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

March 19, 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. – Central America 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.-Central America Free Trade Agreement

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

March 19, 2004

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Labor Advisory Committee for Trade Negotiations and Trade Policy
Report to the President, the Congress and the United States Trade Representative
on the U.S.-Central America Free Trade Agreement

March 19, 2004

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.-Central America Free Trade Agreement (CAFTA). It is the opinion of the LAC that CAFTA 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 CAFTA will not protect the core rights of workers in any of the six countries participating in the agreement, and it represent a huge 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.

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. 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 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

CAFTA fails to meet these basic goals. Like NAFTA, CAFTA will most likely lead to bigger deficits and fewer jobs. CAFTA does not promote the economic interests of the United States, and will not promote equitable and sustainable development in Central America. CAFTA would reward companies that destroy American jobs by providing them with greater access for their goods and services back into the U.S. market, more freedom to violate workers' rights with impunity, and the extraordinary ability to directly challenge government regulations enacted in the public interest. CAFTA creates new rights for American companies that ship jobs overseas, but creates no effective protections for the rights of workers either here or in Central America. This bias leaves the interests of ordinary working men and women out in the cold.

The labor provisions of CAFTA actually move backwards from the labor provisions of our unilateral trade preference programs, and will rob workers in the region of one of the few tools they have been able to use to improve labor standards in their countries. Under CAFTA, governments in Central America will be free to maintain their labor laws far below ILO standards, while employers will enjoy even more freedom to harass, intimidate, fire, and even physically threaten those workers who dare to form independent unions.

The LAC is not opposed in principle to expanding trade with Central America. We believe a trade agreement could be crafted that would promote the interests of working people in, and benefit the economies of, all countries involved. Unfortunately, the U.S. Trade Representative has failed to reach such agreement with Central America.

A. Trade Impacts of CAFTA

CAFTA is likely to have significant negative impacts on the U.S. trade balance and on U.S. employment. In 2003, the U.S. ran a $1.5 billion trade deficit with the region, 85 percent higher than the deficit we ran with the region five years ago, in 1998. Imports in each of the top categories – apparel, fruit, electrical machinery, optical instruments, and coffee – were up from the previous year. These trends are likely to worsen significantly under CAFTA, particularly in the apparel sector.

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 likely that our trade balance will fare much the same way under the Central America 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 also not been completed.

The sector in which trade with Central America is likely to deteriorate the most is in apparel. The agreement creates numerous loopholes, and extends old ones. These loopholes are not only likely to destroy tens of thousands of jobs in the United States – they will also put textile workers in Central America at risk as regional rules of origin are loosened to make way for third-country fabric, most likely to be from Asia. Third countries that benefit from these weakened rules have no obligation to respect workers' rights under the agreement, and provide no reciprocal trade benefits to the U.S. This scheme will close even more American textile mills, hasten the decline of Central American producers, and benefit large multinationals that seek to ship even more work out of the region entirely. These loopholes are explored in detail in the "Rules of Origin" section, below.

CAFTA also threatens sugar workers in the U.S. The agreement would more than double duty-free access to the U.S. sugar market for CAFTA countries over the life of the agreement, with existing quotas rising by about 75 percent immediately. These increased imports threaten to destabilize the delicate supply and pricing mechanisms of the American sugar industry, putting thousands of American workers at risk of losing their jobs.

Market access provisions are not the only aspects of the Central America agreement that will destroy U.S. jobs. Shortly after NAFTA went into effect, Mexico's large external indebtedness and inability to control speculative foreign capital contributed to a devastating financial crisis and the collapse of the peso. While the U.S. stepped in to bail out the Mexican economy, the massive devaluation made Mexican goods so much cheaper in comparison to American goods that our trade deficit ballooned and our economy bled jobs. The crisis also slammed Mexican workers, and ten years after NAFTA went into effect we actually see lower real wages and higher poverty in Mexico than before NAFTA began. CAFTA does nothing constructive to address these important issues of external indebtedness, currency manipulation, and financial speculation. This is not just a theoretical concern in Central America, where debt burdens constrain the ability of governments to invest in basic human needs, health care, and education. Instead of alleviating these imbalances, CAFTA actually restricts Central America's ability to impose capital controls and regulate financial speculation, increasing the likelihood of crisis, devaluation, and chronic imbalances in our trading relationships.

The likelihood of worker dislocation due to increased trade under CAFTA 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 CAFTA 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 CAFTA

CAFTA's labor chapter is virtually identical to the labor chapters of the Chile and Singapore agreements. The Chile/Singapore model was inadequate even for Chile and Singapore. In the context of Central America – where laws fall far below international standards and governments and employers are actively hostile towards unions – this labor chapter model will encourage rampant workers' rights violations to continue.

