The Honorable Robert B. Zoellick
United States Trade Representative
Executive Office of the President
Washington, D.C. 20508

March 12, 2004

Dear Ambassador Zoellick:

Pursuant to Section 2104 (e) of the Trade Act of 2002 and Section 135 (e) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the Labor Advisory Committee on Trade Negotiations and Trade Policy on the U.S. – Australia Free Trade Agreement, reflecting committee's consensus advisory opinion on the proposed Agreement.

Sincerely,

George Becker
Chair of the Labor Advisory Committee on
Trade Negotiations and Trade Policy

The U.S.-Australia Free Trade Agreement

Report of the
Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC)

March 12, 2004

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on the U.S.-Australia Free Trade Agreement

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I. Purpose of the Committee Report

Section 2104(e) of the Trade Act of 2002 (TPA) requires that advisory committees provide the President, the U.S. Trade Representative (USTR), and Congress with reports required under Section 135(e)(1) of the Trade Act of 1974, as amended, not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135(e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principle negotiating objectives set forth in the Trade Act of 2002.

The committee report must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the relevant sectoral or functional area of the committee.

Pursuant to these requirements, the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC) hereby submits the following report.

II. Executive Summary of the Committee Report

This report reviews the mandate and priorities of the LAC, and presents the advisory opinion of the Committee regarding the U.S.-Australia Free Trade Agreement (FTA). It is the opinion of the LAC that the Australia FTA neither fully meets the negotiating objectives laid out by Congress in TPA, nor promotes the economic interest of the United States. The agreement clearly fails to meet some congressional negotiating objectives, and it barely complies with others. The agreement repeats many of the same mistakes of the North American Free Trade Agreement (NAFTA), and is likely to lead to the same deteriorating trade balances, lost jobs, and workers' rights violations that NAFTA has created.

The labor provisions of the Australia FTA will not protect the core rights of workers in either country, and represent a big step backwards from the Jordan FTA and our unilateral trade preference programs. The agreement's enforcement procedures completely exclude obligations for governments to meet international standards on workers' rights. Provisions on investment, procurement, and services constrain our ability to regulate in the public interest, pursue responsible procurement policies, and provide public services. Intellectual property provisions reduce the flexibility available under WTO rules for governments to address public health crises. Rules of origin and safeguards provisions invite producers to circumvent the intended

beneficiaries of the trade agreement and fail to protect workers from the import surges that may result.

III. Brief Description of the Mandate of the Labor Advisory Committee

The LAC charter lays out broad objectives and scope for the committee's activity. It states that the mandate of the LAC is:

> To provide information and advice with respect to negotiating objectives and bargaining positions before the U.S. enters into a trade agreement with a foreign country or countries, with respect to the operation of any trade agreement once entered into, and with respect to other matters arising in connection with the development, implementation, and administration of the trade policy of the United States.

The LAC is one of the most representative committees established by Congress to advise the administration on U.S. trade policy. The LAC is the only advisory committee with more than one labor representative as a member. The LAC includes unions from nearly every sector of the U.S. economy, including manufacturing, high technology, services, and the public sector. It includes representatives from unions at the local and national level, together representing more than 13 million American working men and women.

IV. Negotiating Objectives and Priorities of the Labor Advisory Committee

As workers' representatives, the members of the LAC judge U.S. trade policy based on its real-life outcomes for working people in America. Our trade policy must be formulated to improve economic growth, create jobs, raise wages and benefits, and allow all workers to exercise their rights in the workplace. Too many trade agreements have had exactly the opposite result. Since NAFTA went into effect, for example, our combined trade deficit with Canada and Mexico has grown from $9 billion to $95 billion, leading to the loss of hundreds of thousands of jobs in the United States. Under NAFTA, U.S. employers took advantage of their new mobility and the lack of protections for workers' rights in the agreement to shift production, hold down domestic wages and benefits, and successfully intimidate workers trying to organize unions in the U.S. with threats to move to Mexico.

In order to create rather than destroy jobs, trade agreements must be designed to reduce our historic trade deficit by providing fair and transparent market access, preserving our ability to use domestic trade laws, and addressing the negative impacts of currency manipulation, non-tariff trade barriers, financial instability, and high debt burdens on our trade relationships. In order to protect workers' rights, trade agreements must include enforceable obligations to respect the core labor standards of the International Labor Organization (ILO) – freedom of association, the right to organize and bargain collectively, and prohibitions on child labor, forced labor, and discrimination – in their core text and on parity with other provisions in the agreement.

The LAC is also concerned with the impact that U.S. trade policy has on other matters of interest to our members. Trade policy must protect our government's ability to regulate in the public interest; to use procurement dollars to create jobs, promote economic development and achieve other legitimate social goals; and to provide high-quality public services. Finally, we believe

that American workers must be able to participate meaningfully in the decisions our government makes on trade, based on a process that is open, democratic, and fair.

