimination laws, even though this is an ILO core labor standard. The Andean governments expressed willingness to include non-discrimination within the definition of internationally recognized worker rights, but USTR refused to make this important change.

Penalties are Insufficient

Even for the one labor obligation in the FTA that is subject to dispute resolution – the requirement to effectively enforce domestic laws – the procedures and remedies for

addressing violations are significantly weaker than those available for commercial disputes in the agreement. This directly violates Trade Promotion Authority, which instructs our negotiators to seek provisions in trade agreements that treat all principle negotiating objectives equally and provide equivalent dispute settlement procedures and equivalent remedies for all disputes.

The labor enforcement procedures cap the maximum amount of fines and sanctions available at an unacceptably low level, and allow violators to pay fines that end up back in their own territory with inadequate oversight. These provisions not only make the labor provisions of the agreement virtually unenforceable, they also differ dramatically from the enforcement procedures and remedies available for commercial disputes:

- In commercial disputes, the violating party can choose to pay a monetary assessment instead of facing trade sanctions, and in such cases the assessment will be capped at half the value of the sanctions. In labor disputes, however, the assessment is capped at an absolute level, no matter what the level of harm caused by the offending measure.

- Not only are the caps on fines much lower for labor disputes, but any possibility of trade sanctions is much lower as well. In commercial disputes, a party can suspend the full original amount of trade benefits (equal to the harm caused by the offending measure) if a monetary assessment (capped at half that value) is not paid. In a labor dispute, the level of trade benefits a party can revoke if a monetary assessment is not paid is limited to the value of the assessment itself – capped at $15 million.

- Finally, the fines are robbed of much of their punitive or deterrent effect by the manner of their payment. In commercial disputes under the Peru FTA, the deterrent effect of punitive remedies is clearly recognized – it is presumed that any monetary assessment will be paid out by the violating party to the complaining party, unless a panel decides otherwise. Yet for labor disputes, the violating country pays the fine to a joint commission to improve labor rights enforcement, and the fine ends up back in its own territory. No rules prevent a government from simply transferring an equal amount of money out of its labor budget at the same time it pays the fine. And there is no guarantee that the fine will actually be used to ensure effective labor law enforcement, since trade benefits can only be withdrawn if a fine is not paid. If the commission pays the fine back to the offending government, but the government uses the money on unrelated or ineffective programs so that enforcement problems continue un-addressed, no trade action can be taken.

The labor provisions in the Peru FTA are woefully inadequate, and clearly fall short of the TPA negotiating objectives. They will be extremely difficult to enforce with any efficacy, and monetary assessments that are imposed may be inadequate to actually remedy violations. Given Peru's failure to respect core workers' rights and the huge

inadequacies in its labor laws, it is especially problematic to implement an FTA with weak labor protections at this time.

Labor Rights in Peru

Workers continue to face legal and practical obstacles to the exercise of their rights to freely associate, to join a trade union and to bargain collectively in Peru. Under the autocratic rule of President Alberto Fujimori, which lasted from 1990 to 2000, trade unionists suffered heavy losses. Collective bargaining agreements were abrogated, harsh industrial policies were enacted, and political repression became the norm. As a result, there was a sharp drop in the union density in Peru, from 21.9% in 1990 to 4.6% in 2002. Similarly, the percentage of workers covered by collective bargaining agreements dropped from 37.9% to 11.7%, during the same period.[1] Although the outgoing administration of President Toledo took some steps to moderate the Fujimori era "reforms," serious problems still persist in the labor laws and practices in Peru. Additional reforms to the General Labor Law, which would have made additional steps towards bringing the country's labor code into compliance with ILO labor standards, have been drafted but unfortunately never enacted.

With the coming of a new administration, it seemed possible that an improved General Labor Law could pass soon. However, we are deeply troubled by recent remarks made by Congressman Jorge del Castillo, the Secretary General of APRA -- the political party of president-elect Alan Garcia. In the June 22 issue of *Gestion*, he explains that the current congress would not approve the revised General Labor Law. Even worse, he goes on to say that the labor reforms do not constitute a priority for the new congress, but that they will focus instead on austerity reforms and investment policy. His remarks clearly do not bode well for Peruvian workers and the prospect for needed labor law reforms.

<u>Right to Organize and Bargain Collectively:</u>

In 1992, President Fujimori decreed that collective bargaining agreements would expire within a year and would thereafter be subject to renegotiation. With unions already on the defensive, the gains won through years, and in some cases decades, of negotiation were wiped away. Today's collective bargaining agreements contain only a fraction of the rights and benefits of pre-1992 contracts. Unfortunately, not much has changed as to collective bargaining.