The labor laws of the CAFTA countries do not come close to meeting international standards, and have been repeatedly criticized by the UN's International Labor Organization (ILO) and the U.S. State Department. There is simply no political will in Central America to bring labor laws into compliance with international standards. Employers in Central America intimidate, fire and blacklist workers for attempting to exercise their right to join an independent union, and they do so with impunity under Central American laws. The ILO has found time and again that these laws fail to meet international standards on the right to organize.

- In El Salvador and Nicaragua, workers fired for union organizing have no right to be reinstated, and the only remedy available is a minor fine – a small price to pay to keep factories union-free.
- In Guatemala and Honduras, the laws' fines for anti-union discrimination are so low that they do not effectively deter the practice, and courts hardly bother to enforce the fines anyway.
- In Costa Rica, a proposal to strengthen remedies for anti-union discrimination as recommended by the ILO is still not law, and the government has repeatedly backtracked on tripartite agreements for labor reforms.

The ILO and U.S. State Department have highlighted a number of other areas in which Central American labor laws fail to meet basic international labor standards:

- Costa Rican law allows "solidarity associations" to represent workers in the place of unions. In practice, employers establish solidarity associations to avoid recognizing and bargaining with legitimate independent unions that have been organized by their workers. A bill introduced in Costa Rica in 2002 would strengthen the very solidarity associations that the ILO has condemned.
- El Salvador's officials take advantage of the law's overly formal union registration requirements to deny legal recognition to legitimate trade unions.
- In Guatemala, more than half of all the workers in an entire industry must agree to form an industrial union, presenting an insurmountable barrier to the formation of industrial unions, and barring union pluralism. In export processing zones, where workers routinely shift from plant to plant and thus cannot organize effective unions

at the plant level, this restriction essentially denies workers the freedom to form unions.

- In Nicaragua, the large number of small unions active in the agricultural sector make effective bargaining impossible without federation involvement. Yet Nicaraguan law bars federations and confederations of unions from playing a role in collective bargaining, denying workers in sectors like agriculture their right to bargain collectively.
- Onerous voting requirements and procedural impediments make it nearly impossible to ever call a legal strike in Costa Rica, Honduras, and Nicaragua. In Guatemala, workers can be held individually liable for damages resulting from a strike and face criminal penalties for striking, while the executive has broad legal discretion to bar strikes in certain sectors.

These are only some of the most egregious examples – a review of ILO and State Department documents tallied more than 40 separate areas in which Central American labor law falls short of international standards on freedom of association and the right to organize and bargain collectively.

Despite these gross deficiencies, CAFTA's labor provisions would not require Central American countries to revise their labor laws to meet international standards. Instead, the labor chapter would only require governments to enforce the flawed set of laws they already have. Therefore a government can maintain its labor laws far below ILO standards, and even weaken those laws further in order to gain an unfair trade advantage, and still enjoy all of the market access benefits of the trade agreement. While USTR claims that CAFTA is groundbreaking, it actually backtracks from the Jordan FTA and from our unilateral trade preference programs by only requiring countries to enforce the labor laws they happen to have, no matter how weak those laws are now or become in the future.

The only tool that has helped create the political will to reform labor laws in Central America in the past is our unilateral system of trade preferences – a system that will no longer apply to the region if CAFTA goes into effect. Our unilateral trade preference programs provide for the withdrawal of trade benefits if steps are not taken to meet international labor standards, including steps to reform weak domestic laws. This is a higher standard than that found in CAFTA. Under CAFTA, employers and governments will actually enjoy more freedom to deny workers their fundamental human rights than they currently have under our trade preference programs. While the labor rights provisions of these programs are not perfect, they have led to some improvements in labor rights in the region. In fact, nearly every labor law reform that has taken place in Central America over the past fifteen years has been the direct result of a threat to withdraw trade benefits under our preference programs. Despite these successes, the administration is preparing to give up the GSP workers' rights clause once the weaker labor provisions of CAFTA go into effect.

This outcome is particularly outrageous given the early and frequent input to USTR from unions in the U.S. and Central America, human rights groups, trade experts, and members of Congress – all demanding stronger workers' rights provisions in CAFTA than those

USTR negotiated in the Chile and Singapore agreements. At the beginning of the CAFTA negotiations, USTR admitted the serious problems with Central American labor laws, and pledged to address those problems before duplicating the labor rules of the Chile and Singapore FTAs in CAFTA. Deputy USTR Peter Allgeier, testifying before Congress on June 10, 2003, was asked whether the Chile and Singapore agreements' labor provisions were sufficient for Central America. He responded:

> … it depends in part on what changes in their laws they make during the negotiating process …. We certainly are aware of the importance of this issue in the Central American countries and, frankly, the different circumstances that exist in those countries and among those countries compared to, for example, Chile and Singapore …. And so part of our negotiation is not simply negotiating the obligations, for example, that we have in Singapore and Chile but having a very detailed and concrete dialogue with these countries about the kinds of changes that they would need to make in their labor laws, either in association with this agreement or prior to it …. So we need to get those, the labor standards and the enforcement of labor rights up to a certain level before we would find acceptable a commitment to enforce those laws.