V. Advisory Committee Opinion on the Agreement

The Australia FTA fails to meet these basic goals. The FTA largely replicates the NAFTA, which has cost the U.S. hundreds of thousands of jobs, allowed violations of core labor standards to continue, and resulted in numerous challenges to laws and regulations designed to protect the public interest. In the past three years, American workers have lost 2.8 million manufacturing jobs, many due to the failures of our trade policy. These same polices resulted in another record-breaking trade deficit last year, of $489 billion. While our trade surplus with Australia reached $6.7 billion last year, if history is any guide, the FTA will worsen, rather than improve our trade balance. Rather than reform trade rules to address these imbalances and create good jobs, the standard trade agreement model too often repeats the failures of the past, resulting in bigger deficits and fewer jobs.

The LAC is not opposed in principle to expanding trade with Australia, a country with a democratic government and a vibrant domestic labor movement. We believe a trade agreement could be crafted that would promote the interests of working people in, and benefit the economies of, both countries. Unfortunately, the U.S. Trade Representative has failed to reach such agreement with Australia. The Australia FTA does not promote the economic interests of the United States. The FTA is tilted towards benefiting those few large companies that hope to ship work out of the United States and to constrain the ability of governments to regulate their behavior. This bias leaves the interests of ordinary working men and women out in the cold.

The administration has squandered the rare opportunity presented by these negotiations to reach a new gold standard on workers' rights in a trade agreement with another developed nation. Instead, the labor provisions of the Australia FTA make little progress beyond the ineffective NAFTA labor side agreement and actually move backwards from the labor provisions of our unilateral trade preference programs and the U.S. – Jordan Free Trade Agreement. The labor provisions of the Australia FTA are based on an unacceptably narrow interpretation of the negotiating objectives on labor laid out in the TPA, providing little meaningful protection for workers' rights.

A. Trade Impacts of the Australia FTA

While the impacts of the Australia agreement on the U.S. economy are difficult to predict, the administration has offered no evidence that the Australia agreement will have a positive impact where past agreements have not. In every case in which the United States has concluded a comprehensive "free trade agreement" with another country, the impact on our trade balance has been negative, despite promises to the contrary.

Our combined trade deficit with Canada and Mexico is now more than ten times what it was before NAFTA went into effect. Since granting China Permanent Normal Trade Relations in 2000, the U.S. trade deficit with China has increased by almost 43 percent, hitting a staggering $124 billion last year – making it our single largest bilateral deficit. The U.S. has even managed to rack up a trade deficit with tiny Jordan, with whom we had a surplus when we entered into a free trade agreement in 2001. The overall U.S. trade deficit continues to rise as we reach new

trade deals. Even in the services sector, where we are supposed to enjoy a trade advantage, we have seen our surplus fall as U.S. investors move overseas to export services back into the U.S. market.

It is hard to know if our trade balance will fare much better under the Australia agreement. The administration has still not released any analysis of the economic impacts of the agreement, despite clear instructions from Congress to do so. Section 2102(c)(5) of TPA instructs the President to provide a public report to Congress on the impact of a future trade agreement on United States employment and labor markets. This review is supposed to be available as early as possible in the negotiations, before negotiating proposals are put forward. But now, even after negotiations have been concluded, there is still no such review available. The ITC review of the economic impact of new trade agreement, also mandated by Congress in TPA, has barely even begun, and is not due until after the agreement is signed.

It is possible that the agreement will result in a deteriorating trade balance in some sectors, especially in the agricultural sector. Meat, dairy, and macadamia nuts are among the sensitive sectors that may fare poorly under the agreement. There are also concerns about the impact of the agreement on American entertainment industry workers, whose jobs are already at risk due to the production of American films and television shows overseas. Even where the market access provisions of the agreement themselves may not have much of a negative impact on our trade relationship, provisions on investment, procurement and services could further facilitate the shift of U.S. investment and production overseas, harming American workers.

The potential for worker dislocation due to increased trade under the FTA is particularly worrisome given the failure of the Bush administration to implement commitments on Trade Adjustment Assistance undertaken to secure passage of the Trade Act of 2002. The administration's promises to improve and expand TAA were fundamental to the bargain that Congress struck in granting trade promotion authority. But the administration has not kept up its end of the bargain:

- Each year some states run out of TAA funding before the year is up, stranding dislocated workers without access to income support, training, and other assistance. These shortfalls continued in FY 2004, and are occurring earlier in the year than ever before.

- One of the biggest new TAA promises made to pass the Trade Act of 2002 was the creation of the Health Care Tax Credit. In February 2003, Health and Human Services Secretary Thompson told governors that the Health Care Tax Credit could help over 500,000 Americans each year. Yet, the Treasury Department and the INS reported that as of January 31, 2004, only 3,634 individuals had accessed the credit through the TAA program.