Section 9 of Legislative Decree 728 allows employers to introduce changes unilaterally to the content of previously concluded collective agreements, a practice denounced by the ILO.[2] At the expiration of a collective bargaining agreement, all previously negotiated agreements must be ratified in order for the previously established terms and

[1] ILO, Peru: Proposal of the National Program for Decent Work 2004-2006 (Dec. 2003), p.70.
[2] CEACR: Individual Observation Concerning Convention No. 98, Right to Organize and Collective Bargaining, Peru (2005).

conditions to continue in force. Employers often introduce modifications unilaterally as a "condition" to move forward with re-negotiation of an existing agreement.

The ILO has also found that legal procedures for addressing anti-union discrimination and employer interference are so slow as to be ineffective. It recently recommended that "the legislation …make express provision for rapid appeal procedures and effective and dissuasive sanctions against acts of interference by employers against workers' organizations and that cases concerning issues of anti-union discrimination and interference should be examined promptly so that the necessary remedial measures can be really effective."[3]

Freedom of Association - Right to Strike

Article 73(b) of the Industrial relations Act of 1992 requires that a majority of the workers in a workplace vote in favor of a strike before it can be held. The ILO has found such a requirement to be excessive, as ILO standards only call for the support of a majority of those voting.[4] The right to strike is further restricted for those workers employed in "essential public services." However, the government's list of "essential services" is vast and goes far beyond what is deemed essential under international law.[5]

The ILO has also held that an independent body should determine the legality of a strike. In the case of a strike in an essential public service, an independent body should also determine how many workers are needed to maintain minimum services. In Peru, the Ministry of Labor makes these determinations.[6]

According to the State Department's 2005 Report on Human Rights Practices, there was a single legal strike and 45 illegal strikes between January and August. Labor leaders alleged that it was difficult to get approval for a legal strike and believed that the Ministry of Labor was reluctant to do so for fear of hurting the economy.

Use of Short-Term Contracts and Labor Cooperatives to Frustrate Labor Rights:

Under the laws of Peru, employers may hire new employees through renewable, fixed-term contracts, which are typically for no longer than a few months. Employees may be employed for years on such contracts, despite their temporary nature. However, if an employee attempts to form or join a union, the contract is typically not renewed. Further, it is more difficult to prove anti-union discrimination in the termination of a temporary

[3] Id.
[4] CEACR Individual Observation Concerning Convention No. 87, Freedom of Association and Protection of the Right to Organize, Peru (2005)
[5] According to the Public Service Law, essential services are defined as: a) health services; b) waste collection and public sanitation; c) electricity, water, drainage systems, gas and fuel services; d) funeral and burial services; e) prison system; f) communications and telecommunications; g) transportation; h) national security, national defense and strategic services; i) justice system as decided by the Supreme Court; j) others determined under the law.
[6] See id, supra, n. 4.

three-month contract, as the employer can justify the dismissal on the basis that the work was temporary and that the worker is no longer needed.

Some workers are also hired through a service cooperative. Workers hired by such cooperatives, which are often set up and controlled an employer, are not considered employees of the establishment but rather are deemed members of the cooperative. Thus, since the relationship with the employer is indirect, the employee is not protected by the terms of the General Labor Law. Such workers also do not receive legally established benefits and protections either.

Forced Labor

Forced labor continues to be practiced in rural areas of Peru, affecting primarily the indigenous populations of Atalaya and Ucayali. In 2004, the ILO published the report, *Forced Labor In The Extraction Of Timber In Peruvian Amazonia* as a product of the ILO's special action program to combat forced labor. The report found the "existence of forced labor, particularly in work related to the unlawful extraction of timber in various regions of the Peruvian Amazon basin. …The number of persons affected is reported to be around 33,000, mainly belonging to various ethnic groups of Peruvian Amazonia."[7] The report found extreme cases in which indigenous workers are actually captured and forced to work in timber camps, although forms of debt bondage is a more common practice. The document also reported that major international corporations and powerful timber industry groups provided the financing of timber extraction activities.

Following the release of the report, the government prepared a National Plan of Action for the Eradication of Forced Labor. However, the ILO reported that the government did not receive any legal complaints concerning forced labor. Given that forced labor is known to exist, the absence of any penalties was found to be "indicative of the incapacity of the judicial system to prosecute such practices and penalize those who are guilty." In accordance with Article 25 of the Convention, the Government is under the obligation to ensure that the penalties imposed on those found guilty of the exaction of forced labor are really adequate and strictly enforced.

Child Labor

The 2005 U.S. Department of State Report on Human Rights Practices notes that although the law generally restricts child labor "the law's provisions were violated routinely in the informal sector." The National Institute for Statistics and Information (INEI) estimated that "2.3 million children between 6 and 17 years of age were engaged in work, of which 1.9 million labored in the informal sector."

[7] CEACR: Individual Observation Concerning Forced Labor Convention, No. 29, Peru (2006).