This pledge to Congress has not been met. Central American countries have done nothing to bring their labor laws closer to international standards during the CAFTA negotiations. Labor law reform proposals introduced in response to ILO recommendations and U.S. pressure have been languishing in Central American parliaments for years, and still have not moved forward. Despite these failures, USTR has moved ahead with the exact same labor chapter model used in the Chile and Singapore agreements.

Instead of admitting that they simply made a political decision to ignore the concerns of Congress, workers in the U.S. and Central America, and human rights advocates, USTR now claims that there was nothing wrong with Central America's labor laws to begin with. The one ILO study USTR now refers to support its new claims was commissioned by Central American governments, deliberately limited in scope, marked by grave omissions, and written in only a couple weeks. This report, repeatedly cited by USTR, cannot erase USTR's own previous statements on the record, years of jurisprudence at the ILO, and the U.S. State Department's annual human rights reports.

Even for the one labor obligation in CAFTA that is subject to dispute resolution – the requirement to effectively enforce domestic laws – the procedures and remedies for addressing violations are completely inadequate. They also directly violate 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." CAFTA 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 chapter's one limited obligation 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 CAFTA is $15 million. This amounts to 3.4 percent of the duties we collected from CAFTA countries in 2003, and less than 0.065 percent of our total two-way trade in goods with Central America 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 CAFTA, 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 CAFTA are unacceptable. They fall short of the TPA negotiating objectives, and they will drag down workers in the region into an even more desperate cycle of poverty and misery. CAFTA will only increase opportunities and incentives for employers to fire, harass, intimidate and threaten workers who try to form unions and dare to ask for decent wages. CAFTA will give governments more freedom to turn a blind eye to such behavior, and will rob workers of one of the few tools they had to try to remedy such abuse in the past.

C. Other Issues in CAFTA

In addition to the glaring problems with the market access and labor provisions of the Central America agreement outlined above, other 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.

CAFTA still contains 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. The investment chapter’s annex lists factors to consider in determining whether or not such an indirect expropriation has taken place. At first glance, the 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 the chapter, and even considering the factors listed in the 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.

CAFTA 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 undetermined 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.”

CAFTA also explicitly constrains the ability of governments to regulate the flow of speculative financial capital in order to prevent and redress debilitating financial crises. A government’s ability to employ sound capital controls can be the key to averting financial crises that have the potential to not only cripple a country’s domestic economy, but to spread contagion effects throughout an entire region. American workers also pay the price as financial crises become more frequent and severe; a country in the grip of crisis often devalues its currency and exports under-priced goods to the U.S. market to earn the cash it so desperately needs to maintain its struggling economy. While the investment provisions of CAFTA may provide more freedom and higher profits to some Wall Street firms, these provisions threaten global financial stability and are not in the economic interests of the United States as a whole. The limited exception for the rescheduling of public debts in Annex 10-A, while a nice gesture towards addressing underlying financial issues, is insufficient to address the possibility of financial crises precipitated by hot money.

In addition, CAFTA includes the deeply flawed investor-to-state dispute resolution provisions of NAFTA. While these disputes may be more transparent under CAFTA than they are under NAFTA, any private right of action creates an incentive for investors to bypass domestic complaint procedures and mount novel legal challenges that would not be permitted under domestic law. To control abuse of this private right of action, congressional negotiating objectives in TPA call for measures to eliminate frivolous claims (such as measures requiring the exhaustion of domestic remedies and/or measures allowing a home state to intervene in a dispute involving one of its investors) and the creation of a standing appellate mechanism in new trade agreements. USTR refused to fully comply with either of these instructions:

- There are no general exhaustion requirements in the agreement, inviting investors to mount frivolous claims that have failed at the domestic level through CAFTA. This allows investors to "forum shop" by bypassing U.S. courts (even the domestic appeals process) in favor of international arbitral panels in order to receive more favorable judgments. Central American governments, apparently realizing this danger, declared in Annex 10-E that U.S. investors could not chose CAFTA arbitration once a claim had been presented to a domestic administrative or judicial body, even after the claim had been resolved domestically. Incredibly, despite Congressional directives to eliminate frivolous claims, USTR did not file such an exception on behalf of the U.S.
- The agreement also fails to contain any exhaustion requirements or diplomatic controls on investor suits. It does create an expedited procedure for dismissing frivolous claims, but this is not very different from the expedited procedures for considering jurisdictional questions that already exist for NAFTA claims.
- In addition, USTR defied Congressional will by refusing to create a standing appellate mechanism in CAFTA to guard against inconsistency or abuse in the resolution of investment disputes. Instead, the agreement only commits the parties to discuss creating such a mechanism in three years.