- The Bush budget proposes a cap of $16,000 per TAA participant for 2005, which, given the overall TAA budget, would allow support for only about 69,000 workers during the fiscal year. Yet over 215,000 workers were certified for TAA in the 13-month period from November 2002 to December 2003, and, as noted above, Secretary Thompson estimates that 500,000 workers could be helped by TAA. The Bush administration has offered no

explanation for the huge gap between limited TAA funding and much higher demands for assistance under the program.

- One of the shortfalls of the current TAA program is that it only applies to dislocated workers in the manufacturing sector. With so many service sector workers now being displaced by off-shore outsourcing as well, it is important to expand the program to cover all trade-affected workers, while insuring that finding increases accordingly so that benefits for workers currently covered by TAA do not diminish.

- Finally, the Department of Labor is erroneously denying TAA petitions due to what one judge called "overwork, incompetence or indifference (or a combination of the three)." While many of these denials go unchallenged, in at least nine cases the U.S. Court of International Trade has criticized faulty denials by the Bush Labor Department. In a recent finding for workers denied TAA benefits, the Court blasted the Labor Department, stating, "this case stands as a monument to the flaws and dysfunctions in the Labor Department's administration of the nation's trade adjustment assistance laws – for while it may be an extreme case it is not an isolated one."

Any potential economic impact of the Australia FTA must be considered in light of these troubling trends. Persistent joblessness and broken promises on Trade Adjustment Assistance, combined with a trade policy focused more on increasing corporate profits than creating good jobs, spells disaster for American workers.

B. Labor Provisions of the Australia FTA

The Australia FTA's combination of unregulated trade and increased capital mobility not only puts jobs at risk, it places workers in both countries in more direct competition over the terms and conditions of their employment. High-road competition based on skills and productivity can be positive for workers, but low-road competition based on weak protections for workers' rights drags all workers down into a race to the bottom. Congress recognized this danger in TPA, and directed USTR to ensure that workers' rights would be protected in new trade agreement. One of the overall negotiating objectives in TPA's section 2102(a)(6) is "to promote respect for worker rights … consistent with core labor standards of the ILO" in new trade agreement. TPA also includes negotiating objectives on the worst forms of child labor, non-derogation from labor laws, and effective enforcement of labor laws.

Unfortunately, the labor provisions of the Australia FTA fall far short of meeting these objectives. Instead, the agreement actually steps backwards from existing labor rights provisions in the U.S. – Jordan FTA and in our Generalized System of Preferences (GSP) program. In the Australia agreement, only one single 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 not covered by the dispute settlement system and thus completely unenforceable.

The agreement's failure to prevent governments from weakening their labor laws, or maintaining their labor laws far below ILO standards, is more than just a theoretical concern. Despite the

nation's high level of development, Australia's laws contain a number of onerous restrictions on workers' right to freedom of association and their right to organize and bargain collectively. Many of these restrictions were created by the 1996 Federal Workplace Relations Act (WRA), which constituted a major restructuring of Australia's labor laws and has been criticized repeatedly by the ILO, the U.S. State Department, and the International Confederation of Free Trade Unions (ICFTU). The fairly recent enactment of the WRA shows that problems with workers' rights in Australia are not the result of insufficient enforcement resources or the inheritance of outdated labor legislation from another era – they are the result of a conscious and recent decision in the Australian government to restrict the fundamental rights of workers.

- ***Freedom of Association:*** The WRA allows employers to choose a union to bargain with before it has even employed any workers, through "greenfield" agreements. These agreements can last for up to three years, effectively denying workers the right to choose their own bargaining representative for that length of time. The ILO criticized this provision in 1998 and again in 2000, and requested that the Australian government review and amend the WRA to eliminate this problem. According to the ICFTU, the WRA also makes it much harder for unions to get into workplaces to organize workers, further depriving workers of their ability to freely join the union of their choosing.

  In addition, the WRA undermines the ability of a majority-supported union to represent all of the members in a bargaining unit by abolishing closed shops and union demarcations. These provisions deprive majority-supported unions of the ability to reach closed-shop agreements or use demarcation tools to maintain bargaining power on behalf of their members, and could foster the proliferation of small, competing unions within the workplace. The State Department calls these provisions "the primary curb on union power" in the WRA.

- ***Anti-Union Discrimination:*** The WRA provides workers only partial protection from anti-union discrimination, in violation of ILO Convention 98. The Act gives regulators wide latitude to exclude whole categories of workers – including contract workers, casual workers, or workers paid above a specified salary – from the Act's most comprehensive protections against dismissal based on trade union activities. These excluded workers may enjoy some more limited protections against anti-union discrimination in other sections of the Act, but these protections fall short of those required by the ILO.