Child labor in the mining sector, a "worst form" due to the hazards it poses to the health and welfare of children, persists in Peru. We note that ILO/IPEC has established programs in Peru to help raise awareness of the problem and to expand health and education services. However, there is a long way to go before the problem is resolved, as thousands of children continue to labor in the mines. Peru must take the necessary measures to eradicate the exploitation of children in the mining sector and to improve the conditions of work for adult miners.

Conditions of Work - Export Agriculture and EPZs

Workers in the export agriculture sector enjoy fewer benefits, by law, than their non-agricultural counterparts. Under Law 27,360 of 2000, workers are entitled to less vacation, do not receive compensation for holidays, and in the case of arbitrary dismissal are eligible to collect only up to 15 days wages for each year of service.

Workers, largely women, who enter this line of work are usually between 18 and 25. They work long days, between 9 and 12 hours daily and up to 18 to 20 hours during harvest or during the shipment of product. In general, they do not receive overtime pay. This situation is even worse for those who are transported from their homes to work in the fields, as they are unable to return home until the company agrees. Fieldworkers are also exposed to toxic pesticides and experience a range of occupational health problems, including loss of sight, gastritis, fungal infections, breathing problems and back problems. In the processing factories, workers are required to stand the entire day in highly physical labor without the ability to move about or change position. Additionally, workers are not provided adequate protective gear and are subject to frequent changes in temperature.

In the four Export Processing Zones (EPZs), special regulations "provide for the use of temporary labor as needed, for greater flexibility in labor contracts, and for setting wage rates based on supply and demand."[8]

Trade Impacts of the Peru FTA

The overall trade relationship with Peru is small relative to the economy of the United States. However, the trade agreement will likely exacerbate the already enormous and growing U.S. trade deficit. In fact, the U.S. trade deficit with Peru has grown eightfold in just five years: from $335 million in 2000 to $2.8 billion in 2005. In the first four months of 2006, the trade deficit reached $900 million, up 27% over the previous year at the same time. The agreement is likely to result in a deteriorating trade balance in specific sectors, including sensitive sectors such as apparel. Imports of cotton apparel from Peru doubled in the last five years and are expected to increase. Imports in other sectors, especially metals (e.g., gold, copper, and aluminum), are projected to increase enough to impact U.S. output and employment, according to the recent U.S. ITC study, "*U.S.-Peru*

[8] U.S. Department of State, Country Reports on Human Rights Practice – Peru (2005).

Trade Promotion Agreement: Potential Economy-Wide and Selected Sectoral Effects." Even where the market access provisions of the agreement themselves may not have much of a negative impact on our trade relationship, these provisions when combined with rules on investment, procurement, and services could further facilitate the shift of U.S. investment and production overseas, harming American workers.

Investment: In TPA, Congress directed USTR to ensure "that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States." Yet the investment provisions of the Peru FTA contain large loopholes that allow foreign investors to claim rights above and beyond those that our domestic investors enjoy. The agreement's rules on expropriation, its extremely broad definition of what constitutes property, and its definition of "fair and equitable treatment" are not based directly on U.S. law, and annexes to the agreement clarifying these provisions also 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 deeply flawed 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. Finally, the marked difference between the dispute resolution procedures and remedies available to individual investors and the enforcement provisions available for the violation of workers' rights and environmental standards flouts TPA's requirement that all negotiating objectives be treated equally, with recourse to equivalent dispute settlement procedures and remedies.

Intellectual Property Rights: In TPA, Congress instructed our trade negotiators to ensure that future trade agreements respect the declaration on the Trade Related Aspects on Intellectual Property Rights (TRIPs) agreement and public health, adopted by the WTO at its Fourth Ministerial Conference at Doha, Qatar. The Peru FTA contains a number of "TRIPs-plus" provisions on pharmaceutical patents, including on test data and marketing approval, which could be used to constrain the ability of a government to issue compulsory licenses as permitted under TRIPs and the Doha Declaration.

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 a variety of important procurement provisions including domestic sourcing preferences, prevailing wage laws, project-labor agreements, and responsible contractor requirements. 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.

Safeguards: Workers have extensive experience with large international transfers of production in the wake of the negotiation of free trade agreements and thus are acutely aware of the need for effective safeguards. The safeguard provisions in the Peru agreement, which offer no more protection than the limited safeguard mechanism in NAFTA, are not acceptable. U.S. negotiators should have recognized that much faster,

stronger safeguard remedies are needed. The Peru FTA has failed to provide the necessary import surge protections for American workers.

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 Peru 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 Peru FTA, unless specifically exempted.

Conclusion

Congress should reject the Peru FTA, and send a strong message to USTR that future agreements must make a radical departure from the failed NAFTA model in order to succeed.

American workers are willing to support increased trade if the rules that govern it stimulate growth, create jobs, and protect fundamental rights. The AFL-CIO is committed to fighting for better trade policies that benefit U.S. workers and the U.S. economy as a whole. For the reasons stated above, we urge the Congress to reject the U.S.-Peru FTA and begin work on a more just economic and social relationship with Peru.