Finally, the dispute resolution procedures and remedies available to investors under CAFTA provide a marked contrast to the procedures and remedies available for the violation of workers' rights and environmental standards under the agreements. An individual investor's right to pursue arbitration and receive direct compensation is in no way comparable to the extremely limited opportunity to enforce workers' rights and environmental provisions through state-to-state dispute resolution procedures and capped fines paid back to the violating government. This flouts the requirement in section 2102(b)(12)(G) of TPA that all negotiating objectives be treated "equally" regarding the availability of "equivalent" dispute settlement procedures and remedies.

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 CAFTA 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.

CAFTA contains a number of "TRIPs-plus" provisions which may erode the flexibility that the TRIPs provides to governments to address public health crises. CAFTA 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. CAFTA 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 15.5(6) 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.

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. The CAFTA countries are not signatories to the plurilateral WTO Agreement on Government Procurement. Unfortunately, CAFTA extends these rules to cover products and services from five more countries. Like the WTO agreement, CAFTA'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 CAFTA 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 general rule of origin included in the Central America agreement would allow products with a majority of parts and components made outside CAFTA 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 Central America; it is simply inadequate.

The rules of origin in the apparel sector are particularly worrisome. If CAFTA is passed, these rules will be mad retroactive to January of 2004. While it is difficult to know exactly how many jobs will be lost due to these provisions, especially with the scheduled expiration of import quotas next year, jobs loss is likely to be in the thousands, if not tens of thousands. These provisions also dilute the potential benefits of the agreement for Central American producers, by extending new benefits to production from countries that are taking on no new obligations – either on workers' rights or on the provision of reciprocal market access.

- The agreement increases the level of non-regional content that can be considered "*de minimis*," from seven percent to ten percent.
- The agreement permanently extends temporary loopholes that were previously conditioned on compliance with our preferential trade programs and subject to periodic review and renewal by Congress. One such loophole is duty drawback, which makes third country parts cheaper to import if they are incorporated into products being shipped to the U.S. – this loophole was eventually phased out for Mexico and Chile in their FTAs with the U.S., making its permanence under CAFTA a dangerous new precedent for future agreements.
- The agreement creates an entirely new loophole for fabric from third countries that are parties to FTAs with the U.S. While Mexican fabric is currently the biggest potential threat, cumulation would also be allowed for fabric from other FTA countries. Given the fact that USTR is currently negotiating free trade agreements with literally dozens of countries, this provision could eventually help decimate U.S. exports of fabric to Central America.
- The agreement puts in a place a "short supply" list that could go beyond NAFTA and the current preferential trade programs for the region. This list – already at about 47 products – can be expanded in the future. The relevant annex on short supply

provisions was still not available to the LAC at the time of this writing, making it impossible to estimate the full impact this loophole could have.

- Third country fabric from any country – including China – will be treated like regional fabric for exports of bras, woven boxers and nightwear, and wool apparel. Nicaragua will be allowed to export even more products incorporating third-country fabrics.

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 Central America 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. CAFTA 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 Central America 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 CAFTA, 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 CAFTA. 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 CAFTA, 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 CAFTA:

- 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 CAFTA and U.S. legal principles and practice were noted above. Each of these differences could be exploited by an Central American investor to ask its home government to challenge regulations of our service sector before an international dispute settlement panel. This means that an Central American 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 CAFTA. 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 Central American 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.

Finally, there is serious concern about the impact of CAFTA on our domestic transport sectors. Unlike NAFTA, CAFTA does not even create a temporary carve out from cross-border market access rules for trucks. This appears to allow Central American trucks full access to the U.S. market, which is of particular concern given the Plan Puebla Panama. In addition, though aviation services are excluded from the agreement, maintenance and repair of airplanes is covered. This could enable U.S. carriers to bypass American maintenance and repair crews in favor of less expensive hubs in Central America, particularly Costa Rica.

VI. Conclusion

CAFTA 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 Central America 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. Roming, 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
51. Barbara Shailor, Director, International Affairs Department, AFL-CIO
52. James Sheehan, United Steel Workers of America
53. Talmage E. Simpkins, Executive Director, AFL-CIO Maritime Committee
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58. David Yoeckel, Senior Research Analyst, International Brotherhood of Electrical Workers of America