  For example, an excluded worker participating in an industrial action regarding the negotiation of a single-employer collective bargaining agreement can be protected from employer discrimination, but the same excluded worker would not be protected if the industrial action she were involved in was related to a multi-employer agreement. In addition, a non-excluded worker enjoys protection against employer discrimination if he refuses to bargain an individual contract with the employer outside of the collective bargaining agreement. An excluded worker does not appear to enjoy the same protection. The ILO recommended in 1998 and 2000 that the government amend the WRA to ensure that all workers are covered by the Act's more comprehensive protections against anti-union discrimination.

Finally, the ICFTU and State Department both note that the Act imposes new limits on redress and compensation claims by employees that have been targeted by employers for their union activities.

- ***Collective Bargaining:*** The WRA law allows employers to conclude individual "Australian Workplace Agreements" (AWAs) with their employees, and privileges these agreements over collective bargaining agreements. AWAs are less regulated than collective agreements and easier to file, yet they can cover all of the conditions of employment and are fully enforceable. The AWAs take primacy over federal awards and over any subsequent collective agreement in the workplace. This creates an incentive for employers to conclude AWAs with their workers in order to avoid being bound by a collective agreement, and the ICFTU reports that employers are using the law to undermine collective bargaining. In 2000, the ILO found that theses AWA provisions "do not promote collective bargaining as required under Article 4 of [ILO] Convention [98]," and recommended amendments to the WRA to bring Australia into compliance with international standards on the right to bargain collectively.

  While AWAs are supposed to meet working condition standards comparable to those in their sectors, the content of AWAs is in fact confidential, making it very difficult for unions to ensure that this requirement is met. The ICFTU reports that Australian Bureau of Statistics figures show most AWA workers being paid $100 - $193 (Australian dollars) less a week than workers doing similar work under collective bargaining agreements. The State Department reports that 290,029 AWAs have been approved since the new labor law came into effect in 1997.

  In addition, the WRA privileges bargaining at the enterprise and workplace level over industrial and sectoral bargaining arrangements. This preference is written directly into the WRA, which gives priority to single-business agreements over multiple-business agreements. In fact, a multiple-business agreement can only be certified if it is found to be in the "public interest," and the Industrial Relations Commission must consider whether matters covered by the agreement would be more appropriately dealt with at the enterprise level. The ILO, noting that the level of bargaining should be determined by the parties themselves and not by the government, requested that the Australian government amend the legislation to bring it into compliance with ILO Convention 98 in 1998 and again in 2000.

  Australian law also impermissibly restricts the subjects of collective negotiation by not allowing parties to bargain over strike pay. The ICFTU has criticized this provision, and in 1998 and 2000 the ILO recommended amendments to this provision in order to bring Australia up to international standards on the right to bargain collectively.

- ***The Right to Strike:*** In Australia, a worker can be subject to common law court claims and onerous personal damages for strike activities unless Australian law explicitly protects those activities. The WRA only protects some categories of strike activity, thus penalizing workers engaging in other industrial actions and undermining workers' right to strike as it the ILO has defined it. Workers striking over a multi-employer agreement, strike pay, demarcation issues, or economic and social interests outside of the direct employer-employee relationship

enjoy no protection from common law liability. This lack of protection effectively limits the permissible subjects of strike activity, a violation of workers' rights under ILO Conventions 87 and 98. In 2003, the ILO recommended Australia fix this violation by amending its laws on the right to strike.

In addition, Australia's Crimes Act forbids strikes in services that are declared by the government to be "prejudicing or threatening trade or commerce." Boycotts that obstruct government delivery of services or the transport of goods or persons in international trade are also prohibited. The WRA also allows the Industrial Relations Commission to suspend a strike that threatens to cause significant damage to the economy. These prohibitions go far beyond the limited exception to the right to strike for essential services recognized by the ILO, and the ILO recommended amending these provisions in 2003. These provisions, by protecting employers engaged in international trade from legal industrial actions, undermine Australian workers' right to strike for better wages and working conditions in precisely those sectors where American workers will face more direct competition under the proposed U.S. – Australia FTA.

- ***Child Labor and Forced Labor:*** There are no federal laws in Australia prohibiting forced labor, setting a minimum age for employment, or prohibiting forced or bonded labor by children. Australia has not ratified ILO Convention 138 establishing a Minimum Age for Employment, nor Convention 182 on the worst forms of child labor. While technical discussions are continuing between the Federal Government and the State and Territory Governments, there is no timetable for ratification of either of these Conventions. In terms of the issues covered in Convention 182, the Australian Government has refused to make any commitments to ensuring effective collection, monitoring and analysis of data related to the worst forms of child labor. The failure to ratify these conventions and to pass federal laws prohibiting these practices is particularly worrisome given the scope of child labor laws that Australia must effectively enforce under the FTA. The limits of Australia's commitments on child labor are revealed in footnote 18-1 to the labor chapter of the agreement, which states, "Australia provides labor protections for children and young people primarily through laws and regulations that regulate age levels for compulsory education."

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 section 2102(b)(12)(G) of TPA, which instructs our negotiators to seek provisions in trade agreement that "treat United States principal negotiating objectives equally with respect to (i) the ability to resort to dispute settlement under the applicable agreement; (ii) the availability of equivalent dispute settlement procedures; and (iii) the availability of equivalent remedies." The Australia FTA does not treat all negotiating objectives equally, and it does not 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 to themselves with little 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. The following examples demonstrate the disparate treatment accorded to disputes regarding the enforcement of labor laws:

- Under the rules governing commercial disputes, trade sanctions are supposed to have "an effect equivalent to that of the disputed measure [i.e., the measure that violates the agreement]." Yet under the rules governing labor disputes, the amount of a monetary assessment is not just based on the harm caused by the disputed measure. Instead, the panel also takes into consideration numerous other factors, many of which could be used to justify a lower, and thus less effective, sanction. These factors include the reason a party failed to enforce its labor law, the level of enforcement that could be reasonably expected, and "any other relevant factors." The agreement does not state whether these issues should be considered only as mitigating or aggravating factors, presenting the possibility that a panel could cite these additional factors to reduce the amount of a monetary assessment for a labor violation below the level necessary to remedy the violation – an outcome not permitted for commercial violations.

- In commercial disputes, the violating party can choose to pay a monetary assessment instead of enduring 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 fines for labor disputes capped, but the level of the cap is so low that the fines will have little if any deterrence effect. The cap in the Australia agreement is $15 million. This amounts to less than 0.08% of our total two-way trade in goods with Australia last year.

- 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, or $15 million.

- Finally, the fines are robbed of all punitive or deterrent effect by the manner of their payment. While the LAC supports providing financial and technical assistance to help countries improve labor rights (and all members of the LAC were appalled to see the funds for such activities in the administration's budget for 2005 slashed from $99.5 million to just $18 million), such assistance is not a substitute for the availability of sanctions in cases where governments refuse to respect workers' rights in order to gain economic or political advantage. In commercial disputes under the Australia 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, a monetary assessment is automatically paid into a fund to improve labor law administration in the violating country, thus compensating the violator for its failure to effectively enforce its own laws. There are no explicit provisions to prevent a violator from

simply shifting its budgeting, and thus no assurance that the assessment will actually provide additional money for enforcement. In addition, even if a government misspends the fine proceeds on conferences and seminars that do nothing to remedy the violations of workers' rights, trade sanctions cannot be imposed.

The labor provisions in the Australia FTA are woefully inadequate, and clearly fall short of the TPA negotiating objectives. They will be extremely difficult to enforce with any efficacy, and any monetary assessments that are imposed will be inadequate to actually remedy violations. The Australia FTA will do very little to actually ensure that core workers' rights are respected and improved in the U.S. and Australia.

C. Other Issues in the Australia FTA

In addition to the problems with the labor provisions of the Australia agreement outlined above, commercial provisions of the agreement also raise serious concerns for the LAC.

Investment: NAFTA gave corporations the right to challenge our laws before secret arbitration panels, and to demand compensation from governments if those laws infringed on their rights. Multinational corporations have exploited NAFTA's flawed investment chapter to challenge legitimate government regulations designed to protect the environment, shield consumers from fraud, deliver public services, and safeguard public health. The rights granted to foreign investors under NAFTA exceed the rights guaranteed to domestic investors under our Constitution, and Congress directed USTR to remedy this problem in future trade agreements.

Section 2102(b)(3) of TPA states that new trade agreements should 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." In addition, the section states that standards for expropriation and fair and equitable treatment in new trade agreements shall be "consistent with United States legal principles and practice." This instruction is particularly important with regard to the expropriation provisions of trade agreements. Arbitration panels have interpreted NAFTA's prohibitions on "indirect" expropriations and "measures tantamount to" expropriation to afford protections to foreign investors that are not available to domestic investors under our Constitution. Specifically, panels have relied on this NAFTA language to rule that a regulation can constitute a prohibited expropriation even when that regulation denies an investor just a portion of the rights in his or her property, rather than the entirety of the property as required under our domestic "takings" jurisprudence.

Though the Australia FTA does not contain the problematic investor-to-state dispute resolution provisions of NAFTA, it does still contain language prohibiting "indirect" expropriations and "measures equivalent to" expropriation, leaving open the door for many of the same kind of challenges to legitimate public regulations we have seen under NAFTA. Annex 11-B of the agreement lists factors to consider in determining whether or not such an indirect expropriation has taken place. At first glance, Annex's list of factors looks like factors that have been laid out by the U.S. Supreme Court in takings decisions. But simply listing some of the factors the Supreme Court has discussed, without the essential explanations and limitations that were set forth by the Court regarding each factor, provides no assurance that foreign investors will not in fact be granted greater rights than U.S. investors. Under the language of the Australia

agreement, and even considering the factors listed in the agreement's annex, it is still possible that arbitral panels could determine that the mere diminution in the value of property, even if caused by legitimate public interest regulations, constitutes a prohibited expropriation. This directly contradicts U.S. law, and therefore fails to meet the negotiating objectives on investment that Congress specified in TPA.

The FTA may exceed U.S. law in other ways as well. The agreement's extremely broad definition of what constitutes property ignores the Supreme Court's careful distinctions between the types of property interests that must be violated to constitute an unconstitutional taking and the broader set of property interests that fall under due process protections. The agreement's explanation of "fair and equitable treatment" refers to an undefined notion of customary international law that will not necessarily be interpreted in a manner consistent with U.S. law. The agreement states that "fair and equitable treatment" includes, but is not limited to, principles regarding denial of justice and due process, leaving open the question of how else panels may be able to define "fair" and "equitable" without any reference whatsoever to U.S. legal standards. This violates Congress's direction that fair and equitable treatment standards be "consistent with United States legal principles and practice."

To guard against harmful interpretations of such provisions, congressional negotiating objectives in TPA call for the creation of a standing appellate mechanism in new trade agreements. Yet the Australia FTA creates no standing appellate mechanism to guard against inconsistency or abuse in the resolution of investment disputes.

Intellectual Property Rights: In section 2102(b)(4)(C) of 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 Doha declaration clearly states that TRIPs "does not and should not prevent Members from taking measures to protect public health." It goes on to reaffirm the right of countries to take full advantage of the flexibility available under TRIPs to: 1) grant compulsory licenses and determine the grounds upon which those licenses are granted; 2) determine what constitutes a national emergency, including in emergencies created by a public health crisis; and 3) establish their own regimes for the exhaustion of intellectual property rights.

Unfortunately, rather than reaffirming and strengthening the Doha declaration's recognition of the primacy of public health concerns, it appears that the Australia FTA undermines the protections for public health contained in TRIPs and the Doha declaration. This not only violates congressional negotiating objectives, it sets a terrible precedent for pending free trade agreements with developing countries in Southern Africa and elsewhere. In countries facing devastating public health crises, governments must have adequate flexibility under international trade rules to provide their people with access to essential medicines.

The Australia FTA contains a number of "TRIPs-plus" provisions which may erode the flexibility that the TRIPs provides to governments to address public health crises. The FTA establishes strong new protections for pharmaceutical test data, which are in addition to the protections for patented medicines themselves. Requiring governments to wait five years before

they can allow generic producers access to test data could unnecessarily delay affordable access to quality medicines and make their production more costly. The FTA also places strict restrictions on how governments provide marketing approval and sanitary permits for medicines. These restrictions go beyond TRIPs, and could be used by pharmaceutical companies to block the production of generic medicines during a public health crisis.

In addition to these "TRIPs-plus" provisions on medicines, the proposed FTA goes beyond TRIPs by, in effect, recognizing the "work for hire" doctrine. The language in Article 17.4(6)(a) of the agreement would permit transfer by the performer, upon signing his/her contract, of all rights including moral rights and remuneration rights to the employer. This provision is unfair to artists and performers, and is strongly opposed by the LAC.

The language about "national treatment," in Article 17.1(6), which is vital to the economic interests of performers, is undercut by the last sentence of that paragraph, which states that a Party may limit the rights of performers of another Party, to the extent that the other Party already restricts rights to the performers. Since U.S. performers currently have no performance rights with respect to public broadcasts, this language works against U.S. performers, and therefore the LAC opposes it.

Government Procurement: NAFTA and WTO rules on procurement restrict the public policy aims that may be met through procurement policies at the federal and state level. For example, in Executive Order no. 13126, of June 12, 1999, signatories to these procurement agreements were specifically exempted from the order's ban on federal purchases of goods made by forced child labor, out of fear that the order would violate trade rules. Australia is not a signatory to the plurilateral WTO Agreement on Government Procurement. Unfortunately, the Australia FTA extends these rules to cover products and services from one more country. Like the WTO agreement, the Australia FTA's rules extend to procurement at the state level as well as the federal level in the U.S.

These procurement rules bar the consideration of non-commercial criteria in purchasing decisions covering a broad range of public contracts for goods and services. These rules could thus be used to challenge a variety of important procurement provisions including living wage laws, anti-sweatshop laws, and project-labor agreements. It is especially worrisome that many states have agreed to be covered by the procurement provisions of the Australia FTA with little or no discussion with state legislators or the public.

The U.S. should focus on revising – not extending – this flawed model. Trade agreements should not constrain procurement rules that serve important public policy aims such as environmental protection, local economic development, social justice, and respect for human rights and workers' rights. Governments have a right to invest their tax money in local job creation and to use procurement policy to pursue broader social goals.

Rules of Origin: Any preferential trade agreement must include a rule of origin that assures that products, especially complex goods such as motor vehicles and parts, are manufactured as well as assembled in the beneficiary country. The high degree of international investment in most manufacturing industries makes it essential to set a high rule of origin, focused on manufacturing

content rather than on indirect costs or simply on tariff classification changes. The rule of origin included in the Australia agreement would allow products with a majority of parts and components made outside the FTA countries to qualify for duty-free benefits. Such a low rule of origin defeats the purpose of the agreement and provides excessive opportunities for multinational corporations to manipulate their production and purchasing to take advantage of these benefits. The rule of origin fails to promote production and employment in the U.S. or in Australia; it is simply inadequate.

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 Australia agreement, which offer no more protection than the limited safeguard mechanism in NAFTA, are not acceptable. A surge of imports from large multinational corporations can overwhelm domestic producers very quickly, causing job losses and economic dislocation that can be devastating to workers and their communities. For many American workers losing their jobs to imports, it may be their own employer that is responsible for the surge of imports. In such a case, and similar situations in which an international sourcing decision has been made on the basis of a free trade agreement, the usual remedy of restoration of the previous tariff on the imports will not be enough to reverse the company's decision to move production abroad. U.S. negotiators should have recognized that much faster, stronger safeguard remedies are needed. The Australia 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 services could raise the cost and reduce the quality of such basic services as health care and education. Yet the Australia 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 Australia FTA, unless specifically exempted.

The U.S. did exempt some existing laws and regulations from some of the rules of the services and investment chapters of the agreement, but many existing and future laws or policies could still be challenged under the FTA. The exemptions the U.S. took for public services, for example, are inadequate. The U.S. filed exemptions from some investment and services rules for measures relating to a list of specific public services: law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care. But the U.S. left out of this list a number of important public services, such as energy services, water services, sanitation services, and public transportation services.

Even for those services the U.S. did take an exemption for, the exemption only applies to some of the core rules of the FTA, not all. Thus a broad array of laws and regulations regarding all manner of private services and even some vital public services would be covered by the Australia FTA:

- For example, the U.S. failed to exempt any public services from two investment rules that are particularly problematic – the rule on expropriations and the rule on minimum standard of

treatment. Differences between the investment rules of the FTA and U.S. legal principles and practice were noted above. Each of these differences could be exploited by an Australian investor to ask its home government to challenge regulations of our service sector before an international dispute settlement panel. This means that an Australian investor in education services, health care services or private pension management could try to argue that government measures designed to support public schools, public hospitals, or our public social security system violate the FTA. The investor could argue that government measures regarding these services fail to accord the investor "fair and equitable" treatment, or that the government regulations are "tantamount to" an expropriation because they deprive the investor of its full profit potential.

- The market access rule in the agreement's services chapter also applies to all of the public services listed in the U.S.'s partial exemption. The rule requires governments to provide unlimited market access to Australian service providers. Limiting provision of a service to a few designated providers, or only to providers that meet a certain set of criteria, could run afoul of these market access requirements.

In addition, the agreement disciplines how we regulate private service providers, especially in the telecommunications and financial sectors. Committees of jurisdiction in the U.S. Congress and state and local regulators will have to read these chapters carefully. Even if no changes to our domestic laws and regulations are immediately required, the agreement's rules open up a new avenue for financial and telecommunications firms to challenge existing or future regulations on their operations.

VI. Conclusion

The Australia FTA does not promote the economic interest of the United States. The agreement clearly fails to meet some congressional negotiating objectives and barely complies with others. The agreement repeats the same mistakes of the NAFTA, and is likely to lead to the same deteriorating trade balances, lost jobs, and trampled workers' rights that NAFTA has created.

The LAC recommends that the President not sign the Australia agreement until it is renegotiated to fully address each of the concerns raised in this report. If the President does send the agreement to Congress in its current form, Congress should reject the agreement, and send a strong message to USTR that future agreements must make a radical departure from the failed NAFTA model in order to succeed.

The LAC recommends that USTR reorder its priorities before continuing with negotiations towards new free trade agreements with the Andean Region, Bahrain, Panama, Southern Africa, and Thailand. American workers are willing to support increased trade if the rules that govern it stimulate growth, create jobs, and protect fundamental rights. The LAC is committed to fighting for better trade policies that benefit U.S. workers and the U.S. economy as a whole. We will oppose trade agreements that do not meet these basic standards.

VII. Membership of the Labor Advisory Committee

1. Ande Abbott, Director, Shipbuilding & Marine Division, International Brotherhood of Railway Building
2. Marjorie Allen, Legislative Representative, AFSCME, AFL-CIO
3. Paul Almeida, President, Department of Professional Employees, AFL-CIO
4. Mark Anderson, Secretary-Treasurer, Food and Allied Service Trades Department, AFL-CIO
5. R. Russell Bailey, Senior Attorney, Airlines Pilots Association
6. Gary Baker, President, International Brotherhood of Teamsters, Local 173
7. John Barry, President, International Brotherhood of Electrical Workers
8. Albert Battisti, Alkali Chemical Plant
9. George Becker, President Emeritus, United Steelworkers of America
10. Steve Beckman, International Economist, United Automobile, Aerospace and Agricultural Implement Workers of America
11. Joseph Bennetta, Teamsters Local 191
12. Brian Bergin, Assistant to the President, Building and Construction Trades Department, AFL-CIO
13. Carrie Biggs-Adams, Representative-International Affairs, Communications Workers of America
14. Michael D. Boggs, International Affairs Director, Laborers' International Union of North America, LIUNA
15. Stephen Brown, PACE Local 8-0712, Potlatch Corporation, Consumer Products Division
16. Patricia Campos, Legislative Director, Union of Needletrades, Industrial and Textile Employees (UNITE!)
17. Francis Chiappardi, Jr., General President, National Federation of Independent Unions
18. Joseph Coccho, President, American Flint Glass Workers
19. William Cunningham, Associate Director, Department of Legislation, American Federation of Teachers
20. Joseph W. Davis, Assistant Director of International Affairs, American Federation of Teachers
21. Elizabeth Drake, International Policy Analyst, AFL-CIO
22. Jennifer Lynn Esposito, Legislative Representative, International Brotherhood of Teamsters
23. Cathy Feingold, Program Specialist, Women in the Global Economy, AFL-CIO
24. Douglas A. Fraser, Professor, College of Urban, Labor and Metropolitan Affairs, Wayne State University
25. Patricia A. Friend, International President, Association of Flight Attendants
26. Michael W. Gildea, Assistant to the President, Department of Professional Employees, AFL-CIO
27. Stephen Goldberg, Professor, Northwestern University Law School
28. Arthur Gundersheim, Union of Needletrades, Industrial And Textile Employees (UNITE!)
29. Owen Herrnstadt, International Association of Machinists and Aerospace Workers
30. John Howley, Policy Director, Service Employees International Union
31. David Johnson, President, UFCW International Vice President, National Apparel, Garment and Textile Workers Council
32. Harry Kamberis, Director, AFL-CIO Solidarity Center
33. Don Kaniewski, Legislative and Political Director, Laborers' International Union of North America, (LIUNA)

34. Brendan Kenny, Legislative Representative, Air Line Pilots Association
35. Bill Klinefelter, Legislative and Political Director, United Steelworkers of America
36. Anne Knipper, Assistant to the Director, International Affairs Department, AFL-CIO
37. Thea Lee, Public Policy Department, AFL-CIO
38. Larry Liles, International Representative, International Brotherhood of Electrical Workers
39. William "Bill" Luddy, Director, Labor Management Trust, United Brotherhood of Carpenters and Joiners of America
40. Lawrence Martinez, VP Graphic Communication, Graphic Communications International Union
41. Jay Mazur, President, Union of Needletrades, Industrial and Textile Employees (UNITE!)
42. Lindsey McLaughlin, Washington Representative, International Longshoremen's and Warehousemen's Union
43. Douglas Meyer, Director, Economic Research & Public Policy, International Union of Electronic, Electrical, Technical, Salaried & Machine Workers
44. Francis X. Pecquex, Executive Secretary-Treasurer, Maritime Trades Department, AFL-CIO
45. Cheryl Peterson, Senior Policy Fellow, American Nurses Association
46. Keith D. Romig, Jr., Director, National and International Affairs, PACE International Union
47. Michael Sacco, President, Seafarers International Union of North America
48. Jim Sauber, Research Director, National Association of Letter Carriers
49. Denny Scott, Assistant Director of Organizing, United Brotherhood of Carpenters and Joiners of America
50. Michelle Sforza, Public Policy Analyst, AFSCME
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53. Talmage E. Simpkins, Executive Director, AFL-CIO Maritime Committee
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56. Edward Wytkind, Executive Director, Transportation Trades Department, AFL-CIO
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58. David Yoeckel, Senior Research Analyst, International Brotherhood of Electrical Workers of America